REPORTS

—OF THE—

SUPREME COURT

—OF—

CANADA.

REPORTED BY

GEORGE DUVAL, Advocate.

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1885.

JUDGES

OF THE

SUPREME COURT OF CANADA

DURING THE PERIOD OF THESE REPORTS.

The Honorable Sir William Johnstone Ritchie, Knight, C. J.

" " Samuel Henry Strong, J.

" " Télésphore Fournier, J.

" " William Alexander Henry, J.

" " Henri Elzéar Taschereau, J.

" " John Wellington Gwynne, J.

ATTORNEY-GENERAL OF THE DOMINION OF CANADA:

The Honorable Sir Alexander Campbell, K.C.M.G., Q.C.

ERRATA.

Errors in cases cited have been corrected in the "Table of cases cited."

Page 37—note (8) 5 App. cas. 190, to be struck out.

" 93—in line 16 from bottom, instead of "since" read "for."

" 269—note (2) read 1 Moo. & R. 116.

" 424—in line 17 from top, instead of "son actif" read "pas son actif."

" " —in line 7 from bottom, instead of "je n'ai arriver" read "jè n'ai pu arriver."

" 589—in 1st line from top, instead of "susfructuary" read "usufructuary."

" 604—in line 7 from top, instead of "de vendre" read "à vendre."

" " —in line 9 from top, instead of "quelqu'autres" read "quelques autres."

" 609—in line 18 from top, instead of précieuse" read "précise."

A TABLE

OF THE

NAMES OF THE CASES REPORTED

IN THIS VOLUME.

TABLE OF CASES CITED.

D.

JAMES ANDERSON AND JONATHAN A. PORTE, (DEFENDANTS)..... } APPELLANTS;

AND

JOHN JELLET, (PLAINTIFF).....RESPONDENT.

1882
*Dec. 5.
1883
*May. 3.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Ferry, disturbance of—License to ferry, construction of.

The Crown granted a license to the town of *Belleville*, giving the right to ferry "between the town of *Belleville* to *Ameliasburg*."

Held,—A sufficient grant of a right of ferriage to and from the two places named.

Under the authority of this license the town of *Belleville* executed a lease to the plaintiff granting the franchise "to ferry to and from the town of *Belleville* to *Ameliasburg*," a township having a water frontage of about ten or twelve miles, directly opposite to *Belleville*, such lease providing for only one landing place on each side, and a ferry was established within the limits of the town of *Belleville* on the one side, to a point across the Bay of *Quinte*, in the township of *Ameliasburg*, within an extension of the east and west limits of *Belleville*. The defendants established another ferry across another part of the Bay of *Quinte*, between the Township of *Ameliasburg* and a place in the Township of *Sidney*, which adjoins the City of *Belleville*, the termini being on the one side two miles from the western limits of *Belleville*, and on the *Ameliasburg* shore, about two miles west from the landing place of the plaintiff's ferry.

Held (reversing the judgment appealed from), that the establishment and use of the plaintiff's ferry within the limits aforesaid for many years had fixed the termini of the said ferry, and that the defendants' ferry was no infringement of the plaintiff's rights.

APPEAL from a judgment of the Court of Appeal for *Ontario*, affirming a decree of the Court of Chancery

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

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of that Province (1), declaring that the appellants had infringed the right of ferry of the respondent, and enjoining the appellants from continuing their ferry and from running any ferry boat between the townships of *Ameliasburg* and *Sidney*. The facts are fully stated in the report of the case in 27 Grant 411, and in the judgments hereinafter given.

Mr. *Bethune*, Q. C., for appellants.

Mr. *C. Robinson*, Q. C., for respondent.

The following cases were referred to on the argument: *Fripp* v. *Frank* (2); *Fraser* v. *Drynan* (3); *Hopkins* v. *Great N. Rwy. Co.* (4); *Pim* v. *Curell* (5); *Huzzey* v. *Field* (6); *Newton* v. *Cubitt* (7); *Smith* v. *Ratté* (8).

RITCHIE, C.J.:

I do not think there was any infringment of the rights of the plaintiff by the defendant's ferry running from the township of *Sidney*, in the county of *Hastings*, to *Ameliasburg*, across the bay of *Quinte*, at the points indicated on the plan exhibit P. in this case.

The letters patent, dated the 26th April, 1858, on a petition by the municipality "to grant a license to said municipality of one ferry from *Belleville* to *Ameliasburg*," did "grant full license and authority unto the municipality of the town of *Belleville* to establish a ferry between the town of *Belleville* to *Ameliasburg* aforesaid," and under this authority the municipality of *Belleville* did establish a ferry.

The regular starting place of the ferry thus established on the *Belleville* side was from the town of *Belleville* at the foot of the street, where a ferry dock was built for the purpose, across the bay to the "ferry point," at

(1) 7 Ont. App. Rep. 341.
(2) 4 T. R. 666.
(3) 4 Allen 74.
(4) 2 Q. B. Div. 231.
(5) 6 M. & W. 234.
(6) 2 Cr. M. & R. 432.
(7) 12 C. B. N. S. 60.
(8) 13 Grant 696 & 15 Grant 473.

the *Picton* road, on which the town built a dock on the *Ameliasburg* side, immediately opposite the town of *Belleville* and within a prolongation of the west and east city limits of the said town. The terminus of the defendants' ferry on the *Ameliasburg* side, in the township of *Ameliasburg*, was over two miles from the western city limits of *Belleville*, across the bay of *Quinte* to a point in the township of *Sidney*, three miles from the said dock or starting place of plaintiff's ferry on the *Belleville* side, and it is two miles from defendants' ferry dock in *Sidney* to the town line.

I think the letters patent clearly contemplated the establishment of a ferry between the town of *Belleville* and *Ameliasburg*, not merely a right, as contended, to ferry from *Belleville* to *Ameliasburg* and not from *Ameliasburg* to *Belleville*, or, in other words, a right to ferry one way only. I do not think, as contended, that the grant was void for uncertainty in not describing the limits of the ferry. I think the fair construction of the letters patent is to limit the right to establish a ferry within the limits of the town of *Belleville*, on the one side, to a point across the Bay of *Quinte*, within an extension of the east and west limits of *Belleville*, on the other side, and if there is any doubt on this point, the establishment and user of the ferry within these limits for so many years fixes the termini of the said ferry.

This is not a ferry between *Belleville* and *Ameliasburg;* its termini are at a greater distance than the statutes fix as interfering distances. There is evidence that this ferry is a public convenience, and the petition of the ratepayers, the resolution of the municipal council and the order in Council clearly show beyond all dispute the necessity and expediency of the ferry.

It would be most unreasonable and inconsistent to that part of the country if *Belleville*, under these letters

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patent, could claim the right to control and run or not, as might happen to suit *Belleville*, ferry boats all along the Bay of *Quinte*

I think there has been no infringement of plaintiff's rights, and therefore the appeal should be allowed with costs.

STRONG, J. :

This is an appeal from a decision of the Court of Appeal, which affirmed a decree of the Court of Chancery restraining the defendant from maintaining and using a ferry across the bay of *Quinte*, between the township of *Ameliasburg* and the township of *Sidney*, and also directing an account of moneys received by the defendants in respect of the ferry in question during the year 1879, and ordering payment of the amount found due to the plaintiff.

The bill states the plaintiff's title to a ferry between the city of *Belleville* and the township of *Ameliasburg*, and alleges that the defendants have interfered with his rights by running a ferry boat between *Ameliasburg* and a place in the township of *Sidney*, which adjoins the city of *Belleville*, about two miles from the *Belleville* terminus of the plaintiff's ferry, and with having, for hire and reward, carried persons from *Ameliasburg* whose immediate destination was *Belleville*, and with having carried persons to *Ameliasburg* from *Belleville*, all of whom would, but for the defendants' ferry, have used and travelled by the plaintiff's ferry ; and the bill further states that thereby the defendants intended to and did divert the traffic from the plaintiff's ferry to his detriment and loss, that the only object of the defendants in establishing their ferry was to draw off passengers from the plaintiff's ferry, and that there is no occasion or reason for the defendants' ferry.

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The defendants do not admit the allegations of the bill, and consequently, under the practice of the Court of Chancery as established by its general orders, the plaintiff is bound to prove both his title to the ferry he claims and the disturbance of his right by the defendants.

The plaintiff's title consists, first, of a license from the Crown, under the Great Seal, dated the 26th of April, 1858, whereby the Crown granted "full license and authority unto the municipality of the town of *Belleville* to establish a ferry between the town of *Belleville* to *Ameliasburg* aforesaid, with power to sublet the same," subject to the terms and conditions of the license. This license contains no definition of the limits of the ferry, except in so far as such limits may be considered to be prescribed by the operative words of the license just stated, namely, a ferry between the town of *Belleville* and the township of *Ameliasburg*. On the 17th June, 1867, the corporation of the town of *Belleville* by deed, after reciting; amongst other things, that by the letters patent a lease of the ferry "from the town of *Belleville* to the township of *Ameliasburg*" had been granted, proceeded "to demise and lease to *Abraham L. Bogart*, for fifteen years, the said ferry and the right to ferry to and from the town of *Belleville* aforesaid to the township of *Ameliasburg* aforesaid, as fully and to the same extent as the party of the first part might or could claim under the said lease or letters patent from the Crown." Subsequently, in the spring of 1874, *Bogart* assigned this lease, with the assent of the town of *Belleville*, to the plaintiff. The fact of the defendants having maintained a ferry and carried passengers for hire between the township of *Ameliasburg* and the opposite township of *Sidney*, situated on the same side of the Bay of *Quinte* as *Belleville*, is not disputed. The only color of title to such a ferry as that which the

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defendants have established is an order of the Lieutenant Governor of *Ontario* in Council, dated the 30th September, 1879, whereby it was ordered that a license under the great seal should issue to the township of *Ameliasburg* for a ferry between that township and the township of *Sidney*. No license was ever issued under this Order-in-Council, nor has the township of *Ameliasburg* ever executed any lease or license to the defendants, or authorized them to establish a ferry under the powers conferred upon them. The landing place of the defendants' ferry on the *Belleville* side is proved to have been upwards of 1½ miles west of the westerly limit of *Belleville*.

The first question which arises is whether the license of the 20th April, 1858, authorised the town of *Belleville* to establish a ferry both ways, that is, a ferry from *Ameliasburg* to *Belleville* as well as one from *Belleville* to *Ameliasburg*. The ferry is differently described in the license itself, as well as in the lease subsequently made under it. In the recital of the letters patent it is stated that the petition was for a license for a ferry from "*Belleville* to *Ameliasburg*," but in the operative or granting part of the same instrument it is differently described, the words of this part of the grant being:

> Now, therefore, know ye that we do by these presents grant full license and authority unto the municipality of the town of *Belleville* to establish a ferry between the town of *Belleville* to *Ameliasburg* aforesaid.

I think there can be no doubt, but that the construction put upon this grant by the court below was the correct one, and that what was granted was a ferry both ways. We cannot construe the words of the letters patent literally—so construed, they would be insensible; we must either reject the word "to" and substitute the conjunction "and" for it, or we must reject "between" and substitute "from." It seems to me that

the argument in favor of the former construction, as stated in the judgment of Mr. Justice *Patterson*, is conclusive. The ferry was being established for the use and benefit of the public, and we must therefore so interpret the grant as best to sustain that object—not so as to confer a mere monopoly for the profit of the individual licensee. The statute under which the license was granted clearly shows that it was intended to provide for the establishment of steam ferries running both ways, and not for ferries one way only. The lease by the town of *Belleville*, which is also very inaccurate in the language in which it describes the ferry, must likewise be taken as demising a right co-extensive with that conferred by the license. The operative words in the granting part of the lease are "the said ferry and the right of ferry to and from the town of *Belleville* aforesaid to the township of *Ameliasburg* aforesaid as fully and to the same extent as the party of the first part might or could claim under the said lease or letters patent from the crown." If we take out the words "to the township of *Ameliasburg* as aforesaid," and read the lease as of a ferry "to and from *Belleville*" as fully and to the same extent as confirmed by the letters patent upon the town, there can be no doubt about what was meant, and I cannot consider this description, which we should get by so reading the instrument, narrowed by the insertion of the words, "to the township of *Ameliasburg*;" rather the words "to and from *Belleville*" call upon us to interpolate the words "and from" before the "township of *Ameliasburg*;" and so reading it, we get a complete, sensible and accurate description of what was no doubt intended to be granted—a ferry co-extensive with that which the letters patent had granted to the town, viz., one to and fro between *Ameliasburg* and *Belleville*.

It seems clear that the provision originally contained

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in 8 *Vic.*, ch. 50, now embodied in Rev. Stats. *Ont.*, ch. 112, sec. 3, providing that no exclusive privilege of a right of ferry should extend for any greater distance than one mile and a half of the point at which the ferry is usually kept, does not apply to steam ferries licensed under 20 *Vic.*, ch. 7. The Commissioners, in revising the statutes, have adopted this construction, for sec. 3 of chapter 112 expressly makes the exception of ferries granted to municipalities under the subsequent provisions of the Act (ch. 112), which are a re-enactment of the provisions of 20 *Vic.*, ch. 7.

Section 5 of ch. 112, which is an exact reproduction of the similar provision in 20 *Vic.* ch 7, under which this license now in question was granted, is in these words:

> Such license shall confer a right on the municipality or municipalities to establish a ferry from shore to shore on such stream or other water and within such limit and extent as may appear advisable to the Lieutenant-Governor in Council and be expressed in such license.

Referring to the letters patent we do not find any description or definition of the limits of the ferry beyond those contained in the operative words of the grant which, as before stated, and according to the proper construction, describe it as "a ferry between the town of *Belleville* and *Ameliasburg*." The exclusive limits of the ferry must be taken, therefore, to be the town of *Belleville*, on one side of the bay, and the township of *Ameliasburg*, on the other. These at first, no doubt, seem to be very extensive limits, but when we consider that the grant is subject to an absolute power of revocation by the Crown, any objection on this head ceases to appear of importance.

Therefore, taking the limits of the ferry to be the limits of the town of *Belleville* on one side, and those of the township of *Ameliasburg* on the other, we have to

determine whether the defendants, by the maintenance of a ferry from a point in the township of *Ameliasburg* to a point in the township of *Sidney* west of the limits of the town of *Belleville*, have been guilty of any disturbance of the plaintiff's ferry. And I am clearly of opinion that this question must be answered in the negative. Although the 8 *Vic.*, ch. 50, has no direct application to the license granted to the town of *Belleville*, yet it may be called in aid to assist in the interpretation to be given to the words "such limit and extent" used in the 20 *Vic*, ch. 7, in the section already extracted from the Revised Statutes. Referring, then, to the provision of the 8 *Vic.*, ch. 50, which fixes the limits of a ferry at one mile and a half on each side of the point at which it is usually kept, we find very distinctly what is meant by "limits," and by the words "limit and extent," and for what purpose such limits are defined; for the words of the earlier statute are that—

> When the limits to which the exclusive privilege of any ferry extends are not already defined, such exclusive privilege shall not be granted for any greater distance than one mile and a half on each side of the point at which the ferry is usually kept.

The limits, therefore, being used in the first statute for the purpose of defining the exclusive right of ferry, we are at liberty to conclude, construing the two statutes as *in pari materiâ*, that the limit and extent required in licenses to be issued under the later Act, were also to be the limits of the exclusive privilege. Then, what is meant by the term "exclusive privilege?" It must mean that, within the limits defined, no person shall, without being guilty of unlawful interference, maintain a ferry, but that without the limits there shall be no exclusive privilege, and consequently that no amount of practical interference shall be taken to be unlawful or actionable as constituting a disturbance of the franchise of the licensee. This must necessarily mean within

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the same limits on both sides of the river or stream, for otherwise the very object and purpose of fixing the limits of a ferry, which is to prevent the uncertainty which arises in the case of ancient ferries in *England*, and in respect of other ferries without defined limits, would be defeated. That this is the object of defining the limits of the ferry is, if it is not sufficiently obvious without any demonstration, very clearly shown by a note in *Kent's* Commentaries (1), where it is said:

> It has been usual in the grant of a franchise to exclude in express terms all interference within specified distances. This practice has become highly expedient, considering the doctrine referred to in a subsequent part of this note. By a general Act in *Illinois* a ferry or toll bridge privilege created by statute excludes all other establishments within three miles of the same. * * * * This is an affirmance of the common law rule, and it is the wisest course, for it prevents all uncertainty and dispute as to what are reasonable distances in the given case, and what would amount to an unlawful interference.

On the whole, therefore, it appears very clear that it was intended by the statute that the limits and extent to be defined should be those within which it should be deemed a disturbance of the licensee's franchise to interfere by the establishment of another ferry, and that as regards anything done without those limits, the licensee should have no right to complain. The defendants have not therefore by running a ferry boat between the townships of *Ameliasburg* and *Sydney* been guilty of any interference with the plaintiff's rights. As regards the provision included now in the 10th sec. of the Revised Statutes, ch. 112, I am of opinion that it has no application to the case of a person who "lessens the tolls and profits" of a licensee of the Crown, by ferrying without the limits of the licensed ferry. The section can only be applicable to the case of a disturbance, by ferrying within the limits of the licensed

(1) 3 Vol. p. 459.

ferry, or by some unlawful act other than ferrying without the limits. The language of this section in terms only applies to persons who unlawfully ferry, or who unlawfully do any other act or thing whereby the licensee's profits are lessened. The unlawful ferrying referred to must mean a ferrying within the exclusive limits of the licensed ferry, or otherwise there would be no use in defining the limits of the exclusive privilege, as the statute has so carefully done; for a contrary construction would at once let in all the uncertainty which it was the very object to prevent in requiring a definition of the limits; and the "other unlawful act or thing" means some "act or thing" distinct from ferrying, such as forcibly obstructing the landing from the ferry and other unlawful acts which may be suggested, entirely distinct from maintaining a ferry without the limits.

It is true that the maintenance of a ferry and the taking of tolls for ferrying without the license of the Crown, is at common law illegal, as unduly infringing the prerogative of the Crown, but it is an illegality for which, so long as there is no unlawful interference with the private rights of other ferrying proprietors, there is no remedy but such as the Crown may think fit to resort to, to restrain or abate it.

In my judgment the decree of the Court of Chancery must be reversed and the bill dismissed with costs, and the appellant must have his costs in this Court and in the Court of Appeal.

FOURNIER, J.:—

I agree with Chief Justice *Haggarty* in the court below that the defendants' ferry is no infringement of plaintiff's right, and therefore I am of opinion that this appeal should be allowed.

HENRY and TASCHEREAU, JJ., concurred.

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GWYNNE, J.:—

I am of opinion that the plaintiff, by selecting the ferry point on the *Ameliasburg* side, as his landing place, has adopted the termini of his ferry, and that there has been by the defendants in this case no infringement of plaintiff's rights.

Appeal allowed with costs.

Solicitors for appellants: *Delaney & Ostrom.*

Solicitors for respondent: *Blake, Kerr, Lash & Cassels.*

1882

*Dec. 5.

1883

*May 5.

JOHN FORRISTAL, *et al.*, (DEFENDANTS).APPELLANTS;

AND

JOHN McDONALD, (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Consignment of goods subject to payment—Agreement that purchaser shall not sell—Passing property.

The plaintiff consigned crude oil to *A*, who was a refiner, on the express agreement that no property in the oil should pass until he made up certain payments. Without making such payments, however, *A* sold the oil to the defendants without the knowledge of the plaintiff.

Held,—(Affirming the judgment of the Court of Appeal for *Ontario*,) that although the defendants were purchasers for value from *A*, in the belief that he was the owner and entitled to sell the oil in question, the plaintiff, under his agreement with *A*, having retained the property in the oil, and not having done anything to estop him from maintaining his right of ownership, was entitled to recover from the purchasers the price of the oil.

APPEAL by the defendants, *Forristal* and *McIntosh*, from the judgment of the Court of Appeal for *Ontario*

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

(1), dismissing an appeal of the said defendants from a judgment of the Court of Chancery.

The action was instituted by *Jhon McDonald* to recover the value of five car loads of oil said to have been converted to their own use by *Forristal & McIntosh*, who were carrying on business at the city of *London* as refiners of and dealers in oil.

McDonald claimed the oil under an agreement between him and another defendant *Adams*, and the defendants *Forristal & McIntosh* claimed by purchase and delivery from the defendant *Adams*. The agreement under which the plaintiff claimed is referred to at length in the judgment of *Ritchie*, C.J.

Mr. *Gibbons* for appellant.

Mr. *Street*, Q.C., for respondent.

The arguments are fully noticed in the judgments.

The following authorities were referred to:

Walker v. *Hyman* (2); *Pickering* v. *Busk* (3); *Crossman* v. *Shears* (4); *Chitty* on Contracts (5); *Higgins* v. *Burton* (6); *Campbell* on Sales (7); *Johnson* v. *Credit Lyonnais Co.* (8); *Rumball* v. *Metropolitan Bank* (9).

RITCHIE, C.J.:

This case certainly does not come within the Act respecting contracts in relation to goods entrusted to agents. *Adams* was in no sense the agent of *McDonald*, nor was he in any way entrusted with these goods, shipped to him by *McDonald*, to sell, consign, or part or deal with them. His position with reference to these goods was simply for the purpose of safe custody and refining the crude oil under an agreement, dated

(1) 29 Grant 300.
(2) 1 Ont. App. R. 345.
(3) 15 East 37.
(4) 3 Ont. App. R. 583.
(5) 10 Ed. 355.
(6) 26 L. Jour. Ex. 342.
(7) P. 32.
(8) 3 C. P. Div. 32.
(9) 2 Q. B. Div. 194.

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Ritchie, C.J.

20th December, 1880, between *Adams* and *McDonald*, within two weeks after each delivery or shipment by *McDonald* to *Adams*. The said agreement stipulating that: "The crude oil so shipped is to remain the sole "property of the said *McDonald*, and to be held in his "name until the sum of one dollar and sixty cents per "barrel has been paid for it, and the shipment of it to "the said *Adams* is not, nor is the refining of it by him, "to be taken to change the property in the said oil from "the said *McDonald* to the said *Adams*, but upon pay- "ment for each lot the same is to be transferred from the "said *McDonald* to said *Adams*. In case default shall "be made in payment of any of the moneys hereby "secured, the said *McDonald* is entitled to possession of "the said refinery, and of the crude or refined oil then "being therein, and he may, after due notice to said "*Adams*, sell and dispose of the same, but the said "refinery shall not, nor shall any of the fixtures or "machinery be sold until after the expiration of one "month from the time of default, and the said *Adams* "shall again be entitled to resume possession of the said "refinery at any time before sale has been made, upon "payment of all arrears and costs and charges. And for "the purpose of better enabling the said *McDonald* to "take possession in case of default, the said *Adams* is to "be, and hereby becomes, tenant to the said *McDonald* "of the said refinery, the said such tenancy to continue "until the objects intended by this assignment have been "realized. In case the said *McDonald* acquires a new "lease of the premises during the continuance of these "presents, he shall transfer the same to the said *Adams* "upon payment of all the monies hereby intended to be "secured, and of all expenses connected therewith. In "case *Adams* shall make default in paying the said sum "of one dollar and sixty cents per barrel within the "period of two weeks after shipment to him, according

"to the terms being, he shall not be entitled to call for "any more oil from the said *McDonald* until he shall "have paid all arrears in full."

Adams, having no authority to sell, could not, by making a sale, transfer the property of *McDonald* to *Forristal*. I can discover nothing in the conduct of *McDonald*, nor the neglect of any duty by him, by which he enabled *Adams* to hold himself forth to the world as having, not the possession only, but the property in this crude oil, so as to estop him, *McDonald*, from asserting his right to it. *Adams'* general and principal business was that of a refiner of crude oil and though he may have made occasionally sales of crude oil, it is quite clear such sales were exceptional, and not in the general and ordinary course of his business, and I think the learned Judge *Proudfoot* was quite justified in coming to the conclusion that *McDonald* did not deal with *Adams* as a seller to others of crude oil but as a refiner. This, in my opinion, he had a perfect right to do, and I am of opinion the alleged sale or transfer by *Adams* to *Forristal*, of which *McDonald* had no notice, in payment of a prior indebtedness, of this crude oil, the property in which had never passed from *McDonald*, and the possession which *Adams* had was for the purpose of refining only, on the conditions contained in the agreement, was a fraud on him. Arriving therefore, at the conclusion that *Adams* was not entrusted with these goods as an agent at all; that they were placed in his hands as a refiner to refine them; that *McDonald* was guilty of no negligence, and did not give either authority, or ostensible authority, to *Adams* to sell these goods, nor did he do anything to estop him from maintaining against the defendant his right of ownership, I think the judgments of the court of first instance and of the Court of Appeal quite right, and therefore this appeal should be dismissed with costs.

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STRONG, J.:—

In my opinion the decree of the Court of Chancery in this case was perfectly correct and must be maintained.

There can be no question that the property in the oil never passed to *Adams*. This is expressly stipulated in the agreement of the 20th December, 1880, by the provision of that instrument which is in the following words:

> The crude oil so shipped is to remain the sole property of the said *McDonald* and to be held in his name until the sum of $1.60 per barrel has been paid him for it, and the shipment of it to the said *Adams* is not, nor is the refining of it by him, to be taken to change the property in the said oil from the said *McDonald* to the said *Adams*, but upon payment for each lot the same is to be transferred from the said *McDonald* to the said *Adams*.

It was quite competent to the parties to make this agreement, as an unpaid vendor may always reserve the property in goods sold,—the passing of the property being in every case a matter of intention which can be controlled by the contract of the parties.

Consequently *Adams* could transfer no property unless the case can either be brought within the Factors Act, or there was such conduct on the part of the respondent as estops him from denying that the property was vested in the appellants by the sale which *Adams* assumed to make to them, for sale in market overt, is, of course, out of the question. If any authority is wanted for this position, nothing can be clearer than the following statement of the law by Mr. Justice *Blackburn* in *Cole* v. *N. Western Bank* (1); that learned judge there says:

> At common law a person in possession of goods could not confer on another, either by sale or by pledge, any better title to the goods than he himself had. To this general rule there was an exception of sales in market overt, and an apparent exception where the person in possession had a title defeasible on account of fraud. But

(1) L. R. 10 C. P. 354.

the general rule was that, to make either a sale or pledge valid against the owner of the goods sold or pledged, it must be shown that the seller or pledger had authority from the owner to sell or pledge, as the case might be. If the owner of the goods had so acted as to clothe the seller or pledger with apparent authority to sell or pledge, he was at common law precluded as against those who were induced *bonâ fide* to act on the faith of that apparent authority, and the result as to them was the same as if he had really given it.

That the Factors Acts do not apply, is a proposition concluded by authority, since the goods were not entrusted to *Adams* as the factor or agent for sale of the respondent (1), and for the reason that *Adams* did not in fact carry on the business or calling of a factor. That there was no estoppel is equally apparent from the same authorities, and especially from the case of *Cole* v. *N. W. Bank*. *Adams* had, it is true, the possession, but no case has ever decided that the owner of goods is estopped merely because he has entrusted with the possession of his property a person who, being engaged in a business in the course of which he sells goods of the same kind as those which have been delivered to him as a bailee, in breach of his duty, has wrongfully sold the goods of his bailor as his own. If this were so, no man could safely leave his watch with a watchmaker who sells watches, or his carriage with a carriage maker who sells carriages, to be repaired.

In the judgment of Mr. Justice *Blackburn* already quoted from occurs this passage:

For example, if a furnished house be let to one who carries on the business of an auctioneer, he is entrusted as tenant with the furniture, being in fact an auctioneer, but it never was the common law, and could not be intended to be enacted, that if he carried the furniture to his auction room and then sold it, he could confer any better title on the purchaser than if he had as an auctioneer acted for some

(1) *Fuentes* v. *Montis*, L. R. 4 C. P. 93; *Cole* v. *N. W. Bank* *ubi supra* per Baron *Bramwell*; *Johnson* v. *Credit Lyonnais Co'y*, 3 C. P. Div. 32.

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other tenant who committed a similar larceny as a fraudulent bailee; or, to come nearer to the present case, that a warehouseman or wharfinger, who, as such, is entrusted with the custody of goods, if he happens also to pursue the trade of a factor, can give a better title by the sale of the goods than he could if they had been entrusted to some other warehouseman who employed him to sell.

It is true that, if, in addition to the possession, the *indicia* of the property (not merely documents authorizing the holder to acquire the possession, for such latter documents can be of no greater effect than the actual possession itself) are handed over, then a sale by the party so entrusted, though in breach of faith, will operate as an estoppel in favor of a purchaser in good faith, who has relied on the *primâ facie* title with which the true owner has invested his bailee. This was the true *ratio decidendi* of Lord *Ellenborough's* judgment in *Pickering* v. *Busk* (1); and is also, though with some hesitation, stated as law by Lord *Tenterden* in *Dyer* v. *Pearson* (2), both of which cases were decisions at common law; that of *Pickering* v. *Busk* having been decided in 1812, before any of the Factors Acts had been enacted.

The case which is most like the present, and which seems decisive of it is that of *The City Bank* v. *Barrow* (3). In that case hides had been sent to a tanner near *Montreal* to be tanned and re-shipped to the owner in *England*. The consignee, who, in the course of his business, purchased hides and from them manufactured leather, pledged the hides which had been consigned to him to be tanned, together with others of his own, to a bank, which acted in perfect good faith, as security for advances. It was held by the House of Lords that the bank had no title against the true owner, and was liable for the value of the hides which had been sold. There can be no doubt but that this case correctly states and

(1) 15 East 58. (2) 3 B. & C. 38.
(3) 5 App. Cases 664.

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applies the law of *England*, though it may be doubtful whether it as accurately states the law of *Quebec*, which was assumed to be in this respect identical with the English law.

Were we to hold in this case that *Adams* was able to transfer a good title to the oil in question, we should be establishing the principle that in all cases possession is evidence of title, and this rule that possession is equivalent to title, although it is undoubtedly the law of *France*, and of many other countries whose legal system is founded on that of the French code, and amongst others, and in a restricted sense and as applicable only to commercial transactions, that of the Province of *Quebec*, has never been recognized as a rule of the law of *England;* if it had been, there never would have been any necessity for the enactment of the statutes known as the Factors Acts, and the numerous cases which have arisen on those Acts, and have led to so many refined distinctions, might all have been solved without difficulty, for, in that case, all inquiry would have been limited to two questions of fact—the actual possession of the person assuming to sell or pledge and the *bonâ fides* of the vendee or pledgee.

Therefore, notwithstanding the very able and ingenious argument of the learned counsel for the appellants, I am constrained to say that I heard nothing from the bar, and on subsequent consideration I have found nothing in the authorities, to throw a shadow of doubt on the decision of the court below.

My judgment is that the appeal must be dismissed with costs.

FOURNIER and TASCHEREAU, J J., concurred.

HENRY, J.:

I concur with the other members of the court who

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have expressed their views, that the appeal in this case should be dismissed. *McDonald* was the owner of the property in question, and never conveyed his title to *Adams*. He placed it with him as bailee for a special purpose, which did not include the power to sell. In fact, it was specially agreed that he should not sell or dispose of it in any way himself. There is nothing to show that he was in any way the agent of *McDonald*. Evidence was given on the trial that *Adams* was in the habit of selling refined oil, and, on one or two occasions, had sold crude oil,—but it was only when he was overstocked and had not the means to convert it; but his business was that of a refiner,—of converting oil from the crude to the refined state. I have no doubt the law applicable to this case is as stated by the learned Chief Justice, and my brother *Strong*. A man cannot give a title to property to which he has no title himself. A bailee cannot, because he has merely possession of property, give a title which he has not himself. If a livery stable keeper hires a horse and carriage to a party to drive out, and gives him possession of it for the time being, no one would pretend for a moment, that if he sold the horse and carriage he had hired, the owner could not look to the purchaser for them. The same principle applies to this case. The bailee undertook to sell the property in his possession, and applied the funds to pay an old debt to *Forristal*. The transaction under the circumstances was a fraud upon *McDonald*. *Forristal* knew the terms by which *Adams* came in possession of the property.

I have no doubt that under the law applicable to the case and the evidence that the judgment of the Vice-Chancellor was the correct one, and ought to be sustained, and therefore the appeal should be dismissed with costs

GWYNNE, J.:—

Although the defendants are, in my opinion, purchasers for value from *Adams* in the belief that he was the owner of and entitled to sell the oil in question, still I am of opinion that the plaintiff is entitled to retain the judgment rendered in his favor in the courts below. That *Adams* was not an agent entrusted with the possession of the oil within the meaning of ch. 121 of the Revised Statutes of *Ontario* is clear from the judgment of the Exchequer Chamber in *Cole* v. *The North Western Bank* (1). No question arises here which might arise in a case of conflicting evidence of the terms of an oral contract and of the intention of the parties thereto, namely, whether the provision as to the property not passing until payment was not inserted as an attempt to restrict the rights already acquired by the vendee, to whom, by force of other terms of the contract, it was apparent that the intention of the parties was that the property should pass upon delivery. Here the question arises upon a sealed instrument carefully prepared, the true construction of which I think is that the crude oil was delivered to *Adams* for the purpose of being refined at his refinery, the keeping open of which in operation was the main object in view, and the intention of the parties is clearly and, I think, reasonably, expressed to be that the property in the oil, notwithstanding its change from the crude state to refined, should not pass from the plaintiff to *Adams* until payments should be made in the manner stated in the instrument. I am of opinion also that the case does not come within the doctrine of *Pickard* v. *Sears* (2), or *Freeman* v. *Cooke* (3), as explained in *Swan* v. *N. B. Australasian Co.* (4), approved of in *Johnson* v.

(1) L. R. 10 C. P. 354.
(2) 6 A. & E. 469.
(3) 2 Ex. 654.
(4) 2 H. & C. 175.

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Credit Lionais Co. in the Court of Appeal (1); so as to deprive the plaintiff of his common law right of re-claiming his property from the defendants, although purhasers for value, and without notice, from *Adams*, who, in violation of the terms upon which he had acquired possession of the plaintiff's property, assumed to deal with it as his own.

The appeal, therefore, must be dismissed with costs.

Appeal dismissed with costs.

Solicitors for appellants: *Gibbons, McNab & Mulkern.*

Solicitors for respondents: *Street & Beecher.*

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*Mar. 15,16.

*June 19.

JOHN McCRAE (PLAINTIFF).....APPELLANT;

AND

JOHN WHITE (DEFENDANT).....RESPONDENT.

ON APPPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Insolvent Act of 1875—*Unjust preference—Fraudulent preference—Presumption of innocence.*

W., the respondent, was a private banker who had had various dealings with one *D.*, and had discounted for him at an exorbitant rate of interest notes received by *D.* in the course of his business. *D's* indebtedness on new transactions amounted to a large sum of money, but, being a man of a very sanguine temperament, he had entered into a new line of business, after obtaining goods on credit to the amount of $4,000 or $5,000, upon a representation to the parties supplying such goods that, although without any available capital, he had experience in business.

About twelve days after he had commenced his new business, being threatened by a mortgagee with foreclosure proceedings, he applied to *W.*, who advanced him $300, part of which was

*PRESENT—Sir W. J. Ritchie, C.J., and Strong, Fournier, Henry and Gwynne, JJ.

(4) 3 C. P. Div. 32.

applied in paying the overdue interest on the mortgage, and the surplus in retiring a note of *D's.* held by *W.* *D.* executed a mortgage in favor of *W.* and was granted a reduced rate of interest on his indebtedness and was told he would have to work carefully to get through. *D.* became insolvent about four months afterwards. In a suit by *McR.*, as assignee, impeaching the mortgage to *W.* it was

Held,—(Affirming the judgment of the Court of Appeal,) that *McR.* had not satisfied the *onus* which was cast upon him by the Insolvent Act, of shewing that the insolvent at the time of the execution of the mortgage in question contemplated that his embarrassment must of necessity terminate in insolvency.

APPEAL from a judgment of the Court of Appeal for *Ontario* (1), reversing the decree of the Court of Chancery, which declared a mortgage, executed by one *Depew* in favor of the respondent *Whyte*, void, as being an unjust preference of *Whyte* over the other creditors of *Depew*, and ordering *Whyte* to pay over to the appellant, as the assignee in insolvency of *Depew*, the sum of $465.

Mr. *Robinson*, Q.C., and Mr. *J. H. McDonald* for appellant:

Mr. *Gibbons* for respondent:

The points relied on and the authorities cited appear in the judgments hereinafter given, and in the report of the case in the court below.

RITCHIE, C. J.:

The mortgage which it is alleged was made in contemplation of insolvency, whereby it is claimed defendant obtained an unjust preference, and which is now on that ground sought to be set aside, was made on the 30th October, 1879. The insolvency occurred on the 21st February following.

The defendant was a private banker who had had

(1) 7 Ont. App. R. 103.

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various dealings with the insolvent, discounting notes taken by insolvent from his customers at exorbitant rates of interest, and it would seem almost obvious to any ordinary prudent man of business at rates such as no legitimate business would justify, and it is not at all to be wondered at that the end was insolvency, but this by no means settles the question.

The insolvent is described as a man of a very sanguine temperament, who evidently did not view his business transactions in this light. Mr. Justice *Burton*, in delivering the judgment of the Court of Appeal, states the facts as they appear in the case thus:

At the time of giving the mortgage now in question, the insolvent had ceased to carry on the business in which he had been previously engaged, and had commenced a mercantile business, having purchased goods entirely upon credit from several wholesale houses in *Toronto*.

It appears that when his dealings with *Whyte* commenced, he owned a property in *Morpeth*, subject to a mortgage for $600, the value of which he places at $1,000, but which the defendant places at a larger figure.

This property he exchanged with one *Minnis* for a leasehold property in *Leamington*, containing four and a half acres, and a village lot with a small house upon it. There was a sum of money to be paid to *Minnis* on the exchange, although the parties differ as to the amount; but whatever it was, was advanced by the defendant, and included in a mortgage which was given to him for $1,000 on the 1st March, 1878.

The insolvent acquired, in addition to this property, a farm of about fifty acres, and that known as the *Brown* street. Both the farm and the four and a half acres were subject to mortgages, to one *Setterington*, prior to *Whyte's* mortgage.

And there was a mortgage on the *Brown* street property of $500, prior to that in favour of the defendant. The defendant's mortgage on that property, which is for $1,500, is the one impeached. The last property was, in fact, sold under *Setterington's* mortgage, and realized $465 over and above his incumbrance, which sum the defendant received, and is ordered by this decree to pay over to the plaintiff as assignee of the insolvent's estate.

The account given by the insolvent in reference to what took place on the execution of this mortgage, is given in his evidence

and shows that an advance was then made by the defendant of $300, the greater portion of which went to pay off interest on the prior mortgages held by *Setterington*, and a balance to retire a note held by the defendant.

It was then arranged that the insolvent should have an extension of two years for the notes due to the defendant at a considerable reduced rate of interest, provided the interest was duly paid upon them as they matured.

And the learned judge again says:

We find then in this case that, some days prior to the execution of the mortgage impeached, the insolvent had embarked in a new business; having been entrusted by his creditors with some $4,000 or $5,000 worth of goods upon a representation that he had no available capital, but that he had experience in business, that he was shortly afterwards threatened with proceedings by *Setterington* which, if persisted in, must have closed his business; and that in this emergency he applied to the defendant, who advanced him sufficient to meet the overdue interest and gave an extension of his own claim at a reduced rate of interest, that the defendant intimated to him at that time that he would have to work very carefully in order to get through, and the learned Chief Justice thinks that this intimation was sufficient to bring home knowledge of his position to the insolvent, even if he did not know it previously, but the insolvent denies this, and says that he did not understand this meaning, but supposed that it was given by way of advice, that he himself thought he would get through if he had time. We have in addition to this, that he was a man of very sanguine temperament.

Having, therefore, but a few days before this transaction succeeded in obtaining $4,000 or $5,000 worth of goods from parties knowing he had no available capital, but believing he had experience in business, and getting a further advance, and an extension of time, and a reduction of the rate of interest from defendant, I think the natural inference would be that a man with such a sanguine temperament would easily delude himself with the idea that certain prospects of success were before him; we have seen him all along doing a business at a ruinous rate of interest, we see him now with that interest reduced, payment of capital postponed and with a large stock of goods purchased on credit to start afresh

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in a new business. I can find nothing in the evidence that would justify me in saying that the insolvent obtained these goods with the wicked intent of defrauding those that furnished them, as would have been the case if, at the time of obtaining them and of giving this mortgage he contemplated insolvency; on the other hand I think the legitimate inference, in view of his sanguine character, and judging him by his previous dealings, and the assistance obtained by the large advance of goods, is that he was not thinking of insolvency, but was rather, in view of the fresh start he was getting, looking forward to a career of business success.

It must be remembered that the insolvency did not occur till nearly four months after the transaction now impeached. Fraud is not to be presumed, but, on the contrary, the burthen is on the plaintiff to show affirmatively that, at the time the transaction was entered into, the insolvent contemplated insolvency; to establish this it is clearly not sufficient to show merely that the trader was insolvent when the transfer was made, for it by no means necessarily follows that a man in embarrassed circumstances contemplates insolvency; many men struggle on in hope of retrieving their affairs and avoiding insolvency long after their affairs become embarrassed, anticipating they may rally and come round. In the absence of any direct evidence I find it impossible to say, judging from the surrounding circumstances and the position and character of the insolvent, that at the time he made this transfer he contemplated that his embarrassments must of necessity terminate in insolvency, and that with a view to that end he made the transfer. In *Gibson* v. *Routts* (1), *Tindal*, C.J., says:

> Contemplation of bankruptcy, I take to mean, where the party believes bankruptcy to be the necessary result of his condition, and

(1) 3 Scott, 236.

such belief is operating upon his mind at the time of making the payment.

On the other hand I think all the circumstances tend to the conclusion that the insolvent then entertained a *bonâ fide* hope or expectation that his property and his new business would extricate him from his difficulties, though I am very free to confess that few prudent business men, judging by his past business career, would be likely to look on his business prospects in the same favorable light. Under all these circumstances, I am not prepared to say that the plaintiff has shown, beyond a reasonable doubt, that when the transfer was made the trader was insolvent, and that he contemplated insolvency.

STRONG, J.:—

The question which we have to decide in this case, purely of one fact, is, whether the respondent took the mortgage of the 12th October, 1879, in contemplation of the insolvency of the mortgagor, and with the intent of obtaining an unjust preference over his other creditors. The insolvency did not occur until the 21st February, 1880, so that the presumption created by the statute against transactions of this kind, occurring within thirty days previously to the insolvency, does not arise, and the burthen of proving the transaction to have been fraudulent lies on the assignee who has impeached the mortgage. I am of opinion that all the surrounding circumstances warrant the conclusion arrived at by the Court of Appeal, that neither the respondent nor the insolvent then contemplated failure, and that, on the contrary, both parties then hoped and anticipated that *Depew*, the insolvent, would eventually be able to surmount the difficulties in which he was admittedly at the time involved. The statute does not provide that every security given by a debtor, when

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in circumstances of pecuniary embarrassment, shall be void, even though those embarrassments afterwards culminate in insolvency. The words of the clause in question are:

> If any sale, deposit, pledge, or transfer, be made of any property, real or personal, by any person in contemplation of insolvency, by way of security for payment to any creditor * * * whereby such creditor obtains, or will obtain, an unjust preference over the other creditors, such sale, deposit, pledge, transfer, or payment, shall be null and void.

All depends upon the intention of the parties, and if it can be shown that the creditor acted in good faith, his security is unimpeachable whatever may be the result of the debtor's embarrassments. Each case must, therefore, be decided upon its particular circumstances, and is not to be determined by the application of any general rules, or presumption of either law or fact, laid down in decided cases. In the present case, it appears to me, that the surrounding facts do not warrant the inference of fraud. I do not found this conclusion on the direct evidence, though this is in favour of the respondent, for it is proved that the insolvent, with the assistance of the respondent's partner *Martin*, did make up a rough statement of his assets and liabilities which showed a surplus. What I proceed upon is, that the conduct of the insolvent at the date of the mortgage, and his situation in regard to his business, was such as to make it impossible to suppose that he then contemplated becoming insolvent. Only a few days before this transaction of the mortgage, he had begun a new business as a retail dry goods merchant, with a large stock of goods, which he had been enabled to obtain from merchants in *Toronto* wholly on his own credit, and from this source he anticipated considerable profits, and such as might have warranted the expectation that, by the time the respondent's debt, which was deferred for two years,

became due, he would, from his store and from the profits of his farm and the sale of village lots, be able to meet his payment to the respondent and in the meantime pay for the goods. It is, therefore, out of the question to say that *Depew* himself supposed he was on the eve of insolvency. On the contrary, it is apparent that he supposed he was entering upon a flourishing business, and that all that was required to make his success certain was the concurrence of the respondent in an arrangement which he proposed as to further time. As regards the respondent himself, he certainly seems to have been more doubtful, but from what is stated to have passed between him and *Depew*, and from the nature of the advice he gave the latter, I think it is evident that he too anticipated that with good management *Depew* might get through his difficulties. As to the new advance which was made, I admit no importance ought to be attached to that, as it seems all to have been applied to the payment of debts in which the respondent was interested. Had it been otherwise applied, that alone would have been sufficient to have repelled any *primâ facie* presumption of fraud. I think, however, the circumstance of the extension of time, the reduction of the rate of interest, the expectations which seem to have been entertained respecting the profits of the new business, the conduct of the respondent, in abstaining from any interference with the stock in trade, are all so many circumstances inconsistent with fraudulent intent and in favor of *bona fides* sufficient to rebut any presumption arising merely from the financial condition of the debtor, and that it would be impossible to say that the respondent supposed *Depew* to have been on the eve of insolvency, and took the security to secure himself an unjust preference. The case, I admit, is a suspicious one, but that is not

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enough to avoid the security. In administering the bankruptcy law the English courts will not avoid transactions of this kind on evidence inducing suspicion merely (1), and the same rule ought to be applied to cases of alleged preference coming under this 133rd clause. In *Newton* v. *Ontario Bank* (2), the affairs of the insolvent as known to the secured creditor, the bank, were in a condition to lead it to suspect his approaching insolvency, but the Court of Appeal nevertheless held the transaction to be valid. I think, therefore, that the decision of the Court of Appeal was the correct conclusion on the evidence, and that we ought to adhere to it.

Another point was argued, that of pressure; it was contended by the respondent's counsel that the mortgage was given under such pressure from the respondent, that it alone was sufficient to rebut all presumption of fraud and to establish that there was no unjust preference within the meaning of the statute, and it was contended that the case of *Davidson* v. *Ross* (3) was not law and ought not to be followed. In the view of the facts already stated, it is unnecessary to consider the question, and I am not prepared to say that the evidence would justify us in holding that the mortgage was given under the influence of pressure, but as the question of law was fully and ably argued, I think it not irrelevant to say that, had we been compelled to decide the point, I should not have been prepared to have acquiesced in the decision arrived at by the Court of Appeal in *Davidson* v. *Ross*. But, opposed as that case is to a long line of authority on the construction of similar enactments in *England*, extending back for more than 100 years, (*Harman* v. *Fisher* (4) was decided by Lord *Mansfield* in 1774),

(1) *Ex. p. Witham Re Berry*, 22 Ch. D. 292.

(2) 15 Grant 283.

(3) 24 Grant 22.

(4), Cowp. R. 117.

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and especially in direct conflict with two decisions of the Privy Council upon Colonial statutes, identical in their terms with that under consideration in the present case, I should have felt compelled to dissent from it. And I think it right to add that, not only does the judgment of the Court of Appeal in *Davidson* v. *Ross* appear to me to be at variance with authority, but that, without regard to previously decided cases, it is open to the objection, that it places a construction upon this 133rd section of the statute, and upon the 89th section of the Act of 1869, inconsistent with the very language in which these clauses are expressed; for I am unable to see how it can be said that a creditor, who obtains payment or security as the direct result of the pressure to which he has subjected his debtor, has obtained an unjust preference. The necessary consequence of the decision of the Court of Appeal in *Davidson* v. *Ross* would be that, so soon as a trader, subject to the Insolvent Acts, became unable to meet his engagements, his assets from that time formed a trust fund for the payment of the whole body of his creditors, and no single creditor could obtain by means of pressure an actual payment out of them without being liable to account to the other creditors. This, however, would be a proposition which, so far as I know, has never yet been either embodied in a statutory form or propounded by judicial decision.

The appeal must be dismissed with costs.

FOURNIER, J., concurred.

HENRY, J.:

It appears to me the only point to be decided by this court is that which is raised by the allegation that the transfer was made in this case in contemplation of bankruptcy. The mortgage in question not having

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been made within the 30 days referred to in the statute, it is necessary for the party making the allegation to prove it. Now, there is no proof, I take it, offered here that would remove all reasonable doubts from the mind of a judge or jury as to the fraudulent intent of the insolvent. The plaintiff is bound to prove that when the mortgage was given the party did so in contemplation of bankruptcy, or he is bound to prove that it was in some other way a fraudulent transaction. It is, however, only alleged that the transfer was made in contemplation of bankruptcy, and, therefore, under the statute, was void. I must say that if I were called upon to decide as a juror in this case, I would say there was no evidence here that fraud was contemplated, or that the transfer was made in contemplation of bankruptcy. We cannot set aside the agreement of parties merely on suspicion. There may have been on the part of this man an expectation of going into insolvency, but I think the facts in evidence do not show that such was the case. Here was a large stock of goods recently obtained by the insolvent; he was pressed to pay interest on mortgages due to other parties; the defendant had a claim against him which he might enforce at any moment; the insolvent needed funds to pay up the interest on the mortgage. It was necessary, then, to carry out the very object he had in view—obtaining a fresh start in business—to get an advance of money. This property that was assigned had been previously mortgaged to another, and when it was sold it paid but a small portion of the defendant's original debt; after paying the $300 he advanced and interest, there was a very small sum, not exceeding $100, that would go to the credit of the original debt. The defendant gave the insolvent $300, and gave him time for two or three years for the payment of his original debt. He made the advance more for the purpose of assisting the insol-

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vent to carry on his business than for the purpose of securing the original debt which he owed him. That is the view which I take of it, and it is a reasonable one under the evidence. I think the party alleging this act to have been done in contravention of the Insolvent Act has totally failed to prove it, and I therefor concur with my learned brothers in saying that the appeal should be dismissed and the judgment of the court below confirmed.

GWYNNE, J. :—

The learned counsel for the appellant contended, that the affirmance of the judgment of the Court of Appeal for *Ontario* in this case would be equivalent to a reversal of the judgment of the same court in *Davidson* v. *Ross*, as reported in 24 *Grant* 22.

There is doubtless much said in the judgments of some of the learned judges, who delivered judgments in *Davidson* v. *Ross*, which, if necessary to be considered in the determination of this case, would, in my judgment, require much further argument and careful consideration before all that is there said could be adopted by this court, but those observations have no application to the present case, which proceeds solely upon the view taken in the court of the matter of fact, whether the mortgage was or not executed in contemplation of insolvency. The court was of opinion that it was not, and I do not see sufficient ground for dissenting from this opinion. Indeed the observations in *Davidson* v. *Ross* to which I have alluded do not seem to have been necessary for the determination of that case, which also proceeded upon the view taken by the learned judges of mere matters of fact. The deed impugned there was executed within thirty days preceding the insolvency attaching, and so under the Act had to be presumed to have been executed in contemplation of

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insolvency. Two of the learned judges were of opinion that the presumption raised by the Act could not be rebutted. Two others were of opinion that it could be, but was not in point of fact, so that the court was unanimously of opinion that the impugned deed was established to have been executed in contemplation of insolvency.

The learned Chief Justice was of opinion that the parties by whom the deed was executed were not debtors of the person in whose favor it was executed, in which case it would have been a deed executed in contemplation of insolvency and without any consideration whatever therefor; the other judges were of opinion that the parties who executed the deed were debtors of the person in whose favor it was executed, but then the consideration clearly was merely an old debt due to the person in whose favor it was executed, and the majority of the court was of opinion that there was no sufficient evidence of the deed having been executed under pressure, which was relied upon, although certainly they say that in their opinion pressure would make no difference, however great the pressure might be, as I read their judgment. Now, the facts thus established constituted precisely what according to the old law had always been known under the legal term of "preferential assignment to a favored creditor," so that the observations of the learned judges who commented largely upon the meaning of the expression "unjust preference" as used in the act seem to be merely *obiter dicta*, the soundness of which will require consideration whenever a case shall arise presenting facts showing a sale or transfer "by way of payment to a creditor" (which is what the section deals with) which can with propriety be said to be "unjust" and a "preference" having any features which distinguish it from what independently of the statute has always been known under

the name of "preferential assignment" to a favored creditor.

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Appeal dismissed with costs.

Solicitors for appellant: *Rose, Macdonald, Merritt & Coatsworth.*

Solicitor for respondent: *G. C. Gibbons.*

JAMES DEWOLFE SPURR & JOHN N. MOORE..... ..... } APPELLANTS;

AND

THE ALBERT MINING COMPANY.....RESPONDENT.

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*Feb'y.23,24,

*June 18.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Contract—Sale of goods—Payment—Appropriation—Non-suit.

The *Albert Mining Co.* (respondent) brought this action to recover for coal sold and delivered to appellants during the years 1866, 1867 and 1868.

S. and *M.*, and one *McG.* were partners carrying on business under the name of the *Albertine Oil Company*, the defendant *S.* furnishing the capital. The contract for the coal was made by *S.* who was a large stockholder in the plaintiff company and entitled to yearly dividends on his stock. The agreement, as proved by plaintiffs, was that *S.* purchased the coal for the *Albertine Oil Company*, the members of which he named, that the president of the plaintiff company told *S.* they would look to him for payment, as the other partners were poor; that the terms of sale were cash on delivery on board the vessels; and that *S.* agreed that the dividends payable to him on his stock should be applied in payment for the coal; that in consequence of this arrangement the plaintiffs credited the *Albertine Oil Company*, with the amount of *S.'s* dividends as they were declared from time to time down to August, 1866, leaving a balance of $912 due to *S.* It also appeared that the coal deliv-

*PRESENT—Sir W. J. Ritchie, Kt., C.J.; and Strong, Fournier, Henry and Taschereau, JJ.

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ered was charged in the plaintiffs' books to the *Albertine Oil Company*, and that the bills of lading on the shipments of the coal were also made out in their name, and that some time afterwards a notice signed by *S.* and *M.*, was given to the plaintiffs, complaining of the inferior quality of the coal, and claiming damages in consequence. In the latter part of the year 1868, *S.* repudiated the agreement to appropriate his dividends to the payment of coal, and refused to sign the receipts therefor in the plaintiffs' books. He had signed the receipt for the dividend of 1866. The present action was then brought (in 1873) against *S.* and *M.*, the surviving partners of the *Albertine Oil Company*, *Mc G.* having died, to recover the value of the coal. *S.* shortly afterwards brought an action against the plaintiffs for the dividends; the claim was referred to arbitration and an award was made in favour of *S.* for upwards of $15,000, which the plaintiffs paid in July, 1874. The receipt given for the payment stated that it was in full satisfaction of the judgment in the suit of *S.* against the *Albert Mining Company*, and it appeared (though evidence of this was objected to in the present action) that it included the dividends for the years 1867 and 1868.

The learned judge before whom the action was tried, non-suited the plaintiffs, but the Supreme Court of *Nova Scotia* set aside the non-suit.

Held,—(Reversing the judgment of the court below) *Strong*, J., dissenting, that there being clear evidence of the appropriation of *S.'s* dividends in pursuance of agreement made with him, and therefore of the plaintiffs having been paid for the coal in the manner and on the terms agreed on, the plaintiffs were properly non-suited.

APPEAL from a judgment of the Supreme Court of *New Brunswick*, by which a rule to set aside a nonsuit was made absolute.

The facts of the case, as proved on the trial, appear in the judgment of the learned Chief Justice hereinafter given, and in the report of the case in the court below (1).

Mr. *Weldon*, Q.C., and Dr. *Barker*, Q.C., for appellants, referred to the following cases :

(1) 22 N. B. Rep. 346.

Eyles v. *Ellis* (1); *Bodenham* v. *Purchas* (2); *Hills* v. *Meynard* (3); *Henderson* v. *Stobart* (4); *Lyth* v. *Ault et al* (5); *Cochrane* v. *Green* (6); *Walter* v. *James* (7).

Mr. *Gilbert*, Q.C., for respondents, referred to the following cases:

Graves v. *Key* (8); *Lee* v. *Lancashire and Yorkshire Railway Co.* (9); *Farrar* v. *Hutchinson* (10); *Skaife* v. *Jackson* (11); *Wallace* v. *Kelsall* (12).

RITCHIE, C.J.:

This is an action for goods sold and delivered, tried before his honor Mr. Justice *Weldon* at the Circuit Court, *St. John*, May, 1881, when a nonsuit was ordered by the learned judge, and which nonsuit was subsequently set aside by the Supreme Court.

The facts of the case, as proved on the trial, are as follows:

The respondent company were the proprietors of coal mines near *Hillsborough*, *Albert* county. The appellant *Spurr* was a large stockholder in the company, and the company in 1866, and for several years afterwards, was paying large dividends.

In the early part of the year 1866 the appellants and one *John McGrath*, since deceased, formed an incorporated company which they called The *Albertine Oil Company*, to make oil from the coal mined by the respondents.

Mr. *Henry Gilbert*, the President of the *Albert Mining Co.*, in his evidence, says:

I am President of the *Albert Mining*; was so in 1866-7. I know

(1) 4 Bing. 112.
(2) 2 B. & A. 39.
(3) 10 Q. B. 266.
(4) 5 Exch. 99.
(5) L. J. N. S. Ex. 217.
(6) 9 C. B. (N. S.) 448.
(7) L. R. 6 Exch. 124.
(8) 5 App. Cases 190.
(8) 3 B. & Ad. 318.
(9) L. R. 6 Ch. 534.
(10) 9 A. & E. 641.
(11) 3 B. & C. 421.
(12) 7 M. & W. 273.

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Spurr, Moore and *McGrath*. The latter was living in 1866. *Spurr, Moore* and *McGrath* composed the *Albertine Oil Co.* Q. Had you in 1866, in March or April, conversation about coal in your office, and he (*Spurr*) wanted 3,000 for the *Albertine Oil Co.*? A. I asked who they were. He said he, *McGrath* and *Moore* in *Spurr's Cove* (or above the falls). He furnished capital and mill, and they did the work; *Moore* did the work, and *McGrath* sold the oil; he wanted that quantity for that year. We made up the order for coal. I agreed with him he should get it at $11 per ton; he agreed to that. In 1866, that it should be paid by the Oil Co. The next year the same. He wanted the same quantity for 1867. In August, 1867, the price of oil fell off. I went to *Spurr's* house at *Chipman's Hill*. The quantity was to be reduced to 2,000 tons; he had received some coal before that. I proposed to cancel. He would take 2,000, and the balance was cancelled. Nothing more said. Nothing said about price the second year. We sent him the bill of lading and an invoice; he was directed to do this. This was in 1866 and 1867. I directed *Ketchum* to ship on *Spurr's* order.

Cross-examined by Mr. *Weldon*—

He was to pay cash on delivery—put on board at *Hillsboro'*; free on board, and cash on delivery. I sold to *Spurr* on these terms. I told *Spurr* the others were poor, and I looked to him. He was to turn the dividend in his stock. He was a large stockholder, and his dividend was to go pay for the coal. That was the arrangement of the Oil Company. A dividend in 1864. He (*Spurr*) got his dividend, 7th August, 1864. Credited to Oil Company by Mr. *Ellman*. *Spurr* signed 4th Oct., 1866. Credited to Oil Co., 29th Nov., 1866, $5,760; 5th April, 1867, $3,040. Credited by *Ellman* to the *Albertine Oil Company*. Credited to the *Albertine Oil Company*, 26th Dec., 1867, $4,800, all carried to the Oil Company account. 10th August, 1868, credited to *Albertine Oil Co.* The Oil Co. paid. There would be $6,770 on this, leaving $900 due to *Spurr*.

Re-examined, *Tuck*—

Spurr repudiated the dividend in 1868. He was off fishing in 1867. After 16th October, 1868, he disputed; I agreed to credit the dividends in June, 1866 and 1867, and he agreed to do so. After this, suit was commenced. That it was before this suit was commenced he repudiated; between 1868 and 1869 he repudiated, and would not sign the books for the dividend after that.

I think the evidence shows clearly that the sale was to the *Albertine Oil Company* composed of *Spurr, Moore*

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& McGarth, and not to *Spurr* individually, though the fair inference is that this sale would not have been made had not the President of the *Albert Mining Company* considered *Spurr* a responsible party, and the partner on whose credit he especially relied for payment, though I can discover no indication whatever of any intention of relieving the other partners from liability. There is clear evidence that *Spurr* agreed that he would allow his dividends in the *Albert Mining Company* to be appropriated by that company in payment of the coal, and unless *Spurr* had made this arrangement, the fair inference is, I think, the coal, which appears to have been a cash article and the sale a cash transaction, that is, the dividends were to be appropriated and to be accepted as cash by the *Albert Mining Company*, would not have been furnished by the *Albert Mining Company* to the *Albertine Oil Company*.

The contract of sale having been made by *Spurr* on behalf of the *Albertine Oil Company*, it can hardly be presumed that *Spurr* did not communicate the terms of so all important a contract to his co-partners, and the liability of such co-partners would continue only until the coal was paid for in the manner and at the time stipulated by the agreement by virtue of which the purchase was made and the coal supplied.

The coal having been furnished and the dividends having been so appropriated in payment therefor, in my opinion, on such appropriation, the transaction between the *Albert Mining Company* and the *Albertine Oil Company* was closed in accordance with the terms of the arrangement on which the coal was bought and sold.

The agreement amounts to this, that for the coal supplied to and received by the *Albertine Oil Company* the appropriation of the dividends should be con-

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sidered as payment, and places the parties in the same situation as if the dividends had been actually paid in money to *Spurr* by the *Albert Mining Company* and then returned by him to that company in payment for the coal therefore so soon as the *Albert Mining Company* under this agreement appropriated, by the authority of *Spurr*, the dividends to the payment of the coal, their claim against the oil company ceased in like manner. This is doing no more than treating that as a payment which the parties themselves have agreed should be so regarded.

In *Spargo's* case (1) *James*, L.J., said:

> If there was on the one side a *bonâ fide* debt payable in money at once for the purchase of property, and on the other side a *bonâ fide* liability to pay money at once in shares, so that if bank notes had been handed from one side of the table to the other in payment of calls, they might legitimately have been handed back in payment for the property, there is no necessity that the formality should be gone through of the money being handed over and taken back; but that if the two demands are set off against each other the shares have been paid for in cash.

Mellish, L. J., said:

> It is a general rule of law that in every case where the transaction resolves itself into the payment of money by *A.* to *B.*, and then handing it back again by *B.* to *A.*, if the parties meet together and agree to set the one demand against the other, they need not go through the form and ceremony of handing the money backwards and forwards.

If *Spurr*, after the coal was supplied and the dividends appropriated in payment thereof, attempted as a stockholder to claim payment of the dividends from the *Albert Mining Company*, the evidence in this case shows he would have been trying to obtain such payment after he had received satisfaction for the same, and no such claim could be successfully sustained, and any such claim, if made, should have been resisted by the *Albert*

(1) L. R. 8 Ch. App. 412.

Mining Company. If Mr. *Spurr* has received the benefit of his dividends in paying for the coal and has since been paid the same dividends in cash, it is clear he has been twice paid. Whatever suspicions the evidence in this case may raise on this point, the record of the suit and award under which it is contended they were paid *Spurr* not being in evidence, and no evidence of the matter submitted to the arbitrators or of the proceedings before them, we have no sufficient legal evidence to show it unless from the items on which the award and judgment for $15,279.98 was based on the receipt given by *Weldon* in the evidence of *Schofield* on this point objected to, and which should have been rejected. But even if this was shown by satisfactory legal evidence, I do not see how it could affect this case, for the question we are now trying is not one between *Spurr* and the *Albert Mining Company*, as to whether he has or has not been paid twice over for his dividends; but the question is between the surviving partners of the *Albertine Oil Company* and the *Albert Mining Company*, and that is whether the *Albert Mining Company* have been paid for the coal supplied the *Albertine Oil Company* in the manner and on the terms agreed on.

I cannot discover that there was any question to be submitted to the jury, such as the court below assumes, because there was clear uncontradicted evidence of an actual appropriation of the dividends, after the receipt of the coal by *Spurr* and his co-partners, whereby the co-partnership debt was paid and which payment, as against either the *Albert Mining Company* or his co-partners, he could not legally repudiate.

STRONG, J.:—

I have come to the conclusion that the judgment appealed from setting aside the non-suit and granting a new trial was right and ought not to be disturbed.

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Granting that the evidence objected to, shewing of what items the sum recovered by the judgment in favor of *Spurr* against the company was made up, was inadmissible, as it undoubtedly was, being a mere admission by Mr. *Weldon*, *Spurr's* attorney in the action, and therefore not binding on the other parties, or even on *Spurr* himself, it still appears to me that there was evidence to go to the jury.

There were two questions of fact to be tried—the first being, who were the vendors under the contract made by *Spurr* with Mr. *Gilbert*, acting on behalf of the *Albert Mining Company*—*Spurr* alone, or the partnership firm trading under the designation of the *Albertine Oil Company*; and secondly, in the event of the first issue being found for the plaintiff, payment, for although there does not appear to be any plea of payment in the record, the parties at the trial and the court below also seem to assume that the defence was admissible under the general issue.

As to the first issue—it can scarcely be doubted that there was evidence for the jury, for although Mr. *Gilbert* says he told *Spurr* he should look to him for payment, yet this is not incompatible with the sale being to the firm, and the claim for damages, in respect of the inferior quality of the coal, afterwards put in by the Company, was at least an admission of their having been the purchasers, sufficient to entitle the plaintiff to have the case sent to the jury.

Then, as regards payment, the burden of that issue was of course on the defendants, and they, no doubt, gave some evidence in support of it when they established by Mr. *Gilbert*, the president of the company, that *Spurr* "was to turn the dividend on his stock; that he was a large stockholder, and his dividend was to go to pay for the coal." This, coupled with the further proof given by Mr. *Schofield*, that the dividends payable

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to *Spurr* were actually credited in the company's book to the Oil Company, made a *primâ facie* case of payment. But, at most, these were facts for the consideration of the jury, and should not have been treated as conclusively showing payment for the following reasons:

First, it was not proved by Mr. *Gilbert* that *Spurr* ever actually assented to the appropriation of his dividends which the company assumed to make. All that Mr. *Gilbert* says is, that he "was to turn the dividends on his stock," thus rather implying that, though *Spurr* agreed to pay in this way, there was to be some further act or assent on his part, upon the application of the dividends to the debt for the coal was to be made. At all events the evidence was susceptible of such a construction, and that is sufficient for the purpose of shewing that the question was one of fact for the jury, and not one which the judge should have taken into his own hands to decide as he did by non-suiting. I need not say that the entry in the books of the company was not conclusive against the plaintiffs, it was quite open to explanation just as a receipt may be explained and shown to have been given under a misapprehension and without any actual payment. Further, it cannot possibly make any difference that the dividends were not paid over to *Spurr* until after this action was brought; the question is, had there been a payment at that date, and it is quite consistent with the facts that there had been no payment, that the dividends were still retained by the company, for if the jury, as judges of fact, should find that the plaintiffs were never authorized to apply the dividends in the way they had assumed to do without a further reference to *Spurr*, it was clear there was no payment, and that the dividends, although standing in the plaintiffs' books credited to the Oil Company, were still in

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the hands of the *Albert Mining Company* as so much money due by them to *Spurr*, which, if the purchasers of the coal were the partnership firm known as the Oil Company, they could not even set off against the amount due to them for the price of the coal.

The question was of course wholly one for the jury, but my own conclusion from the evidence would be that there never was any actual and completed appropriation of the dividends by *Spurr*, that there never was anything more than a promise by him to apply the dividends on the debt for the coal, some further authority being contemplated by him, before the company were to be entitled to charge him and credit the Oil Company with the profits payable to *Spurr*. I merely mention this, however, to show that there was a real substantial question of fact on the evidence which should have been left to the jury to try, and not of course with the view of now assuming to decide that question.

For these grounds, which are precisely the same as those assigned by the learned Chief Justice of New Brunswick, for the judgment of the majority of the court below, I think the appeal should be dismissed with costs.

FOURNIER, J., concurred with *Ritchie*, C. J.

HENRY, J.:

The bargain for this coal was made by the one company with the other. The evidence abundantly shows it. It was given under the express undertaking of *Spurr* to allow his dividends, as they arose, to go in payment of the coal. The terms of the company were cash, and it is not unreasonable to suppose they would not have accepted that arrangement as cash unless they made this stipulation originally. The first question is, "Was this an undertaking of *Spurr's* for the *Albertine Oil*

Co. to appropriate these dividends to the payment of the coal?" Could *Spurr* sue the company for his dividends? He would be estopped from doing so, because there was an express agreement from him that the company should appropriate those dividends in payment of the coal. When they did so the coal was paid for. If *Spurr* were the sole contractor for and purchaser of this coal, it would operate exactly in the same way, but how much more ought it to operate when others are interested? He bought that coal for the *Albertine Oil Co.*, and it is but reasonable to suppose that the *Albertine Co.* reimbursed him for that advance. How would it operate then, if the company, being paid for the coal, could afterwards have recourse against the oil company, who had settled with *Spurr* for it? The evidence is, therefore, I think, all in favour of the appellants in this action. But it is said there was a question for the jury. I can hardly see what question there could be for a jury when the president of the plaintiffs' company admitted sufficient to show that the coal had been paid for, and that the claim of the plaintiffs to sue was completely rebutted. How could a jury find that they had not been paid when the plaintiffs themselves, by their head, the president of their company, came before a court and admitted that they had been paid? Now, that is the way the case appears to my mind, and I consider it would be useless, and worse than useless, to send this case back to a jury to ascertain what their views were upon facts on which they would have had but one verdict to find. If they found there was no payment, I should say that verdict ought to be set aside. I concur, therefore, in the views taken by the learned Chief Justice in regard to this case, that the payment of the coal was completely made out, and that *Spurr* and the other members of the *Albertine Co.* are entitled to have the appeal allowed.

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TASCHEREAU, J.:

I have come to the same conclusion.

Appeal allowed with costs.

Solicitors for appellants: *Delaney & Ostrom.*

Solicitors for respondents: *Blake, Kerr, Lash & Cassels.*

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*Nov. 28, 29, 30.

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*June 19.

GEORGE THOMAS SMITH, *et al*.....APPELLANTS;

AND

JOHN GOLDIE, *et al*.....RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL OF ONTARIO.

Patent—Combination—Novelty—Inventor—Prior patent to person not inventor—Pleading and practice—Section 6 Patent Act—Use by others in Canada—Use by patentee in foreign countries—Section 28 Patent Act—Final decision—Judgment in rem—Section 7 Patent Act, 1872—Commencement to manufacture before application in Canada—Section 48—Use by defendant before patent.

An invention consisted of the combination in a machine of three parts, or elements, *A*, *B* and *C*, each of which was old, and of which *A* had been previously combined with *B* in one machine and *B* and *C* in another machine, but the united action of which in the patented machine produced new and useful results.

Held, 1 (*Strong*, J., dissenting) to be a patentable invention.

To be entitled to a patent in *Canada*, the patentee must be the first inventor in *Canada* or elsewhere. A prior patent to a person who is not the true inventor is no defence against an action by the true inventor under a patent issued to him subsequently, and does not require to be cancelled or repealed by *scire facias*, whether it is vested in the defendant or in a person not a party to the suit.

2. The words in the 6th section of the Patent Act, 1872, "not being in public use or on sale for more than one year previous to his

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application in *Canada*," are to read as meaning "not being in public use or on sale in *Canada* for more than one year previous to his application."

3. That the Minister of Agriculture or his Deputy has exclusive jurisdiction over questions of forfeiture under the 28th section of the Patent Act, 1872, and a defence on the ground that a patent has become forfeited for breach of the conditions in the 28th section, cannot be supported after a decision of the Minister of Agriculture or his Deputy declaring it not void by reason of such breach.

Per *Henry*, J.—The jurisdiction of the Commissioner is administrative rather than judicial, and he may look at the motive and effect of an act of importation, and a single act, such as the importation of a sample tending to introduce the invention, is not necessarily a breach of the spirit of the conditions of the 28th section.

Under the 7th and 48th sections of the Patent Act, 1872, persons who had acquired or used one or more of the patented articles before the date of the patent, or who had commenced to manufacture before the date of the application, are not entitled to a general license to make or use the invention after the issue of the patent.

APPEAL from the judgment of the Court of Appeal for *Ontario* (1), affirming a decree of the Court of Chancery dismissing the bill of complaint with costs.

The bill of complaint alleged an infringement by the respondents of the appellants' patented machine for purifying flour during its manufacture. The patent in question, No. 2257 for a "Flour Dressing Machine," is for a combination and arrangement of parts to effect the purification of flour, and consists of a sieve down which the middlings, (the residuum of the meal after removing the very finely pulverized flour and the very coarse bran,) are made to travel, by giving it a shaking or reciprocating motion by proper machinery, of a fan and air spout placed on the box above the sieve or shaker to produce, when put in motion, an upward draft of air through the meshes of the sieve; of proper apertures being made below the shaker in the case enclosing the whole apparatus, to admit the air at that point, and

(1) 7 Ont. App. R. 628.

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finally of a brush arranged upon guides to move continually against the under side of the shaker. The appellant, *Smith*, was the discoverer of the process of purification which was unknown before he invented the above combination.

The history of the invention, as stated by Mr. *Smith* and other witnesses in the case is stated in the judgment of Mr. Justice *Patterson* in the court below (1), and in the judgment of *Henry*, J., hereinafter given.

In answer to appellants' claim, the respondents contended that the novelty or combination was not patentable; that the patent was void: 1st. because prior patents had been issued in *Canada* to one *Sherman* and to one *Lacroix*, and that in a suit of this nature the patent to *Lacroix* could not be impeached, but sec. 29 of the Patent Act, 1872, points out the method of impeaching a patent namely by *scire facias*; 2nd. because that the patent was in public use by patentee in the *United States*; 3rd. because the patentee imported the machine into *Canada* after the expiration of 12 months from the issue; 4th. because the patentee failed to commence or carry on the construction or manufacture of the invention within two years from the date of the patent, and also because the respondents commenced to manufacture the article complained of prior to the application of *Smith* for a patent in *Canada*, and under sec. 6 of the Patent Act, the respondents have the right to continue such manufacture and sale. Some of the objections relied on by the respondents as avoiding the patent were previously heard and adjudicated upon by the Deputy Minister of Agriculture, under 28th section of the Patent Act, the Deputy Minister of Agriculture upholding the validity of the appellants' patent.

Mr. *Bethune*, Q.C., and Mr. *Howland* for appellants:

On the question of patentable novelty relied on

(1) 7 Ont. App. R. 633.

Crane v. *Price* (1); *Lewis* v. *Marling* (2); *Cannington* v. *Nuttall* (3); *Murray* v. *Clayton* (4); *Union Sugar Refining Co.* v. *Matthieson* (5); *Hailes* v. *Van Wormer* (6); *Harrison* v. *Anderston Foundry Co.* (7); *Harwood* v. *Great Northern R. R.* (8); *Hayward* v. *Hamilton* (9); *Liardet* v. *Johnson* (10); *Household Co.* v. *Neilson* (11); *Galloway* v. *Bleaden* (12); *Muir* v. *Perry* (13); *Van Norman* v. *Leonard* (14); *Bump* on Patents (15); *Metropolitan Board of Works* v. *N. W. R. R.* (16); *Cornish* v. *Keene* (17); *Plimpton* v. *Malcolmson* (18); *Bartholomew* v. *Sawyer* (19).

Mr. *Lash*, Q.C., and Mr. W. *Cassels* for respondents, relied on the following authorities: *Hailes* v. *Vanwormer* (20); *Pickering* v. *McCullough* (21). *Haywood* v. *Great Northern R'y.* (22); *Brook* v. *Astor* (23); *Harrison* v. *Anderston Foundry Co.* (24); *Yates* v. *G. W. R'y. Co.* (25); *Cannington* v. *Nuttall* (26); *Curtis* v. *Platt* (27); *Mowry* v. *Whitney* (28); *Rubber Co.* v. *Goodyear* (29); *Jackson* v. *Lawton* (30); *Plympton* v. *Malcolmson* (31); *Walton* v. *Bateman* (32); *Stead* v. *Williams* (33); *Beard* v. *Egerton* (34);

(1) 4 M. & G. 603.
(2) Webster P. C. 490.
(3) L. R. 5 H. L. 216.
(4) 10 Chy. App. 675.
(5) 2 Fisher Pat. 600.
(6) 20 Wallace, 368.
(7) 1 App. Cas. 574.
(8) 11 H. L. Cas. 654.
(9) Reported in the "Engineer" June 31st, 1881.
(10) Webster P. C. 54.
(11) Webster P. C. 705.
(12) Webster P. C. 526-529.
(13) 2 L. C. R. 305. Vol. 20 Patent Office Gazette, p. 1233.
(14) 2 U. C. Q. B. 72.
(15) Page 150.
(16) Weekly notes 27th Feb., 1880.
(17) Webster P. C. 501.
(18) L. R. 3 Ch. 555.
(19) 1 Fisher Pat. 516.
(20) 7 Blatch. 443.
(21) Decided by the Supreme Court of the United States, on the 12th December, 1881, and reported in the Official Gazette of the U. S. Patent Office, January 3rd, 1882.
(22) 11 H. L. 667.
(23) 8 E. & B. 478.
(24) 1 App. Cases 574.
(25) 2 Ont. App. R. 227.
(26) L. R. 5 H. L. 205.
(27) 3 Ch. D. 135.
(28) 14 Wall. 434.
(29) 9 Wall. 796.
(30) 10 Johnson N. Y. 23.
(31) 3 Chy. Div. 555.
(32) 1 Web. P.C., 615.
(33) 8 Scott, N. R. 449.
(34) 3 C. B. 97.

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Nickels v. *Ross* (1); *Milligan* v. *Marsh* (2); *Agawam Co.* v. *Jordan* (3); *Cook* v. *Sholl* (4); *Baldwin* v. *Sibley* (5); *Bicknell* v. *Todd* (6); *Day* v. *Union Rubber Co.* (7); *Wilson* v. *Simpson* (8); *Wilson* v. *Rousseau* (9); *Simpson* v. *Wilson* (10); *Bloomer* v. *McQuewan* (11).

RITCHIE, C.J.:—

This is a very important case. The main and substantial question raised and on which the case was decided in the court below, was whether the machine was a patentable machine, and the learned judges of the Court of Appeal held that the combination, though admittedly producing a useful result, was nevertheless not patentable in law.

After a careful consideration of the evidence, I have arrived at the conclusion that this machine was a new combination of old machinery or instruments, whereby a new and useful result was obtained by which a new effect was produced which is stated to have revolutionized the manufacture of a certain description of flour producing a materially better article, and therefore, I think, it is the subject of a patent. I think where the patent is for a combination, the combination itself is the novelty and also the merit, and this view is, in my opinion, abundantly supported by the following authorities.

In *Harrison* v. *Anderston Foundry Co.* (12) the Lord Chancellor says:

> It is, as I read it, a claim for a combination; that is to say, a combination of all the movements going to make up the whole of the mechanism described. It must for the present at least, be assumed

(1) 8 C. B. 679.
(2) 2 Jurist, N. S. 1083.
(3) Whitman's. Patent cases, 205.
(4) 5 T. R. 256.
(5) 1 Clifford, 150.
(6) 5 McLean, 236.
(7) 8 Blatchford, 488.
(8) 9 Howard, 109.
(9) 4 Howard, 648, 683.
(10) 4 Howard, 710.
(11) 14 Howard, 539.
(12) 1 App. Cases 577.

that this combination as a combination is novel; that it is, to use the words of the Lord President, a new combination of old parts to produce a new result, or to produce a known result in a more useful and beneficial way. It is not doubted that a combination of which this may be said is the subject of a patent.

In *Penn* v. *Bibby* (1), the head note is as follows:

The new application of any means or contrivance may be the subject of a patent, if it lies so much out of the track of the former use as not naturally to suggest itself, but to require some application of thought and study.

* * * * * *

Lord *Chelmsford*, L. C., says:

It is very difficult to extract any principle from the various decisions on this subject, which can be applied with certainty to every case; nor, indeed, is it easy to reconcile them with each other. The criterion given by Lord *Campbell* in *Brook* v. *Aston* (2) has been frequently cited (as it was in the present argument), that a patent may be valid for the application of an old invention to a new purpose, but to make it valid there must be some novelty in the application. I cannot help thinking that there must be some inaccuracy in the report of his lordship's words, because, according to the proposition, as he stated it, if the invention is applied to a new purpose, there cannot but be some novelty in the application. Lord Chief Justice *Cockburn* approaches much nearer to the enunciation of a principle, or at least of a rule, for judging these cases, in *Harwood* v. *Great Northern Railway Co.* (3), where he says, "although the authorities establish the proposition that the same means, apparatus, or mechanical contrivance, cannot be applied to the same purpose, or to purposes so nearly cognate and similar as that the application of it in the one case naturally leads to application of it when required in some other, still the question in every case is one of degree, whether the amount of affinity or similarity which exists between the two purposes is such that they are substantially the same, and that determines whether the invention is sufficiently meritorious to be deserving of a patent." In every case of this description one main consideration seems to be, whether the new application is so much out of the track of the former use as not naturally to suggest itself to a person turning his mind to the subject, but to require some application of thought and study. Now, strictly applying this test, which cannot be considered an unfair one, to the present case, it appears to me impossible to say that the

(1) L. R. 2 Ch. App. 127. (2) 8 E. & B. 485.
(3) 2 B. & S. 208.

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patented invention is merely an application of an old thing to a new purpose.

In *Murray* v. *Clayton* (1), the head note is as follows:

Where a machine, for which a patent had been granted, was shewn to produce work more expeditiously, more economically, and of a better quality than any previous machine:—Held (reversing the decision of *Bacon*, L.C.,) that the patent could not be invalidated on the ground that the machine was formed by the mere arrangement of common elementary mechanical materials, producing results of the same nature as those previously accomplished by other mechanical arrangements and construction. The public exhibition of a machine in which there are defects, owing to which it proves an entire failure, does not affect the validity of a subsequent patent for a machine, in which, though similar in some of its details to the former, the defects are remedied so as to produce a serviceable machine.

* * * * * *

And Sir *W. M. James*, L.J., says:

This evidence shews that the defendants, when competing for government work, with all the knowledge they possessed from this previous user, which is said to be an anticipation of the plaintiff's patent, never thought of anything in any way like the machine which the plaintiff invented; and it is scarcely possible to get stronger evidence of the entire novelty of the plaintiff's machine. The machine, too, when produced, is so simple and so completely adapted to effect its object, that one feels disposed to wonder how people could have gone on for thousands of years making bricks without ever having thought of it; but that is the case with many noted inventions—when the thing is once hit it seems a marvel that it was not hit before.

Cannington v. *Nuttal* (2) decided that a patent might be sustained, though each principle or process in it was well known to all persons engaged in the trade, to which the patent relates, provided that the mode of combining these processes was new and produced a beneficial result; and provided also that the specification claimed not the old processes, or any one of them, but only the new combination; and it was held that a

(1) L. R. 7 Ch. App. 570. (2) L. R. 5 H. L. Cas. 208 (1871).

direction to a jury that if the combination has been and was useful the patent could be supported, though each separate process employed in it was previously known was correct.

In *Crane* v. *Price* (1), *Tindal*, C.J., says:

Such an assumed state of facts falls clearly within the principle exemplified by *Abbott*, C.J., in *The King* v. *Wheeler* (2), where he is determining what is and what is not the subject of a patent, viz.: It may perhaps extend to a new process, to be carried on by known implements or elements, acting upon known substances, and ultimately producing some other known substance, but producing it in a cheaper or more expeditious manner, or of a better or a more useful kind. And it falls also within the doctrine laid down by Lord *Eldon* in *Hill* v. *Thompson* (3), viz.: There may be a valid patent for a new combination of metals previously in use for the same purpose, or for a new method of applying such materials; but in order to its being effectual, the specification must clearly express that it is in respect of such new combination or application.

There are numerous instances of patents which have been granted when the invention consisted in no more than the use of things already known, the acting with them in a manner already known, the producing effects already known, but producing those effects so as to be more economically or beneficially enjoyed by the public. It will be sufficient to refer to a few instances, in some of which the patents have failed on other grounds, but in none on the objection that the invention itself was not the subject of a patent.

* * * * * *

And at page 605:

* * in point of law, the labor of thought or experiment, and the expenditure of money, are not the essential grounds of consideration upon which the questions, whether the invention is or is not the subject matter of a patent, ought to depend; for if the invention be new and useful to the public, it is not material whether it is the result of long experiments and profound research, or whether of some sudden and lucky thought, or of mere accidental discovery. The case of monopolies in—*Darcy* v. *Allein* (4)—states the law to be "that where a man by his own charge and industry, or by his own wit or invention, brings a new trade into the realm, or any engine tending to the furtherance of a trade that never was used before,

(1) 4 M. & G. 603.
(2) 2 B. & Ald. 350.
(3) 3 Meriv. 629.
(4) 11 Co. Rep. 84, Noy 178.

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and that for the good of the realm, the king may grant him a monopoly-patent for a reasonable time."

In *Hayward* v. *Hamilton* (1), Mr. Baron *Pollock* says:

> In our judgment it is properly and fairly described; it is described as a patent claiming the construction of something by a combination of things, many of which—possibly all of which—may be old, in such a manner as to produce a result that is new, and a result which is valuable when it is treated as a commercial article. I do not think it is necessary to refer to the older cases on this subject. No doubt *Crane* v. *Price* (2) was in one's mind during the whole of the argument of this case. But we have a recent dictum on this point—indeed, it is more than a dictum, because it is contained in the judgment of the House of Lords by the Lord Chancellor in the case of *Cannington* v. *Nuttall* (3); and what the Lord Chancellor says is this: "Few things come to be known now in the shape of new principles, but the object of an invention generally is the applying of well known principles to the achievement of a practical result not yet achieved; and I take it that the test of novelty is this; is the product which is the result of the apparatus for which an inventor claims letters patent effectively obtained by means of your new apparatus, whereas it had never before been effectively obtained by any of the separate portions of the apparatus which you have now combined into one valuable whole for the purpose of effecting the object you have in view." That seems to me as clear and as reasonable a definition as one can well have of that branch of the subject.
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> * * * * * *
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> In all these cases the real question must depend very much upon the extent to which the subject-matter, to which the particular apparatus or particular contrivance is applied, is cognate in its character, and wherever you find it is cognate in its character, and that there is not sufficient novelty in the combination which is put forward, then the patent cannot stand. If, however, it is otherwise, if the subject-matter is not cognate, or if the combination is really new, or if what is done comes within the language which was used in *Crane* v. *Price*, and in the later case of *Cannington* v. *Nuttall*, so as to show that there is in substance a new commercial product, then the patent is good.

STRONG, J.:—

I am compelled to dissent from the conclusion which

(1) The Engineer, June 3, 1881, 408.
(2) 1 Web. P. C. 393.
(3) L. R. 5 H. 216.

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has been arrived at by the other members of the court in this appeal, for I think, upon the first ground taken in the very able judgment of Mr. Justice *Patterson* in the court below, the plaintiff's invention was not one entitled to the protection of a patent. Without going into any detailed examination of the evidence, which would now serve no useful purpose, but referring to the analysis of it contained in the judgments delivered in the Court of Appeal, and adopting the conclusions there arrived at, it appears to me very clear that the only invention of which the appellant can be entitled to claim the merit, is the combination of what is called "The Complete Middlings Purifier" with the brushes worked by machinery instead of by hand. The machine without the attachment of the brushes is not claimed to be new. Then the application of the brushes moved by hand to what is called the bolt or sieve of a middlings purifier is also admitted by *Smith* to be old. The decree of the Court of Appeal, therefore, seems to me to be in exact conformity with the decree of the Queen's Bench Division in the case of *Saxby* v. *The Gloucester Waggon Co.* (1), where it was held that as any person of ordinary skill and knowledge of the subject, placing two inventions, known previous to the discovery of that covered by the plaintiffs patent, side by side, could effect the combination of the two in a manner similar to the plaintiffs invention without making any further experiments or obtaining any further information,—the patent obtained by the plaintiff was void. Upon the principle of this decision and upon the authorities referred to by Mr. Justice *Burton* applied to the facts in evidence, I am of opinion that the plaintiff was not entitled to a patent, and that the judgment of the Court of Appeal affirming the decree dismissing the bill was correct and should be affirmed.

(1) 7 Q. B. D. 305.

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FOURNIER, J.:—

I have read my brother *Henry's* notes in this case, and for the reasons contained in his notes, I am in favor of allowing the appeal.

TASCHEREAU, J.:—

I also fully concur in that judgment.

HENRY, J.:—

This is an action commenced by the appellants by a bill in chancery in *Toronto*, *Ontario*, amongst other things, to restrain the respondents from denying the validity of a certain patent of invention issued to *George Thomas Smith*, one of the appellants, and from making and constructing, using, or vending to others to be used, the machine, or any other machine, or machines, or part, or parts of a machine, or machines, embodying or involving the said patented invention, or any part thereof. And from causing or procuring other persons to manufacture, use or vend to others, to be used, any of the same, and from infringing the said letters patent or causing, or procuring the same to be infringed.

The bill was amended twice, and several answers were given to it. The case was decided by the learned Chancellor, before whom it was heard, against the appellants, not on the merits of the claim for the patent, but rather on the ground that the patentee had not complied with the terms of the patent in regard to the manufacture, in *Canada*, of the combined machinery described in the patent; and in regard to the importation into *Canada*, after twelve months, of the same. He says, however, that apart from such objections:

I am inclined to think—I would not say, that it is more than an inclination of my opinion—I would say, that the patent is not in itself void, upon the evidence before me. What the other evidence is I

do not know, but upon the other points I think the plaintiffs' case fails.

After a good deal of consideration of the bill and answers, I am of opinion, that the main and important question raised by the pleadings and evidence is that upon which the judgment of the Appeal Court below was given. That judgment substantially admitted, and I think properly, that *Smith* was the real inventor of the art or process as contended for by the appellants. Being such, and having therefore been entitled to the patent which he obtained at the time it was issued, the court below decided that the subject-matter was not patentable.

The claim made in his application was for a machine called a "Middlings Purifier," consisting of the combination described in this patent. The object was to remove from what is called the "Middlings," produced in the grinding of wheat, by the operation of specific gravity, light fibrous impurities and fine particles of bran, required to be separated to produce the finest quality of flour. The process is, therefore, "purification" as well as "separation", the latter being all that can be effected by bolts or sieves only.

It is alleged in the appellants' factum and sustained by evidence that "before the plaintiffs' invention it had "been the object of millers to make the least possible "quantity of middlings, as it had been found impossi- "ble to separate the fine particles of bran and other "impurities from the coarse flour granules by sifting; "and the middlings, when re-ground, made an inferior "quality of flour. Since *Smith's* invention and discovery "of the process of purification, this practice has been "reversed; and millers now seek to make only coarse "flour or middlings at the first grinding, in order to "obtain the benefit of the purifying process, as it has "been found that, by that process, certain light fibrous

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"impurities can be removed, which the old process of "sifting left, even in the finest flour."

The process of purification is by causing a thin stream of middlings to descend a slightly inclined sieve or bolt, through the meshes of which a current of air is drawn up by an exhausting fan, so as to pass upward through the middlings as they pass over or through the sieve or bolt. The current of air passing through this thin stream of middlings, lifts, and carries away, the light impurities, leaving the pure middlings, which have a greater specific gravity, to be ground into flour. It was found, however, that the current of air from below the sieve or bolt, by creating a resistance to the descent of the fine particles passing through the sieve or bolt, and, by accumulating them upon the under side of the sieve or bolt-cloth, clogged the latter so much, that unless constantly removed, the fan would fail to draw air through the cloth, the upward current of air would cease, and purification would not take place. The upward current of air through the sieve or bolt was the chief factor in producing the desired results; but it, when operating alone, by its action clogged up the sieve or bolt, and its beneficial operation was prevented. Before the invention, by *Smith*, it was attempted to keep the seive or bolt clear by hand brushing; but after a reasonable trial the attempt was abandoned, as it was found costly and unsatisfactory. *Smith* directed the experiments made in that way, and when the owner of the mill, where they were tried, discontinued them, he (*Smith*) made the combination of the machinery for which the patent issued to him. The result was most satisfactory, and its value may be, to some extent, estimated when flour of such superiority was, through its means, produced that was worth, and sold for, about three dollars a barrel more than that produced by any means previously known or used. It was, in regard to

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the public interests, a most valuable combination; and the public therefore became largely indebted to him who made it.

Was that combination entitled through a patent to protection?

The result, in this case, is produced by the combined and simultaneous action of the draft upwards created by the fan and the continuous operation of the brush or brushes worked by the machinery as described in the specification. It was the simultaneous action which produced the result. It could not have been obtained by the independent action of either. It was, therefore, to all intents and purposes, a combination that produced simultaneous results—it is true, a combination of old elements; but it is one in which the constituents so entered it that each qualified the other. Referring to the judgment of the Supreme Court of the *United States* in *Pickering* v. *McCulloch* (1), cited by Mr. Justice *Burton* in the court below, I may say that the constituents in this case are fully up to the standard therein adopted; they are "joint tenants" of the domain of the invention, seized each of every part per *my et per tout*; and not mere tenants in common, with separate interests and estates.

By the co-operation of the constituents a new machine of a distinct character and function was formed; and a beneficial result produced by the co-operating action of the constituents, and not the mere adding together of separate contributions. The importance and value of the invention to the public in the case of the invention in question, cannot, under the evidence, be questioned; the circumstances connected with the discovery of the invention are not necessarily a matter for judicial inquiry, according to the ruling of Chief Justice *Tindal* in *Crane* v. *Price* and others (2).

(1) Decided 12 Dec., 1881. (2) 1 Webster P. C. p. 411.

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In delivering judgment in that case, he said;

But in point of law, the labour of thought or experiments, and the expenditure of money, are not the essential grounds of consideration on which the question whether the invention is or is not the subject-matter of a patent, ought to depend. For if the invention be new and useful to the public it is not material whether it be the result of long experiments and profound research, or whether by some sudden and lucky thought, or mere accidental discovery.

There have been some most important inventions made by mere accidental discovery, and after being discovered the great wonder has been, that what appears after discovery so palpable, had never been discovered before. Such may be said to some extent of the discovery in this case; but that is no reason why the inventor should not get the benefit of his discovery, through its protection, as provided by law. The person entitled to a patent, is one who has invented any new and useful art, machine, manufacture, or composition of matter, or any new and useful improvement in any art, machine, manufacture, or composition of matter, not known or used by others before his invention thereof; and not being in public use, or on sale, for more than one year, previous to his application in *Canada*, with the consent or allowance of the inventor thereof—35 *Vic.* ch. 6.

The evidence leaves no doubt on my mind that *Smith* was the first and only inventor of the combination he claims in his specification; and I feel as little doubt that the other parties who obtained the two other contesting patents became acquainted with the value of the combination by obtaining the knowledge of his discovery. There are one or two minor objections raised to his patent which I will hereafter dispose of. Setting out, then, with the affirmative proposition that *Smith* was the *bonâ fide* inventor of the combination in question, the only important remaining question is, was the dis-

covery and invention in question the proper subject for protection by letters patent?

As some of the authorities I intend to refer to are decisions in cases in *England*, it is proper to ascertain what legislation affected the rights of parties to patents in that country. It will be seen that the right there depended on legislation, not nearly so liberal or extensive as that of the Canadian Act, or the patent laws of the *United States*. *Curtis* in his work on patents (1) says:

> In *England* the corresponding system has rested upon a proviso in the statute of monopolies, which excepted from the prohibitions of that act letters-patent, granted by the Crown for the sole working or making of any manner of new manufactures within this realm to the first and true inventor or inventors of such manufactures, which others at the time of the making of such letters-patent and grants did not use, so they be not contrary to the law, nor mischievous to the state.

The principle upon which the exception referred to was made, was clearly that he who has first exercised the right of invention has bestowed something upon society, which ought to procure for him thereafter, at least for a time, the exclusive right to make or use that thing.

The same writer (2) referring to the English statute says:

> The subjects of patents which could be lawfully granted were to be "new manufactures" or "the working or making of new manufactures" invented by the grantee, and which "others" at the time of the grant "did not use." Hence it was apparent that something of a corporeal nature, something to be made, or at least the process of making something, or of producing some effect or result in matter, or the practical employment of art or skill, and not theoretical conception or abstract ideas, must constitute the subjects of exclusive privileges which the Crown was authorized to grant. See *The King* v. *Wheeler* (3).

(1) P. 1. (2) At page 2.
(3) 2 B. & Ald. 349.

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Referring to the decision in *Boulton* v. *Bull* (1), Mr. *Curtis* says:

> The distinction to which this case gave rise and which greatly extended the meaning of the term "manufacture," is this, that although a principle or a rule in mechanics, or an elementary truth in physics cannot be the subject of a patent, yet a new principle, rule or truth, developed, carried out, and embodied in the mode of using it, may be the subject of a patent. A mere principle is an abstract discovery incapable of answering the term "manufacture;" but a principle so far embodied and connected with corporal substances as to be in a condition to act and produce effects in any art, trade, mystery, or manual occupation becomes the practical manner of doing a particular thing. It is no longer a principle, but a "process."

He refers, to sustain those views, to the decision of *Eyre*, C.J., in *Boulton* v. *Bull* (2), a quotation from which will be found at page 3. His Lordship there says:

> It was admitted at the argument at the bar that the word "manufacture" in the statute was of extensive signification, that it applied not only to things made but to the practice of making, to principles carried into practice in a new manner, and to the results of principles carried into practice * * * Under the practice of making we may class all new artificial manners of operating with the hand, or with instruments in common use, new processes in any art producing effects useful to the public." * * * When the effect produced is no substance or composition of things, the patent can only be for the mechanism, if new mechanism is used, or for the process, if it be a new method of operating, with or without old mechanism by which the effect is produced. To illustrate this: The effect produced by Mr. *David Hartley's* invention for securing buildings from fire is no substance or composition of things; it is a mere negative quality, the absence of fire. The effect is produced by a new method of disposing iron plates in buildings. In the nature of things it could not be for the effect produced. I think it could not be for making the plates of iron, which, when disposed in a particular manner, produced the effect, for those things are in common use. But the invention consists in the method of disposing those plates of iron so as to produce their effect; and that effect being a useful and meritorious one, the patent seems to have been properly granted to him for his method of securing buildings from fire.

(1) 2 H. Bl. 463. (2) *Ubi supra.*

His Lordship thus concludes his judgment:

> Now, I think these methods may be said to be new manufactures, in one of the common acceptances of the word, as we speak of the manufactory of glass, or any other thing of that kind.

Here, then, is laid down most explicitly the doctrine deduced from the English statute for patents under the terms "new manufactures, or the working or making of new manufactures." It is exactly the case before us under *Smith's* application for the "combination" or "method" he claims. The specification or claim made by *Smith* admits that the elements of the combination were old, and that other machines had existed, in which some of those elements had been found working together, though never arranged in the combination, and adapted to the purpose described. It is therefore objected that the mere combination is not patentable. His patent being confined to the combination, the court below decided he was not entitled to it. That decision, in my opinion, is not only contrary to the doctrine laid down by *Eyre*, C.J., before in part recited, but to the current of the decisions since, both in *England* and the *United States*, which establish the position that a new arrangement of old parts producing new results beneficial to the public is patentable. See the cases referred to in the appellant's factum: *Crane* v. *Price* (1); *Lewis* v. *Davis* (2); *Cannington* v. *Nuttal* (3); *Murray* v. *Clayton* (5); *Union Sugar Refining Co.* v. *Mathieson* (5); and also *Hailes* v. *Van Wormer* (6.)

In *Hailes* v. *Van Wormer*, Mr Justice *Strong* said:—

> All the devices of which the alleged combination is made are confessedly old. No claim is made for any of them singly as an independent invention. It must be conceded that a new combination, if it produces new and useful results is patentable, though all the consti-

(1) 1 Webster's Pat. Cases 375.
(2) Ib. 490.
(3) L. R. 5 H. L. 216.
(4) 10 Chy. App. 675.
(5) 2 Fisher 600.
(6) 20 Wallace 368; see also *Brunton* v. *Hawkes*, 4 B. & Ald. 541.

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tuents of the combination were well known, and in common use before the combination was made. But the results must be a product of the combination, and not a mere aggregate of several results, each the complete product of one of the combined elements.

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The combination claimed by *Smith* is, in principle, the same as in the case of the disposition of the iron plates, the subject of the decision of *Eyre*, C.J., before in part recited. The constituents were old, but the combination or method was new. The result in the one case was but preventive in regard to security against fire, but the other was the production, by means never before known or used, of a superior quality of flour never before produced, and by a very cheap and available process. If the inventor in the one case was entitled to a patent for a useful discovery, upon no principle could it be refused to the other. *Smith's* combination was, in the terms of the concluding sentence above quoted of the judgment of Mr. Justice *Strong*, the means of producing a direct and combined result, not a mere aggregate of several results. There was but one result and it was produced, and could only be produced by the simultaneous action of the constituents. The operation of the combined constituents was performed on the mixed product of the result of grinding, consisting of fine flour, middlings, bran and impurities, whilst the same was, by the necessary mechanical contrivances, passing through the bolt, and at no other time. The draft upwards by itself was useless, and the constant and simultaneous aid of the brushes was necessary to enable that draft to be effective. By operating the constituents, unless simultaneously, the object could not be obtained. There was, therefore, by their union and simultaneous action, and in no other way, produced the important results shown by the evidence. To give the inventor a patent for his combination was no favor. By law he was entitled to it as being well earned.

Although unnecessary, I will quote some further authorities. *Whitman*, in his work on patents, says (1):—

A machine is rightfully the subject of a patent whenever a new or an old effect is produced by mechanism new in its combinations, arrangements, or mode of operation. A machine is rightfully the subject of a patent when well known effects are produced by machinery entirely new in all its combinations, or when a new or an old effect is produced by mechanism of which the principle or *modus operandi* is new.

Again (2):

There may be a patent for a new combination of machines to produce certain effects, whether the machines constituting the combination be new or old.

At page 238, under a classification of "Inventions pertaining to Machines," he includes:

Those, where all the elements of the machine are old, and where the invention consists in a new combination of those elements, whereby a new and useful result is obtained. Most of the modern inventions are of this latter kind, and many of them are of great utility and value. See *Union Sugar Refinery* v. *Mathieson* (3).

He might have added that numerous inventions have been carried out and perfected by the co-operation of many minds or by the application of varied genius to the same object, year after year and age after age.

At page 241 the same author says:

Where the result or effect is a greatly improved article of manufacture it may be the test from which inventions may be inferred.

Let us now look at *Curtis*, another American authority on Patents. In his treatise he says (4):

There may be a patent for a new combination of machines to produce certain effects, whether the machines constituting the combination be new or old. In such cases the thing patented is not the separate machines, but the combination.

And he cites six American decisions to sustain the proposition.

(1) p. 236.
(2) Page 237.
(3) 2 Fisher 600.
(4) At page 17.

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At page 20, in a note, he cites a decision of *Abbott*, L.C.J., in *The King* v. *Wheeler* (1), in which I find his Lordship saying in respect of the right of a person to a patent:

> Or it may perhaps extend also to a new process to be carried on by known implements or elements acting on known substances and ultimately producing some other known substance by producing it in a cheaper or more expeditious manner, or of a better and more useful kind.

He also cites from *Webster's* Patent cases (*Cornish* v. *Green*) (2) from which I extract the following:

> The use of all materials in other combinations may have been known before; but if they are used in a new combination producing a new result, there will be a good subject for a patent for a "manufacture;" as there is, in respect to "machinery," when the same thing is effected.

The right to obtain a patent for a new combination of old constituents producing a new and useful result is fully admitted in a comparatively recent case (*Clark* v. *Adie*) (3), and such is unequivocally alleged by lord *Gordon*, who says:

> There is no doubt whatever that there may be a patent right in a combination, and there may be a patent granted for improvements in machinery, but in order to carry out the patent in a legal and proper manner, there ought to be distinct intimation given to the public of what was the intention of the party proposing to take out the patent, with a view to prevent others infringing on what he claims as his invention. There may possibly be cases of subordinate combinations protected by a patent as my noble and learned friend on the woolsack has explained.

I will refer to but one more case, *Harrison et al* v. *The Anderston Foundry Company* (4). In his judgment in that case the Lord Chancellor *Cairns* says:

> In my opinion the first claim is also sufficient in point of form. It is, as I read it, a claim for a combination, that is to say, a combination of all the movements going to make up the whole of the

(1) 2 B. & Ald. 349.
(2) Pages 512-517.
(3) 2 App. cases 315.
(4) 1 App. Cases 574.

mechanism described. It must for the present, at least, be assumed that this combination, as a combination, is novel; that it is, to use the words of the lord president, a new combination of old parts to produce a new result, or to produce a known result in a more useful and beneficial way. It is not doubted that a combination of which this may be said, is the subject of a patent. If there is a patent for a combination, the combination itself is *ex necessitate* the novelty.

Lord *Hatherly*, referring to the case of *Foxwell* v. *Bostock* (1), says:

It could not have been meant in that case to say that where that happens, which may well happen, that a person arranging his machinery in a totally different way from the way in which it has ever before been arranged, although every single particle of that machinery is a well known implement, produces an improved effect by his new arrangement, that new arrangement cannot be the subject of the patent. It may be said that the levers may be perfectly well known in their mode of action, and it may be that all the other portions of the machinery to which the patent relates may be perfectly well known; but if he says: "I take all those known parts "and I adjust them in a manner totally different from that in which "they have ever before been adjusted; I have found out just what it "is that has made these parts, though they have been used in "machinery, fail to produce their proper effect, and it is this, that "they have not been properly arranged. I have, therefore, recon-"sidered the whole matter and put all these several parts together "in a mode in which they never were before arranged, and have "produced an improved effect by so doing." I apprehend it is competent for that man so to do. That, my lords, I apprehend, is the principle of a patent for a combination.

Under all the authorities I have quoted, and many others that I might have quoted, I cannot conceive that any doubt should exist that the combination claimed by *Smith* is the proper subject of a patent. I have considered the reasons given for the decision in *Harwood* v. *The Great Northern Railway Co.* (2) upon which the judgment in the court below was principally rested, but I cannot perceive any similarity in the principle upon which that case was decided and the case before us. In that case there was really no new result. The

(1) 4 De G. J. & S. 298. (2) 2 B. & S. 194.

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constituents were all admitted to be old—there was no combination, as such, but the mere application of grooved plates in connecting rails of railways; and the principle was decided not to be new because the same kind of grooved plates had previously been applied for connecting timbers in the construction of bridges. It was, however, clearly admitted in that case that a new combination of old materials, producing a new and useful result, is properly the subject of a patent.

An objection has been taken, that under one or other of the conditions imposed upon a patantee under section 28 of the Patent Act, *Smith's* patent became null and void. The proviso to the provisions of that section is as follows:

> And provided always that in case disputes should arise as to whether a patent has or has not become null and void under the provisions of this section, such disputes shall be settled by the Minister of Agriculture or his deputy, whose decision shall be final.

The evidence shows that a complaint, by petition, was made to the Minister of Agriculture under the provisions of that section in 1876 setting forth that the three patents to the appellant, including the one in question, were null and void under the provisions of that section. After a lengthened and exhaustive investigation, in which both parties were represented by able counsel before Mr. *Taché*, the Deputy Minister of Agriculture, he, in a very logical and sound judgment, in which he reviewed the law and commented on the evidence, decided that *Smith* had not forfeited his patent rights or any of them, in any of the three patents. The statute makes his decision final; and, in view of the whole subject, I have arrived at the conclusion that parliament intended that it should be so; and that it was intended solely as a matter for ministerial, and not for judicial, determination. But in case of any doubt, on that subject, I will add that, having well considered

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the case, as presented before him, I would have come to the same conclusion as he did. I think the law as laid down and explained by him in his exhaustive, and, I will add, able judgment, cannot properly be questioned. I concur fully in his conclusions, as I do also in his reasons. The patent now in question, being one of the three referred to in the judgment just mentioned, was issued for five years from the 18th of April, 1873. The judgment of the Deputy Minister of Agriculture was given on the 15th February, 1877. The extension of the patent was given on the 30th of March, 1878, for a further period of five years. The infringement is admitted by the respondents, and having dealt with the case, as presented at the argument before us, I have only to express my opinion that the appeal should be allowed with costs, and the necessary decree ordered for the plaintiffs on the bill filed by them.

GWYNNE, J.:

At the close of the argument of this case I was of opinion that the only point requiring further consideration was that upon which the judgment of the Court of Appeal for *Ontario* proceeded, namely, that the combination in virtue of which the patentee claims that his patent should be sustained, was not, in point of law, the proper subject of a patent, the learned counsel for the appellant having, in my opinion, fully answered in his very able argument all the other objections. Now, upon the question whether the combination is or not the proper subject of a patent—it appears to me, I confess, not to be altogether immaterial, although not conclusive, that after a protracted contestation, which must have involved enquiry into the patentable character of the combination, the plaintiff *Smith* obtained a patent in the *United States*. Apart from this consideration, however, there was not in the case of *Harwood* v. *The*

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G. N. Ry. Co. (1), upon which the judgment of the Court of Appeal for *Ontario* in the present case rests, any difference of opinion as to the rule of law there enunciated, namely, that one cannot have a patent for a well-known mechanical contrivance, merely when it is applied in a manner or to a purpose which is not quite the same, but is analogous to the manner or the purpose in or to which it has been hitherto notoriously used; the point upon which considerable difference of opinion did exist, arose on the facts of the case, namely, whether an additional result was not obtained by the application of grooved fish plates to connecting the rails of railways over that which had been obtained by the application of grooved plates to connecting timbers in the construction of bridges. It does not seem to have been doubted that, if a new result had been obtained, it would have been a good subject for a patent. It is, however, equally a rule of law which was not disputed in *Harwood* v. *Great Northern Railway Company*, that a new combination of old materials producing a new beneficial result is the valid subject of a patent.

The difficulty in these cases consists in the application of the rules of law to the circumstances of each case, not in any conflict of opinion as to what are the rules of law. The question in this case is, what rule of law is applicable to the circumstances of the present case? And with deference to the opinions of the learned judges of the Court of Appeal for *Ontario*, I do not think that the present case comes within the rule enunciated in *Harwood* v. *The Great Northern Railway Co.*, upon which the judgments of the House of Lords and of the Exchequer Chamber in that case was rested. There the patent was for constructing fishes for connecting the rails of railways, with a groove adapted for receiv-

(1) 2 B. & S. 194 & 3 B. & S. 984.

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the heads of the bolts or rivets employed for securing such fishes, and the application of such fishes for connecting the rails of railways in the manner in the specifications described, and by his specifications the patentee stated the advantages of the groove to be two, namely, that it serves to receive the square head of the bolts, and to prevent their turning round when they are being screwed in, and further that it renders the fish lighter for equal strength, or stronger for an equal weight of metal, than fish if made of equal thickness throughout. Upon the trial it was found as a fact that "channelled"—that is "grooved"—iron had been used before the patent for the double purpose of obtaining increased strength and preventing the bolt heads from turning round, but that they were not used for the purpose of fishing. It was also found as a fact that the use of iron plates ungrooved for fishes was known, and that for strengthening timbers in bridges and bolting them together, the use of iron plates grooved was known, and that the special advantages when so applied, of securing the bolt heads and of affording equal strength with less material were also known, Now, under these circumstances, the only question was, as stated by lord *Westbury* in the House of Lords, whether there could be any invention in the plaintiff taking a thing which had been used as a fish for a bridge, and using it as a fish for a railway—the purpose of the application in both cases and the result being the same. That the application of a series of brushes, as used in *Smith's* machine in the case before us, to the bolting surface of a flour bolt in combination with a current of air made to pass through the bolt by means of an air chamber or fan, is new, does not appear to be disputed; indeed, in the judgment of the Court of Appeal, it is admitted that there is no evidence that any one before

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Smith made use of this combination; that the result obtained by the use of this combination is wholly new there is no doubt, for, by this mode of making flour, it is admitted that a quality of flour superior to anything before known is obtained, and that, in fact, thereby a complete revolution is wrought in the manufacture of flour. Under these circumstances, I cannot see how *Harwood* v. *The Great Northern Ry. Co.* can apply. So neither can *Saxby* v. *Gloucester Waggon Company* (1). There it was held, that the combination of two formerly known articles, which had been the subject of patents, was not the subject of a patent because no new result was obtained by the combination different from that which had been obtained by the previous inventions; and the question seems to have been whether, admitting that no new result was obtained by the combination, it could be said that to make it, called forth the exercise of the inventive faculties so as to justify the application to it of the term invention. The cases of *Haywood* v. *Hamilton* (2) and *Cannington* v. *Nuttal* (3), are more applicable: that the combination of known things so as to create a new and artificial result is the subject of a patent; and that the combination first used by *Smith* does create such a result there can, I think, be no doubt. The combination, therefore, does come within the meaning of invention as applied to patents.

The purpose for which the brushes are applied in this case is different from that for which they were applied in the *Buchholz* machine for making semolina or cracked wheat. In the latter, they were used for forcing upwards the particles of cracked grain which were too large to pass through the meshes of the bolting cloth; in *Smith's* patent they are used for the purpose of brushing down-

(1) 7 Q. B. Div. 305. (2) Ubi supra.
(3) L. R. 5. H. L. 216.

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wards the fine flour underneath the cloth, which after having passed through it are forced back against the cloth by the current of air going upwards, and which is thus impeded. The combination having been first used by *Smith* and applied by him to produce a wholly new result, which is highly beneficial and of the greatest utility in the manufacture of flour, the combination is, in my opinion, the proper subject of a patent, and the infringement being admitted, the plaintiffs are entitled to a decree in the court below for an account and a perpetual injunction. The appeal, therefore, should be allowed with costs and a decree ordered to be entered accordingly for the plaintiffs in the Court of Chancery with costs.

Appeal allowed with costs.

Solicitors for appellants: *Howland, Arnoldi & Ryerson.*

Solicitors for respondents: *Ball & Ball.*

THE ANCHOR MARINE INSURANCE COMPANY..... APPELLANTS.

AND

FREDERICK D. CORBETT, ASSIGNEE...RESPONDENT.

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*Nov. 8.

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*March 8.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Marine insurance—Policy, conditions in, as to default in payment of premium, effect of—Premium note, guarantee of, in case of insolvency—Condition precedent—Reference to arbitration—Award, effect of.

W. et al effected in A. M. Ins. Co. a policy of insurance on a ship. The policy among other clauses contained the following: "In case the premium, or the note, or other obligation given for the premium, or any part thereof, should be not paid when due, this

*PRESENT.—Sir W. J. Ritchie, C.J., and Strong, Fournier, Henry and Taschereau, JJ.

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insurance shall be void at and from such default; but the full amount of premium shall be considered as earned, and shall be payable, and the insurer shall be entitled to recover for loss or damage which may have occurred before such default. Should the person or any of the persons liable to the company for the premium, or on any note or obligation given therefor, or any part thereof, fail in business or become bankrupt or insolvent before the time for payment has arrived, this insurance shall at once become and be void, unless and until before loss the premium be paid or satisfactorily secured to the company."

There was also in the policy an arbitration clause by which arbitrators were to decide any difference which might arise between the company and the insured "as to the loss or damage or any other matter relating to the insurance" in accordance with the terms and conditions of the policy and the laws of *Canada*, and the obtaining of the decision of the arbitrators was to be a condition precedent to the maintaining of an action by the insured against the company.

W. et al gave a promissory note for the premium, which was not yet due when they became insolvent: and *C.*, the respondent, was appointed assignee. A guarantee was then given and accepted by the company as a satisfactory security for the premium. The note became due on the 30th September, 1878, and was not paid but remained overdue and unpaid at the date of the loss on the 12th of October, 1878. After the loss the matters in dispute arising out of the policy were submitted to three arbitrators, who awarded $5,769.29. An action was then brought on the policy, the declaration containing a count on the award.

Held,—1. (Affirming the judgment of the court below), That the premium having, on the insolvency of the insured, been satisfactorily guaranteed to the company, the policy was thereby kept in full force and effect and did not become void on non-payment of the premium note at maturity. (*Strong*, J., dissenting.)

2. That the award was binding on the company, the question as to the payment or default in payment of the premium being a difference "relating to the insurance" within the meaning of the policy, and the award not appearing on its face to be bad from any mistake of law or otherwise.

APPEAL from the judgment of the Supreme Court of *Nova Scotia* in favor of the plaintiff, upon a special case stated for the opinion of the court. The case is hereafter set out in the judgment of *Ritchie*, C.J.

Mr. *MacLennan*, Q.C., for appellants:—

The premium note was not paid when it became due, nor at any time afterwards. It became due on the 30th September, 1878, and the loss occurred on the 12th October following. Under these circumstances the policy became void under the provisions of the first clause of the policy.

The judgment proceeds upon a misapprehension of the scope and effect of the clauses of the policy. There are two clauses providing for totally different contingencies; one providing for the case of the premium note being dishonored at maturity, the other for the case of failure in business, bankruptcy, or insolvency of the obligor while the note is current. These clauses are distinct in themselves, and provide for totally distinct contingencies. If the obligor of the note fails in business, &c., then, by virtue of the second clause, the policy is at once suspended, unless and until, before loss, the premium is either paid or secured. It is suspended, but it may be revived by payment or security. If that is done, before loss, the policy is re-established, and goes on as before, as if no failure or bankruptcy, &c., had happened. If the premium is paid both clauses cease to be of any importance, but if the premium is only secured, the other clause remains in full force, and unless the premium is paid at maturity, the policy is to become void.

In the present case, when the failure happened a guarantee was given. That had the effect of reviving and re-establishing the policy, and it went on as before. The effect of the failure or bankrutcy was got rid of, and, from the time of giving the guarantee, until the note fell due, the policy was in full force. It was, however, still necessary that the premium note should be paid at maturity, otherwise the policy was to be void under the other clause. There can be no ground for

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contending that the occurrence of the bankruptcy and the giving of a guarantee dispensed with the payment at maturity, or with the condition avoiding the policy upon default. Every reason is the other way; there are no words in the clauses favoring that view; the guarantee expressly undertakes to see the note paid, and it is only fair that the company should be relieved from further risk on default being made in payment of the premium.

The acknowledgment of payment in the policy cannot exclude the condition relied on. The company accepted the note as payment, but there is nothing in that to prevent the parties agreeing that if the note is not paid when due the policy shall be void.

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

The award of the arbitrators is conclusive, and the appellants cannot go behind it. *Russell* on Arbitration (1); *Hodgkinson* v. *Fernie et al.* (2); *Cummings* v. *Heard* (3).

In order to entitle the appellants to impeach the award, they should have made the submission a rule of court and moved to set aside the award, and not having done so, the court cannot in this suit review the award, nor entertain any question as to whether the arbitrators decided properly or not in point of law or otherwise. *Delver* v. *Barnes* (4).

The appellants, by entering into the reference and proceeding with it, recognized the policy as being still in force, and cannot claim that it is invalid. If the policy was void, by reason of non-payment of the premium, or from any other cause, there was nothing to refer. The alleged non-payment of the premium was contested and enquired into before the arbitrators, and their finding

(1) P. 476.
(2) 3 C. B. N. S. 189.
(3) L. R. 4 Q. B. 668.
(4) 1 Taunt. 48.

thereon was against the appellants, and such finding was conclusive, and is not reviewable in this suit.

The guarantee was given to secure the payment of the premium, and was not a guarantee to pay the note at maturity, and such guarantee was equivalent to actual payment of the premium.

By the giving of the guarantee in question, the payment of the premium was satisfactorily secured to the appellants, and there is no provision in the policy or in the guarantee making the policy void upon non-payment of this guarantee.

It was the duty of the appellants to have demanded payment of the guarantee, especially as it was not a guarantee to pay the note at maturity.

The appellants are estopped from asserting that the premium was not paid, inasmuch as the policy, which is under the seal of the defendant company, expressly acknowledges the payment thereof. *Arnold* on Marine Insurance (1); *Anderson et al.* v. *Thornton* (2); *Roscoe's Nisi Prius* (3).

RITCHIE, C.J.:—

This was an action upon a policy of insurance, issued by defendants to *Weir Bros. & Co.*, with a count upon an award.

The said policy was issued on the 27th day of June, A. D. 1878, and was sealed with the common seal of said defendant company, and duly signed by its authorized officers.

It was a policy for the sum of $6,000 on the schooner "*Mabel Clare*," from the port of *Liverpool*, trading to *Labrador* and back to *Liverpool*, with permission to use the *Newfoundland* coast.

The said policy contained, amongst others, the following clauses:

(1) 5th Edition, 195. (2) 8 Exch. 425.
(3) 13th Edition 70, and cases cited there.

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The said company hereby acknowledges the receipt of two hundred and ten dollars as the premium or consideration for this insurance, being at and after the rate of three and one-half per cent., and in case the premium, or the note, or other obligations given for the premium, or any part thereof, be not paid when due, this insurance shall be void at and from such default; but the full amount of premium shall be considered as earned, and shall be payable, and the insured shall be entitled to recover for loss or damage which may have occurred before such default. Should the person or any of the persons liable to the company for the premium or on any note or obligations given therefor, or any part thereof, fail in business or become bankrupt or insolvent before the time for payment has arrived, this insurance shall at once become and be void, unless and until before loss the premium be paid or satisfactorily secured to the company.

In making payment, the company may deduct any sum remaining unpaid on account of premium, whether the claimant be legally liable to the company therefor or not, and whether the time for payment has or has not arrived, and whether the obligation therefor be or be not outstanding in the hands of persons other than the company, and may also deduct all other indebtedness of the insured or the claimant to the company, but the company shall save harmless, and indemnify the insured against any outstanding obligation for premium to the extent of any deductions made in respect thereof.

If any difference shall arise between the company and the insured as to the loss or damage or any other matter relating to the insurance in such case, the insured shall appoint an arbitrator on his or her behalf, and the company shall appoint another; and if the company refuse for fourteen days after notice of the appointment of his arbitrator by the insured to appoint another, the insured may appoint a second, and in either case the two appointed shall forthwith appoint a third, which three arbitrators, or any two of them, shall decide upon the matters in dispute, in accordance with the terms and conditions of this policy and the laws of *Canada*. Provided always, and it is hereby expressly agreed between the company and the insured, that the insured shall not be entitled to maintain any action at law or suit in equity on this policy until the matters in dispute shall have been referred to, and settled by arbitrators, appointed as hereinbefore specified, and then only for such sum as the arbitrators shall award; and the obtaining of the decision of such arbitrators on the matters and claims in dispute is hereby declared to be a condition precedent to the right of the insured to maintain any such action or suit.

When insurance was effected a promissory note was given for the premium by the insured.

[$210.] *Halifax, N.S.*

Three months after date we promise to pay to the order of the Secretary of the Anchor Marine Insurance Company, of *Toronto*, at the bank of *British North America*, at *Halifax*, the sum of two hundred and ten dollars, value received in Policy No. 142.

(Signed) *Wier* Bros. & Co.

On the 7th of September, 1878, *Wier Bros. & Co.* became insolvent, and an attachment was issued against them under the Insolvent Act of 1875.

On the 6th of August, 1878, the defendants, in consequence of *Wier Bros. & Co.'s* failure, demanded and obtained from them, under the terms of the policy, a guarantee as follows:—

Halifax, 6th August, 1878.

H. N. Paint, Esq., Secretary Anchor Marine Insurance Company:

DEAR SIR: We hereby guarantee you the payment of $210 premium of insurance on schooner "*Mabel Clare*," under Policy No 143, and for which you hold the note of *Wier Bros. & Co.*

Yours truly,

(Signed) *Jno. Smith*,
William E. Wier,
Guardians of estate of *Jos. Wier*.

December 18th, 1880.

The said note was duly presented and protested for non-payment on the 30th of September, A.D. 1878, the protest thereof being in due form.

The said guarantee was never paid, and is now held by the defendant company. It was never returned or offered to the makers, nor was it ever demanded by them, nor did the defendants ever demand payment thereof.

The said vessel was wholly lost by perils of the seas insured against by said policy on the 12th day of October, A.D. 1878, and no question is raised as to the sufficiency of the proof of loss or interest, or adjustment.

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Disputes having arisen, three arbitrators were appointed in compliance with the terms and conditions of the policy to decide upon and settle the matters in dispute arising out of said policy; these arbitrators made the following award:

TO ALL TO WHOM THESE PRESENTS SHALL COME:

We, *Harris H. Bligh*, of the city and county of *Halifax*, barrister-at-law; *Robert Sedgewick*, of the same place, barrister-at-law; and *John T. W. Wylde*, of the same place, merchant,

Whereas, in and by a certain policy of insurance, No. 142, bearing date the 27th day of June, in the year of our Lord, 1878, upon the body, tackle, apparel and other furniture of the ship or vessel called the schooner "*Mabel Clare*," executed by the Anchor Marine Insurance Company in favor of Messrs. *Wier Brothers & Co.*, of *Halifax, Nova Scotia*, * * * * it was among other things provided and agreed that if any difference should arise between the said insurance company and the insured, as to the loss or damage or any other matter relating to the insurance in such case, three arbitrators should be appointed, which three arbitrators, or any two of them, should decide upon the matters in dispute in accordance with the terms and conditions of said policy and the laws of *Canada*.

And whereas, we, the undersigned, have been appointed the three arbitrators, in compliance with the terms and conditions of said policy, to decide upon and settle the matters in dispute arising out of said policy,—

Now know ye that we, the said arbitrators, having taken upon ourselves the burthen of the said arbitration, and having heard, examined and considered the witnesses and evidence brought before us by and on behalf of the said parties in difference, and having fully examined into the claims, under the said policy respectively, do make and publish this our award of and concerning the same in manner following, that is to say:

We do award and determine that the loss of said vessel was a total loss, and was *bonâ fide* and without fraud. That upon the said policy No. 142 the said *F. D. Corbett*, as assignee of the said *Weir Brothers & Co.*, under the provisions of the Insolvent Act of 1875, has a just and valid claim and demand against the said The Anchor Marine Insurance Company for the sum of five thousand seven hundred and sixty-five dollars and twenty-nine cents, which sum of $5,765.29 is made up in the following manner:

Amount insured.....		$6,000 00
Deduct amount received from proceeds..		250 02
		5,749 98
Add interest from 14th January, 1879....		237 65
		$5,987 63
Deduct premium note.....	$210 00	
Add interest from 30th September, 1878	12 34	
		222 34
		$5,765 29

which sum of five thousand seven hundred and sixty-five dollars and twenty-nine cents we do award and determine that the said *The Anchor Marine Insurance Company* do pay to the said *F. D. Corbett* as such assignee, as aforesaid, which sum shall be so paid, accepted, and taken in full satisfaction and discharge of and upon said Policy No. 142.

* * * * * * * *

(Signed) *Harris H. Bligh,*
Robert Sedgewick, } *Arbitrators.*
Fees, $120. *John T. Wylde,*

Halifax, September 22nd, 1879.

The facts before set forth were proved before the arbitrators on the part of the defendant company, and they are now admitted by the plaintiff to be correct, and to form part of this case, provided the defendant company can avail itself of them as an answer to plaintiff's claim.

The question submitted is as follows: "If upon the foregoing statement of facts the court shall be of opinion that the plaintiff is entitled to recover on said award or policy, then judgment shall be entered for him for the sum of five thousand seven hundred sixty-five dollars and twenty-nine cents, the amount of said award, with interest at six per cent. from the date of said award, with costs, otherwise judgment is to be entered for the defendant, with costs."

The first section of the clause, in my opinion, applies simply and solely to the case of a party who, on the falling due of a note given for the premium, fails to

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pay it at maturity, in which case there is an end of the policy.

The second section provides precisely for the present case, viz: When a note or obligation has been given for the premium and the person or any of the persons liable on any such note or obligation "fail in business or become bankrupt or insolvent before the time of payment has arrived," then, and in such a case, the insurance "shall at once become and be void, unless and until before loss the premium be paid or satisfactorily secured to the company." The makers of the promissory note in this case became insolvent before the time of payment had arrived, and the guardians of the estate of the insolvent satisfactorily secured the premium to the company, and so the terms of the policy were complied with—and from that time the company relied on the security so taken for payment of the premium as if no note had been taken, and I can discover no pretence for saying that from the time the premium was so secured to the satisfaction of the company until and at the time of the loss the policy was not in full force and effect. The company still held the guarantee and have never attempted to realize on it, and it does not appear that they could not have done so had they chosen to seek its enforcement, but whether the security was good or bad they elected to accept it.

As to the effect of the award, in *Forwood* v. *Watney* (1) the contract contained the following arbitration clauses: "Should any dispute arise, the same to be submitted for settlement to the arbitration of two *London* corn factors, respectively chosen, whose

(1) 49 L. J. Q. B. 447.

See particularly *Collins* v. *Locke* 4 App. Cases 674; also *Moffatt* v. *Cornelius*, 39 L. T. N. S. 102, affirmed, 26 W. R. 914; see also *Law* v. *Garrett*, 8 Ch. Div. 26, affirming 57 L. T. N. S. 602; *Plews* v. *Baker*, L. R. 16 Eq. 564. Prospective agreements of reference: *Dawson* v. *Lord Otto Fitzgerald*, L. R. 9 Exch. 7.

decision shall be final and binding." Held, that the clause in question formed part of consideration for contract and was intended to include questions of law as well as questions of fact which might arise upon the construction of the contract."

In *Hodgkinson* v. *Fernie* (1) *Cockburn*, C.J., says:

It is not easy to reconcile all the decisions as to how far the court will interfere with the determination of an arbitrator, whether upon the law or upon the facts. But the modern cases which have been cited certainly go the length of deciding, that unless there be something upon the face of the award to show that the arbitrator has proceeded upon grounds which are not sustainable in point of law, the court will not entertain an objection to it. *Flaviell* v. *The Eastern Counties Railway Company* (2) is very much to the purpose. The parties have selected their own tribunal, and they are bound by the decision, be it right or wrong.

Williams, J.:

The law has for many years been settled, and remains so at this day, that, when a cause or matters in difference are referred to an arbitrator, whether lawyer or a layman, he is constituted the sole and final judge of all questions both of law and of fact. You have constituted your own tribunal; you are bound by its decision.

In *Hart* v. *Hart* (3), *Kay*, J.:

In the case of *Milnes* v. *Gery* (4) the agreement was for sale according to the valuation of two persons, one to be chosen by each side, or an umpire appointed by the two in case of disagreement. They differed in their estimate, and were not able to agree upon a third person, and in that case it was decided that the agreement could not be specifically performed. The ground is put thus by Sir *William Grant* in giving his judgment: "The only agreement into which the defendant entered was to purchase at a price to be ascertained in a specific mode. No price having ever been fixed in that mode, the parties have not agreed upon any price. Where then is the complete and concluded contract which the court is called upon to execute?" Surely you may put the reason of that decision briefly thus: The contract which the court is called upon to execute is not a complete contract; but it is an agreement that a contract should be made. The court cannot enforce an agreement that

(1) 3 C. B.N. S. 189.
(2) 2 Exch. 344.
(3) 18 Ch. Div. 688.
(4) 14 Ves. 400.

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a contract should be made; the contract must be complete. Reference is also made to the case of *Darbey* v. *Whitaker* (1) which is essentially the same as *Milnes* v. *Gery*. Those were the decisions upon which the case of *Tillet* v. *Charing Cross Bridge Co.* (2) proceeded. Therefore, I have no doubt, the meaning of that decision was this: that under the particular terms of that contract there was not a complete and concluded agreement, but it was essential in order to complete and conclude the agreement that a further agreement between the company and Messrs. *Tillett*, or failing them, the arbitration of the named persons should have taken place; and until that was done, there was nothing which the court could enforce, that being the essential term of the agreement. That is entirely consistent with the case of *Scott* v. *Avery* in the House of Lords (3). The facts were these: "*A*, effected in a mutual insurance company a policy of insurance on a ship, one of the conditions of which was that the sums to be paid to any insurer for loss should in the first instance be ascertained by the committee, but if a difference should arise between the insurer and the committee relative to the settling of any loss or to a claim for average * * * that was to be referred to arbitration in a way pointed out in the conditions; provided that no insurer who refuses to accept the amount settled by the committee shall be entitled to maintain any action at law or suit in equity on his policy, until the matter has been decided by the arbitrators, and then only for such sum as the arbitrators shall award." The obtaining of the decision of the arbitrator was declared to be a condition precedent to the maintaining of an action. It is quite clear, according to the terms of the contract, that as no action could be brought except for such a sum as the insurer was entitled to under the award, until the sum was settled there was no cause of action whatever. That case was followed in *Scott* v. *Corporation of Liverpool* (4), where the surveyor was to determine the amount payable, and until he had made that determination there was no sum which could be sued for.

All these cases seem to me to proceed on one and the same principle—a very simple and intelligible principle—that where the agreement on the face of it is incomplete until something else has been done, whether by further agreement between the parties, or by the decision of an arbitrator, this court is powerless, because there is no complete agreement to enforce.

Applying that rule to this case, I find here an agreement which, on the face of it, is quite complete: the arbitrators are not to com-

(1) 4 Drew. 134.
(2) 26 Beav. 419.
(3) 5 H. L. C. 811.
(4) 3 DeG. & J. 334.

plete this agreement; they are not to supplement any defect in it; that is not the purpose for which they are appointed; but the thing they are appointed to do is merely this, that in case of difference in working out these terms the matter is to be referred to them."

I am therefore of opinion that the appeal should be dismissed with costs.

STRONG, J.:—

This was an action upon a policy of marine insurance, and the declaration contained a count on the award hereafter to be mentioned. It came before the court below in the form of a special case stated for its opinion; it being agreed that if the court should be of opinion that the plaintiff was entitled to recover on the award or policy, then judgment should be entered for him for the sum of $5,765.29, the amount of the award, with interest at 6 per cent from the date of the award, with costs, otherwise judgment was to be entered for the defendant, with costs.

The court below was of opinion that the plaintiff was entitled to recover, and there was a rule to enter judgment accordingly.

The policy which was executed by the appellants in favor of Messrs. *Wier Bros. & Co.*, was dated the 27th June, 1878, and was upon the schooner "Mabel Clare" for $6,000. The vessel was lost on the 12th of October, 1878, and no question was raised as to the sufficiency of proof of loss or interest. The policy contained (amongst others) the following conditions:

That in case the premium or the note or other obligation given for the premium or any part thereof be not paid when due, this insurance shall be void at and from such default. And should the person liable for the premium, or on any note or obligation given therefor, fail in business or become bankrupt or insolvent before the time for payment has arrived, this insurance shall at once become and be void unless and until before loss the premium be paid or satisfactorily secured to the company.

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There was also in the policy an arbitration clause as follows:

If any difference shall arise between the company and the insured as to the loss or damage, or any other matter relating to the insurance, in such case the insured shall appoint an arbitrator on her or his behalf, and the company shall appoint another.

Then follows a provision for the appointment of a third arbitrator, and the condition proceeds:

Which three arbitrators or any two of them shall decide upon the matters in dispute in accordance with the terms and conditions of this policy and the laws of *Canada;* Provided always, and it is hereby expressly agreed between the company and the insured, that the insured shall not be entitled to maintain any action at law or suit in equity on this policy until the matters in dispute shall have been referred to and settled by arbitrators appointed as hereinbefore specified, and then only for such sum as the arbitrators shall award; and the obtaining the decision of such arbitrators on the matters and claims in dispute is hereby declared to be a condition precedent to the right of the insured to maintain any such action or suit.

A promissory note was given by *Wier Bros. & Co.*, for the premium, and was current when they failed. A guarantee was then, on 6th August, 1878, given by *J. Smith* and *W. E. Weir*, and accepted by the company as a satisfactory security for the premium. This guarantee, addressed to the Secretary of the company, was as follows:

We hereby guarantee you the payment of $210 premium of insurance on schooner *Mabel Clare* and on policy 142, and for which you held the note of *Wier Bros. & Co.*

Wier Bros. & Co. went into insolvency on 7th September, 1878, and the plaintiff was appointed assignee of their estate. The note became due on 30th September, 1878, and was not paid, but remained overdue and unpaid at the date of the loss on the 12th of October, 1878.

Upon this state of facts I should have been of opinion that the plaintiff was not entitled to recover, differing altogether in this respect from the court

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below, who place their judgment in favour of the plaintiff entirely upon the ground that the conditions were all complied with. The condition to pay or secure the loss in case of failure in business or insolvency was no doubt sufficiently complied with by giving the guarantee to the satisfaction of the company; but there was a clear breach of the other and distinct condition which provided that, in case the premium or the note or other obligation given for it should not be paid when due, the policy should be void from the date of default. Here the guarantee was an obligation given for the premium, as well as the note, and that was according to the undoubted construction of its terms, to pay according to the tenor of the note, *i.e.*, at its maturity. It seems to me therefore impossible to say that there was not at the date of the loss such a default as rendered the policy void. I cannot therefore place my judgment on the same grounds as those on which that of the Supreme Court of *Nova Scotia* proceeded.

It appears to me, however, that the plaintiff was clearly entitled to recover on the award which was made in pursuance of the arbitration clause already mentioned, by arbitrators duly appointed according to the terms of that provision. By this award it was determined that the company was liable for the loss in the amount for which the judgment of the court was entered. The case states that the declaration contains a count on this award. No objection was made on any ground to the award, which must be taken to have disposed of all matters which were included in the terms of the arbitration clause already set out. That clause is beyond all question sufficiently comprehensive to include all disputes relative to the payment or securing of the premium according to the terms of the policy. By it arbitration was made a condition precedent to any

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action being maintained on the policy, or in respect of the insurance.

Whether the case of *Scott* v. *Avery* (1) is to be considered as determining that such a condition precedent is valid as regards all questions, those of liability as well as of amount of damage, or whether it is only binding as to the amount of debt or damage, and is illegal as tending to oust the jurisdiction of the courts when it goes to the root of the action, as was held by *Kelly*, C.B., and *Brett*, J., in *Edwards* v. *The Aberayron Mutual Ship Ins. Society* (2), is a question which does not arise in the present case. Here no objection has been raised to the arbitration clause, but the parties have mutually acted under it. Therefore, it not being suggested that any fault can be found with the award, and the question as to the payment or default in payment of the premium being "a difference relating to the insurance" within the meaning of the policy; and the award not appearing on its face to be bad from any mistake of law or otherwise, we must hold it binding on the company. It, therefore, entirely precludes us from the consideration of the condition relating to the payment of premium and the question of default under it. The appeal must consequently be dismissed with costs.

FOURNIER, J. :—

L'Appelante poursuivie sur une police d'assurance maritime émise par elle en faveur de *Weir Bros. & Co.*, a été condamnée à payer à l'Intimé *Corbett*, comme syndic à la faillite de ces derniers, la somme de $6,399.41. D'après les conditions de la police la prime pouvait être acquittée par un billet promissoire, mais à la condition que si le billet n'était pas payé à son échéance la police devenait nulle. Dans le cas d'insolvabilité des assurés,

(1) 5 H. L. C. 811. (2) 1 Q. B. D. 563.

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avant l'échéance du billet, l'assurance devenait aussi nulle, à moins que la prime ne fût payée ou garantie d'une manière satisfaisante. Conformément à cette dernière condition, (les assurés étant tombés en faillite), une garantie pour le paiement de la prime fut offerte à la Cie. et acceptée par elle. Le billet ainsi garanti ne fut pas payé à son échéance. L'appelante invoque ce défaut de paiement comme étant, en vertu des conditions de la police une cause de nullité, et demande pour ces motifs l'infirmation du jugement rendu contre elle. Cette prétention n'est pas justifiée par les termes de la police. La condition de nullité est établie pour deux cas : le premier, défaut de paiement du billet de prime à son échéance ; le deuxième, dans le cas d'insolvabilité de l'assuré avant l'échéance. Cette dernière cause de nullité peut être évitée en donnant une garantie. Dans le cas actuel une garantie a été donnée et acceptée. La police ne contient aucune condition de nullité pour le cas où la garantie n'est pas payée à l'échéance. La raison en est sans doute que la Cie. ayant, dans ce cas, le choix entre le paiement et la garantie, si elle accepte cette dernière c'est qu'elle la considère comme parfaitement équivalente à un paiement. De plus il n'appert pas dans la cause que la Cie. ait fait aucune démarche pour se faire payer de cette garantie, ni que le paiement en ait été refusé. Cette raison suffirait seule pour faire renvoyer l'appel. Mais il y a pour cela une autre raison encore plus concluante : C'est que la Cie. ayant volontairement procédé avec l'Intimé à un arbitrage des matières en contestation concernant cette police, il ne lui est plus permis d'opposer le défaut de paiement comme moyen de défense. La sentence rendue par les arbitres est finale et ne peut pas être revisée dans cette cause. Elle n'aurait pu l'être qu'en se conformant aux dispositions de la loi à cet égard, c'est-à-dire en faisant de la référence aux arbitres

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une règle de cour et en faisant motion pour la faire annuler pour quelques-unes des causes admises par la loi. Ceci n'ayant pas été fait, la sentence doit être considérée comme ayant terminé la contestation, et l'appel doit être renvoyé avec dépens.

HENRY, J.:

This action was brought on a policy of Marine Insurance and upon an award in favor of the respondent. A special case was substituted for the usual pleadings and the evidence adduced before the arbitrators was made evidence herein.

I am of opinion the respondent is entitled to our judgment on both counts.

The only objection to the recovery by the respondent on the first is, that before the note became due the insured became bankrupt, and the note at maturity was protested for non-payment, and that at the time of the loss it still remained unpaid. By one provision of the policy, if the premium or any part thereof should be unpaid when due, the policy was to become void from that time, but that the insured should be entitled to recover if the loss occurred before such default. By another clause of the policy it was provided that if the person or persons liable to the company for the premium, or on any note or obligation therefor, or any part thereof, should become bankrupt or insolvent before the time for payment should arrive, the insurance should become and be void, unless and until before loss the premium should be paid or satisfactorily secured to the company.

The policy was issued on the 27th of June, 1878. The note, dated the same day, for the premium ($210) was payable three months after date, and fell due on the 30th September following.

Having become bankrupt, *Wier Bros & Co.*, having

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been called upon for security, obtained, and the company, by their agent, accepted, a guarantee on the 6th of August following. It was addressed to the secretary of the company, and is as follows:

DEAR SIR,—We hereby guarantee you the payment of $210, premium of insurance on schooner "*Mable Clare*" under policy No. 142, and for which you hold the note of *Wier Bros. & Co.*

The note was protested for non-payment on the 30th September, and the loss occurred on the 12th of October. We see here two provisions, under the first of which, if not for the other, the policy became void for non-payment of the premium on the 30th of September as to any loss subsequent to that date. Under the second, provision is made against the loss to the company through the bankruptcy of those whose note was taken for the premium, and in that event the policy is to become void "unless and until before loss the premium be paid or satisfactorily secured to the company." There is therefore this important distinction, that under the first provision actual payment is necessary to keep alive the policy, but in the the other, satisfactory security is put on the same footing as payment. In this case, therefore, the policy did not become wholly void, but the security under it suspended until at any time before loss it was satisfactorily secured. I think the true construction of the two clauses, each making provision for different events, are not to be read together, and that by considering the second alone, the giving the security is shown to be equivalent to payment. The policy was binding on the company if the premium were paid before loss, and I think it was equally binding if it were satisfactorily secured as admitted to have been done.

After the loss the whole subject was submitted to three arbitrators, chosen by the parties, and the award made as provided for in the policy. It was not set

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aside, nor were any steps taken to set it aside. It is not attacked for any reason given or alleged. By the reference, all matters of fact and law were submitted unreservedly to the arbitrators, and unless some good reason to set it aside, such as the refusal of the arbitrators to admit important and legitimate evidence or other improper conduct on their part, no court would interfere with it. The submission was the voluntary act of the parties who, by it, made the arbitrators judges of the law and as a jury to decide on the evidence. The award in this case would be binding on the parties, even if no provision had been made for the submission by the policy, and it is none the less so because the submission is so provided for.

I think the judgment of the court below is right, and that it should be affirmed with costs.

TASCHEREAU, J., was also of opinion that the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors for appellants: *J. N. & T. Ritchie.*

Solicitors for respondent: *Meagher, Chisholm & Ritchie.*

CONTROVERTED ELECTION FOR THE ELECTORAL DISTRICT OF MONTCALM IN THE PROVINCE OF QUEBEC.*

1883
Nov. 13.
1884
*Jan'y 16.

ODILON MAGNAN, *et al*.....APPELLANTS;

AND

FIRMAN DUGAS.....RESPONDENT.

ON APPEAL FROM MATHIEU, J., SITTING FOR THE TRIAL OF THE ABOVE NAMED ELECTION CASE.

Election petition—Bribery—Corrupt intent—Appeal on matters of fact.

Among other charges of bribery and treating which were decided on this appeal was the following:—One *Mireau*, a blacksmith, who was a neighbour of the respondent, had in his possession since two years, several pieces of broken saws which the respondent had left with him for the purpose of making scrapers out of them on shares. A few days prior to nomination the respondent went into *Mireau's* shop with a scraper he wanted to be sharpened, and in return for sharpening the scraper told him to keep the old pieces of saw which he might still have. *Mireau* in his evidence answered as follows:

Q. He did not speak of your vote? A. No.

Q. What has he said? A. He said that Mr. *Magnan* was coming like mustard after dinner?

Q. M. *Dugas* did not ask you for whom you were? A. No.

* * * * *

Q. Do you swear on the oath that you have taken that M. *Dugas* left with you these two pieces of saw in question with the intention to buy (*bribe*) you? A. I think so, I cannot say that

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*PRESENT—Sir W. J. Ritchie, C.J., and Strong, Fournier, Henry and Gwynne, JJ.

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it is sure, I don't know his mind (*son idée.*) It is all I can swear.

Q. It has not changed your opinion? A. No.

Q. For whom were you in the last election? A. For M. *Magnan.*

The scrapers were worth in all about two dollars, and were of no use to the respondent, and no other conversation took place afterwards between the parties. The judge who tried the case found that there was no intention on the part of the respondent to corrupt *Mireau.*

Held,—That the Supreme Court on appeal will not reverse on mere matters of fact the judgment of the judge who tries an election petition, unless the matter of the evidence is of such a nature as to convey an irresistible conviction that the judgment is not only wrong, but is erroneous, and that the evidence in support of the charge of bribing *Mireau,* as well as of the other charges of bribery and treating, was not such as would justify an Appellate Court to draw the inference that the respondent intended to corrupt the voters.

APPEAL from the judgment of Hon. Mr. Justice *Mathieu,* of the Superior Court of the Province of *Quebec,* the judge trying the election petition, under the Act of *Canada,* 37 *Vic.,* ch. 70 (1).

The case upon which this appeal was decided was the personal charge against the respondent of having bribed one *Mireau.* The facts of this case, as well as the facts of the other charges, appear in the report of the case in the 12th volume of La Revue Légale (2), and in the judgments hereinafter given.

Mr. *J. Bethune,* Q. C., and Mr. *Pagnuelo,* Q. C., for appellants:

In the *Mireau* case, the respondent allowed the evidence to go uncontradicted, and his silence cannot but be taken as a confession of guilt.

Borough of *Eversham* case (3).

(1) 12 Rev. Leg. 226. (2) P. 226.
(3) 3 O'M & H. 192, 193.

As to the amount of the gift, it matters very little in the present circumstances.

Shrewsbury case (1); *Blackburn* case (2).

Bellechasse case in Superior Court (*McCord*) (3), and S. C. in Supreme Court (4).

MR. *G. Irvine*, Q. C., and *C. Pelletier*, Q. C., for respondent.

The respondent was not bound to contradict evidence of this description. There was no corrupt intent.

Windsor case (5); *Staleybridge* case (6); *Jacques Cartier* case (7); *Kingston* case (8).

RITCHIE, C.J :—

The only case which has given me any difficulty is the personal charge in the case of *Mireau*, in which it is alleged defendant bribed *Mireau*, by giving him a piece of an old broken saw.

The abandonment of the pieces of the saw to *Mireau* was not in connection with any conversation relative to the election, either before or at the time or subsequently, the only reference to the election (but not in connection in any way with the saw,) was the casual observation to *Magnan*, which he thus details:

Q. Il ne vous a pas parlé de votre vote? R. Non.

Q. Qu'est-ce qu'il a dit? R. Il a dit que Monsieur *Magnan* arrivait comme de la moutarde après dîner.

Q. Il ne vous a pas demandé, Monsieur *Dugas*, pour qui vous étiez? R. Non.

Nor are there any circumstances beyond the simple abandonment from which a corrupt intention can be inferred; on the contrary, *Mireau* would seem to have been a man in very poor circumstances, the

(1) 2 O'M. & H. 36.
(2) 1 O'M. & H. 202, 208. See also 3 O'M. & H. 107, 108.
(3) 6 Q. L. R. 100.
(4) 5 Can. S. C. R. 91.
(5) 2 O'M. & H. 88.
(6) 2 O'M. & H. 72.
(7) 2 Can. S. C. R. 306 & 307.
(8) 11 Can. L. Jour. 22 &24;

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defendant much the reverse and having, it would seem, from his mills a great number of broken saws, which it may be readily supposed, from the circumstance of the pieces left with *Mireau* having been allowed to remain with him for two years without being called for or otherwise noticed, they could not have been considered of much, if any, value to *Dugas*, if not actually worthless. This conduct of defendant would seem to show that he attached to them very little, if any, value, and considering that *Mireau* was then performing a service for defendant in sharpening his scraper, though *Mireau* thinks the service trifling and the pieces of the saw more than an adequate payment, the defendant, having no use for the pieces, and having, as *Mireau* says, a great number of pieces of broken saws, may have esteemed the remuneration equally trifling; at any rate, it is very clear, that before a party can be declared guilty of a corrupt act entailing such serious consequences as would flow from declaring defendant guilty, the intention to corrupt must be established beyond a reasonable doubt. With reference to the trifling value of the article with which it is alleged *Mireau* was bribed, I can only say that when an intention to bribe is clearly established the extent or value of the bribe is of no importance, but in considering whether the intention to corrupt exists the trifling character of the bribe may, in connection with other circumstances, become most important to negative the corrupt intent.

I cannot think that simply leaving with *Mireau*, in return for sharpening his scraper without any reference being made to the election, the small pieces of a broken saw of comparatively little or no value, and which defendant had allowed to remain in *Mireau's* possession for two years without having been in any way inquired after or apparently esteemed of any value, is of itself,

sufficient to justify the conclusion that the defendant thereby necessarily intended corruptly to influence *Mireau* in voting or abstaining from voting at the election.

Still less do I think the case so clear as to justify me in over-ruling the decision of the judge who saw and heard the witnesses, who it cannot be denied was in a better position to deal with the questions of fact than I now am.

It is true that in his evidence, *Mireau*, in answer to this question:

Q. Jurez-vous sur le serment que vous avez prêté, que M. *Dugas* vous a laissé ces deux bouts de scies en question dans l'intention de vous acheter? R. Je le pense. Je ne puis pas dire que c'est certain. Je ne connais pas son idée. C'est tout ce que je puis jurer.

Q. Ça n'a pas changé votre opinion? R. Non.

The opinion of the voter has nothing to do with the question. What we have to deal with is the intention of defendant, and this we must discover, not from the opinion of the voter, but from the acts, facts and circumstances developed by the evidence in the case or the necessary inferences deducible therefrom; and even at most the impression made on *Mireau* does not really amount to more than a suspicion; and if only a suspicion was created in his mind, can I say the evidence is sufficient to establish a conclusion beyond a reasonable doubt in my mind.

2nd case, *Azarie Pauzé*. Case of an alleged bribing by an offer to buy a man:

I quite agree with the learned judge that there is nothing whatever in this case to justify the conclusion that there was any infraction whatever of the 92nd sec. of the Dominion Elections Act of 1874.

3rd case, as to the treating at *Thouin's*.

I have nothing to add to what the learned judge has said as to this case.

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As to all the other cases the learned judge has very carefully and minutely discussed them all, and as I agree in the conclusions at which he has arrived, I do not think it worth while to take up time by again going over the same ground.

STRONG, J. :

At the conclusion of the argument in this case, I was convinced that the appeal was wholly unfounded. A subsequent careful consideration of the evidence has convinced me that, with the exception of *Mireau's* case, the appeal is not only unfounded, but may be characterized as frivolous. *Mireau's* was perhaps an arguable case, but when the facts are considered, as already stated by the learned Chief Justice, the only proof upon which the learned judge of the court below was asked to draw the inference that there was an intention to corrupt the voter was this, that a piece of old saw, worth less than $2, which about two years before had been left with *Mireau* by the respondent for the purpose of making hoes out of it, was in his possession at the time he paid this visit, whilst the canvass for the election was going on, and the respondent told *Mireau* that he might keep this. It was not handing him a present, or conferring any benefit on him, but he abandoned to him this piece of old iron, for which he had no use whatever, the respondent being in the saw mill business, and having a number of old saws lying by him. This the learned judge found was without corrupt intent. To say that a Court of Appeal should draw a different inference from that drawn by the judge of first instance, who has seen the witnesses and had them examined before him, would be not only reversing all the principles on which this court acts in cases of appeals on questions of fact, but would be directly to controvert the principle laid down

by an eminent judge of high authority on questions of this kind—I refer to the late Chief Justice of this court—whose thorough experience in election cases, and his great practical knowledge of the law of elections make his opinion of the utmost value, and who, in his judgment in the *Kingston* case (1), lays it down as law that, wherever there is a doubt, the benefit of that doubt is to be given to the respondent. On that principle alone, in the present case, it would be out of the question to say, that the judge has given a wrong interpretation to this evidence, much less could we, sitting in appeal and reviewing the evidence, be asked to hold otherwise. I think, therefore, that *Mireau's* case, which is really the only substantial one which we could be asked to interfere upon, was properly decided by the learned judge, Mr. Justice *Mathieu*, in the court below, and, for the reasons which he gave there, as well as for the reasons given by the Chief Justice in the judgment which he has just read, I have come to the conclusion that we cannot disturb the judgment. I repeat, as to all the other cases, I consider them frivolous. The appeal should be dismissed with costs.

FOURNIER, J.:

The evidence is not sufficient to authorize an appellate court to reverse the judgment in favor of the member elected.

HENRY, J.:

The animus, of course, with which anything is done in an election by a candidate appealing to a voter is all important. The amount is of secondary importance, but the amount of gratuity has, of course, a great deal to do with determining the mind of the party who makes it. It is said that this man *Mireau* was a poor

(1) Hodgins' Elec. Cases 625.

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man, and a couple of dollars to a poor man would be as important, or more so, than $20 to a wealthier individual. The circumstances here are in a nut-shell. The sitting member was engaged in canvassing in his election. He takes a hoe to this blacksmith to be sharpened. The blacksmith says it wanted very little. While he was proceeding to do it, he spoke of the election and made use of the term which has just been mentioned. The subject was in his mind, at all events, and whether he was canvassing this man or not, it was in the mind of the man who made the gratuity. After sharpening this hoe, which, he said, took very little time, for it wanted very little, he said—"These saw plates which I gave you to manufacture on our joint account you can have altogether. I will not exact what I required by our agreement." That was really giving him up something that was alleged to be worth some two or three dollars. I admit the principle laid down, not originally by our late learned Chief Justice, but by a judge in *England*, that if you can ascribe two motives to a party, one legal and the other illegal, we are not, at all events, bound to ascribe the illegal one, and it would be quite sufficient to exculpate a party charged with bribery in an election. If I were trying the case as the first judge, I should have had a good deal of difficulty in deciding as to the animus of the candidate in that election; but the judge, who tried the case, and who was better acquainted with the manner of dealing and the minds of the people than I can be, has given a judgment. I do not consider that is a case which we should review. The judge having given his decision, and being much better able to decide under the circumstances, than I can be, from his knowledge of the habits and mode of dealing of the parties in question, I would defer to his judgment. I would be totally unjustified, because of a doubt in my mind, in reversing his judgment.

Under the circumstances, I think this appeal should be dismissed with costs.

GWYNNE, J.:

The questions raised upon this appeal are all questions purely of matters of fact. In the case of *Cimon* v. *Perrault* (1) I have stated my opinion to be that—

> If there are any cases in which more than in others we should inflexibly adhere to the rule that we should not, on appeal, reverse upon mere matters of fact the judgment of the judge who tries the cause, having himself heard all the evidence, unless the matter of the evidence is of such a nature as to convey an irresistible conviction that the judgment is not only wrong but is erroneous, they are these election cases in which so much depends upon the manner in which the witnesses give their evidence and upon the degree of credit to be attached to them respectively. A judge sitting in appeal, not having before him the demeanor of the witnesses, which the judge who tried the petition had, assumes a grave responsibility, and indeed, as it seems to me, exceeds the legitimate functions of an appellate tribunal when he pronounces the judgment of the judge of first instance in such cases to be erroneous, upon anything short of the most unhesitating conviction.

To this opinion, thus expressed, I still adhere. In the present case, all the parties whose acts are called in question, and all the witnesses who speak to those acts are French habitants of the Province of *Quebec*, and the judge himself of the same nationality as they. After a careful perusal of the judgment of the learned judge who tried the case, and heard all the witnesses give their evidence in his and their own language, and who possessed a peculiar knowledge—a knowledge which I have not and cannot have—of the habits and customs of the parties whose acts came in review before him in this contestation, I have no hesitation in saying, that if I should reverse his judgment upon these questions of fact, my judgment would be deservedly open to the imputation of presumption.

(1) 5 Can. S. C. Rep. 153.

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In the principles of law by which the learned judge has, in his very able judgment and review of the reported cases, stated that he was governed in his consideration of the evidence, and in arriving at his conclusion upon it, I entirely concur.

In this view it is unnecessary to express an opinion upon the question as to the sufficiency of the evidence of the parties said to have been corruptly approached by the respondent or by his agents, being electors.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for appellant: *Pagnuelo & St. Jean.*

Solicitors for respondent: *Pelletier & Martel.*

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*Feb'y. 19.

*April 1st.

CONTROVERTED ELECTION FOR THE ELECTORAL DISTRICT OF BERTHIER, IN THE PROVINCE OF QUEBEC.

NARCISSE GENEREUX *et al*.....APPELLANTS;

AND

E. O. CUTHBERT.....RESPONDENT.

ON APPEAL FROM DOHERTY, J., SITTING FOR THE TRIAL OF THE ABOVE NAMED ELECTION CASE.

Dominion Controverted Election—Railway Pass—37 Vict., ch. 9, secs. 92, 96, 98 and 100—Questions of fact in appeal—Agent, limited powers of.

In appeal, four charges of bribery were relied upon, three of which were dismissed in the court below, because there was not sufficient evidence that the electors had been bribed by an agent of the candidate; and the fourth charge was known as the

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

Lamarche case. The facts were as follows:—One *L.*, the agent of *C.*, the respondent, gave to certain electors employed on certain steamboats, tickets over the North Shore Railroad, to enable them to go without paying any fare from *Montreal* to *Berthier*, to vote at the *Berthier* election, the voters having accepted the tickets without any promise being exacted from or given by them. The tickets showed on their face that they had been paid for, but there was evidence *L.* had received them gratuitously from one of the officers of the company.

The learned judge who tried the case found as a fact that the tickets had not been paid for, and were given unconditionally, and therefore held it was not a corrupt act.

Held—1. (*Fournier* and *Henry*, JJ., dissenting) that the taking unconditionally and gratuitously of a voter to the poll by a railway company or an individual, whatever his occupation may be, or giving a voter a free pass over a railway, or by boat, or other conveyance, if unaccompanied by any conditions or stipulations that shall affect the voter's action in reference to the vote to be given, is not prohibited by 39 *Vict.*, ch. 9 (D).

2. That if a ticket, although given unconditionally to a voter by an agent of the candidate, has been paid for, then such a practice would be unlawful under section 96, and by virtue of section 98 a corrupt practice, and would avoid the election.

3. That an agent who is not a general agent but an agent with powers expressly limited, cannot bind the candidate by anything done beyond the scope of his authority.

As to the remaining three charges the Court was of opinion that, on the facts the judgment of the Court below was not clearly wrong and should therefore not be reversed. (*Fournier* and *Henry*, JJ., dissenting on the charge known as the *Maxwell* case.)

APPEAL from a judgment delivered on the 21st of February, 1883, by Mr. Justice *Doherty*, dismissing the election petition against the return of the respondent, at the election which took place in June, 1882, for the electoral district of *Berthier*, to the House of Commons.

The petition in this cause was presented, in the usual form as to corrupt practices, without claiming the seat.

This petition was supplemented by a list of particulars consisting of twenty-six charges.

Petitioners called and examined a large number of

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witnesses, and at the hearing, they abandoned all but five of the charges, persisting only in the 1st, 2nd, 8th and 20th, and in the additional particular A.

On appeal four charges of bribery were relied upon, 1st, the *Lamarche* case; 2nd, the *Chalut* case; 3rd, the *Rithier & Cote's* case; and 4th, the *Maxwell* case. The particulars of these charges are stated in the judgments hereinafter given.

Mr. *Doutre*, Q. C., and Mr. *Mercier*, Q. C., for appellants:

As to the *Lamarche* case.

The only question to decide on this question is whether the grant of free passes, some 20 in number, amounts to a corrupt practice, according to the Dominion election Act, 1874.

We submit that it is a corrupt practice according to sections 92, 96 and 98 of said Act.

The respondent was the conservative candidate, the railway was a government railway under the control and management of the *Quebec* conservative government. The passes were delivered by the officials of the road to convey electors to the poll, at the special request of respondent's agents. These passes were delivered the day before the polling day, and all these men were paid at the end of the week their full salary, although they lost a day and a half. Then it is established by the evidence that the value of these passes was $1 50cts. each. There is no doubt that these men would not have gone to *Berthier* that day, if they had been obliged to pay their travelling expenses and lose their salary during their absence.

This is a payment of a carriage to convey voters in violation of sec. 96. There is no actual payment proved, for *Lamarche* says he did not pay for these passes. But it comes to the same thing, and we fail to see the

necessity of an actual payment of money, under the circumstances, to constitute a corrupt practice.

To maintain such a system would be simply to give to a government, holding railways, the means of controlling, in a very extraordinary way, the elections of the whole country.

But suppose there is any doubt that this act falls under sec. 98, it seems that it can be brought under sec. 92, which constitutes a corrupt practice with the giving of any valuable consideration to an elector in order to induce him to vote or to favor the election of a candidate.

This point was specially raised in the celebrated case of *Cooper* and *Slade*, before the House of Lords in 1858 (1). *Hickson* v. *Abbott* (2). See also *Leigh* and *Lamarchand* (3).

In the *North Simcoe* election case (4) it was decided in 1871 by Vice-Chancellor *Strong* that the hiring by an agent of the respondent of a railway train to convey voters was a payment of the travelling expenses of voters within the meaning of section 71 of 32 *Vict.*, ch. 21, and was a corrupt practice.

According to the ruling in the *Selkirk* case (5), the 96th section of the Dominion Elections Act, 1874, is included in the 98th section of the same Act (6).

The gift to electors of passes on railways, for the purpose of allowing those voters to go at all to the polls was declared in 1881 to be a corrupt practice in *Hickson* v. *Abbott* (7).

It seems to us very clear that under the circumstances of this case the election ought to be voided on account of the delivery of these passes. They were a valuable

(1) 27 L. J. N. S. 449.
(2) 25 L. C. Jur. 313.
(3) P. 5.
(4) 1 Hodgins' Elec. Cases 50.
(5) 4 Can. S. C. R. 494.
(6) 3 Legal News, p. 335.
(7) 25 L. C. Jur., p. 313.

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consideration given to electors to induce them to vote. They were practical payment of travelling expenses, and it is quite indifferent whether this payment of travelling expenses was made with money or with a valuable consideration of any kind.

To uphold such a system would be to encourage the worst kind of bribery; for it would be to allow a candidate to convey any amount of voters to the polls by way of passes granted by a friendly railway company.

The *Bolton* (1) case cited by Mr. Justice *Doherty* has no authority here; and the principles laid down by Judge *Mellor* are entirely opposed to our own jurisprudence.

[As to the three other charges, the argument of counsel sufficiently appear in the judgments.]

Mr. *Lacoste*, Q. C., and Mr. *Bisaillon* with him for respondent.

As *Lamarche* is admitted to have been an agent, the only question which arises is whether *Lamarche* has violated the 96th section of the Act by "having promised to pay, or paying for any horse, team, carriage, cab or other vehicle, by any candidate or by any person on his behalf, to convey any voter or voters to or from the poll, or to or from the neighbourhood thereof at the election."

The passes were given gratis; they were never paid for, and were given unconditionally. *Lamarche* or *Labelle* acted merely as would have acted any person voluntarily and gratuitously conveying voters at the poll with his own carriage, and the judge in the court below so found.

The appellant's proof entirely fails to bring the charge under the provisions of the said 96th section of the Act, but the petitioners contend that the passes given to the voters by *Lamarche* were things of value, and

(1) 2 O'M. & H. 147.

that they were given as a "valuable consideration," to induce said voters to vote for respondent at the election. This question has been already fully discussed in the *Bolton* case (1), where it was decided that the giving of a pass was not a valuable consideration under the Act. See also *Rogers* on Elections (2), where all the cases on this point are collected.

Then as to whether *Lamarche* has violated section 92. We submit that there has been no violation of that section, because no payment was made. There is nothing in the law to prevent a railway company any more than a private company from granting a free conveyance to the voter. *Cooper* v. *Slade* is distinguishable on this point. *Hickson* v. *Abbott* (3), and the *Simcoe* case (4), relied on by appellants, are not applicable, because in those cases the tickets were paid for, and the election was avoided, not under section 92, but under section 96.

Mr. *Mercier*, Q. C., in reply.

RITCHIE, C. J.:—

There are in this case four charges which the petitioners rely on, viz.:—

1st. The *Lamarche* case.

The charge in this case is in these words:—

"Que pendant la dite élection, le dit *Edouard Octa-*
"*vien Cuthbert*, directement et indirectement, par lui-
"même, par le moyen d'autres personnes, et de ses
"agents autorisés, et entr'autres par *Olivier Lamarche*,
"marchand de *Berthierville*, district électoral de *Ber-*
"*thier*, de la part et du consentement et à la connais-
"sance réelle du dit Intimé, a payé les dépenses de
"voyage et autres dépenses d'un grand nombre d'élec-
"teurs du dit district électoral de *Berthier*, pour les
"aider à se rendre à l'élection, et à s'en retourner, à se

(1) 2 O'M. & H. 147-8-9.
(2) P. 362.
(3) 25 L. C. Jur. 313.
(4) 1 Hodgins p. 50.

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"rendre aux, ou aux environs des bureaux de votation, "et entr'autres à *Octave Boucher*, *Jean Baptiste Godin*, "*Alexandre Godin*, *Narcisse Boucher*, *Louis Valois*, "*Pierre Latour*, tous navigateurs de l'Ile *Dupas*, dans "le district électoral de *Berthier*; *Joseph Plouffe*, *Alfred* "*Bruno*, *Dolphis Rocrais*, *Dolphis Massé*, *Servius Massé*, "*Joseph Pagé*, *Octave Parent*, tous navigateurs de "*Berthier*, dans le dit district; *Lafontaine* de *Québec*, "employé civil; *Narcisse Boucher*, navigateur de *Trois* "*Rivières*, district de *Trois-Rivières*; *Pierre Arpin*, "navigateur de *Lanoraie*, dit district de *Berthier*; "*Dolphis Buron*, navigateur de *Berthier*, district élec- "toral de *Berthier*; *Charles Rocrais*, navigateur du "même lieu; *Alfred Chiquette*, maître de pension de "*Montréal*, district de *Montréal*; toutes ces personnes "étant électeurs de la division électorale de *Berthier*, et "dûment qualifiés à voter à la dite élection, et ayant "voté à la dite élection, donnant à chacune des dites "personnes, un billet de passage sur le chemin de fer "*Québec*, *Montréal*, *Ottawa et Occidental*, et autres "valeurs et d'autres manières, pour les conduire dans le "dit district électoral de *Berthier*, aux, ou aux environs "des bureaux de votation, où chacune des dites personnes "avait respectivement droit de voter, et que les dites "personnes ont ensuite revendu les dits billets de "passage, qu'ils avaient ainsi obtenus gratis et dans un "but frauduleux, illégal et de corruption, et pour les "engager à voter pour le dit Intimé, et ont retiré de ces "ventes des sommes d'argent ou autres valeurs qu'ils "ont gardées pour leur usage personnel exclusif."

Lamarche, the agent of *Cuthbert*, gave to certain parties employed on certain steamboats, being persons qualified to vote at the *Berthier* election, tickets or passes over the *Quebec, Montreal, Ottawa & Occidental Railway*, to enable them to go, without paying any fare, from *Montreal* to *Berthier* to vote at such election.

It is very clear, indeed, not denied, that these voters travelled free on these tickets from *Montreal* to *Berthier* to vote, and voted there, but it is denied that they were given with any corrupt intent, or that the giving of these tickets or passes amounted to bribery or corrupt practices within the meaning of the Dominion Elections Act, 1874, and it is alleged that nothing was said or done by *Lamarche* corruptly to induce these persons to vote for or aid the respondent in his election, but that the passes were given unconditionally, and, therefore, there was no violation of the Dominion Elections Act, 1874. The judgment of the learned judge in the court below would seem to proceed on the authority and applicability of the cases of *Cooper* and *Slade* (1), and the *Bolton* case (2). In the case of *Cooper* and *Slade* a conditional promise to pay travelling expenses was held to be bribery.

In the *Bolton* case, it was submitted that the sending of the letters and railway passes was either an act of bribery according to the doctrine laid down by the House of Lords in the case of *Cooper* and *Slade* (1), or a simple act of bribery within the meaning of the Corrupt Practices Act, 1854, sec. 2; and secondly, that if it was not an act of bribery still that it was an illegal act which had been systematically and wilfully done for the purpose of influencing the election, and that as such it ought to be held to have avoided the election.

The court held in the *Bolton* case that there was not a conditional promise, but had it been: "If you come and vote for the respondent the expense of obtaining a railway ticket will be paid," Mr. Justice *Mellor* says: "This would, no doubt, have brought it within the case of *Cooper* and *Slade*." I think neither the case of *Cooper* and *Slade* nor the *Bolton* case are at all applicable to the present, because I cannot satisfy my mind

(1) 2 O. M. & H. 147. (2) 6 H. L. Cases 746.

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that the tickets were in this case given on any such condition as would legally constitute the act a case of bribery under the 92nd section. In the English acts there are no such enactments, as sections 96 and 101 of the Dominion Act of 1874, and it is under these sections that this case must, in my opinion, be determined. Under these sections the charge is not that of bribery, but of a corrupt practice by virtue of the prohibition of section 96 and the declaration of what offences shall be corrupt practices, as quite distinct from acts of bribery as provided against in section 92. Those provisions which are not to be found in the English Act of 1854 are as follows:

37 *Vic.* ch. 9, section 96:

And whereas doubts may arise as to whether the hiring of teams and vehicles to convey voters to and from the polls, and the paying of railway fares and other expenses of voters, be or be not according to law, it is declared and enacted, that the hiring or promising to pay or paying for any horse, team, carriage, cab or other vehicle, by any candidate or by any person on his behalf, to convey any voter or voters to or from the poll, or to or from the neighbourhood thereof, at any election, or the payment by any candidate, or by any person on his behalf, of the travelling and other expenses of any voter, in going to or returning from any election, are and shall be unlawful acts; and the person so offending shall forfeit the sum of one hundred dollars to any person who shall sue for the same; and any voter hiring any horse, cab, cart, waggon, sleigh, carriage or other conveyance for any candidate, or for any agent of a candidate, for the purpose of conveying any voter or voters to or from the polling place or places, shall, *ipso facto*, be disqualified from voting at such election, and for every such offence shall forfeit the sum of one hundred dollars to any person suing for the same.

Section 98:

The offences of bribing, treating or undue influence, or any of such offences, as defined by this or any other Act of the Parliament of *Canada*, personation or the inducing any person to commit personation, or any wilful offence against any one of the six next preceding sections of this Act, shall be corrupt practices, within the meaning of the provisions of this Act.

Section 101:

If it is found by the report of any court, judge or other tribunal for the trial of election petitions, that any corrupt practice has been committed by any candidate at an election, or by his agent, whether with or without the actual knowledge and consent of such candidate, the election of such candidate, if he has been elected, shall be void.

In my opinion this offence or corrupt practice may be complete without the slighest intent to bribe, as where a candidate or his agent knowing a voter intended to vote for the candidate and therefore required no inducement to do so, chooses to pay such a voter's railway fares or travelling expenses. In such a case, notwithstanding the voters may have accepted the free passage without any condition or promise being exacted from or given by them, the offence provided against by sec. 96 would be complete, though no offence of bribery could be thereby established, while on the other hand, if the voting for the candidate was made by the voter to depend on the condition that he should be paid his railway fare and travelling expenses, then the offence of bribery would be made out, and parties so offending would be guilty of a misdemeanor under section 92, to which persons offending against the 96th section are not made liable.

The question here being, whether what is complained of was a corrupt practice under the 96 and 98 sections, let us see how the case stands.

It is established that *Lamarche* was the respondent's agent. The learned judge says "the proof summarized shows that he was a strong partizan and supporter of respondent, was a member of his committee, canvassed some, and was engaged and interested in favor of respondent," and the judge further says that "*Lamarche* gave passes for 17 to 20, and that he gave them to the voters referred to, and that they did travel free on them from *Montreal* to *Berthier* to vote and voted; this,"

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he says, "is not and cannot be disputed." It is difficult to believe that those tickets or passes were not placed in *Lamarche's* hands to enable him to convey voters to the polls who would vote for the respondent, or that when he delivered such tickets he did not well understand and believe that the voters to whom tickets were so supplied would proceed to *Berthier* and record their votes for the respondent, and that they did so.

Then, were these tickets paid for? The fair inference, in the absence of evidence to the contrary, would seem to be that these tickets or passes were purchased from the government to be used for the conveyance of voters to vote for the respondent, and so in point of law the railway fares of these voters were paid for by the agent of the respondent who used these tickets and supplied them to the voters; or if not actually paid for by him were so used by him, knowing them to have been paid for.

Then there is the evidence of *Parent*, one of those voters, and he produces the ticket supplied to him, which certainly goes far to show that these tickets were purchased and paid for, the ticket on its face stating that it was paid for though issued at a reduced rate. He says:

Q.—Avez-vous vu M. *Olivier Lamarche* ce jour-là? R.—Oui monsieur.

Q.—Eh bien, dans quelle occasion et à quel propos, l'avez-vous vu? R.—Je l'ai vu au *gang-way* de l'arrière qui s'informait des gens qui avaient droit de vote, et il appelait leurs noms.

Q.—Il avait une liste? R.—Celui qui était là, il avait un petit morceau de papier et celui qui se trouvait présent, il disait: il est ici.

Q.—Ensuite? R.—Il m'a demandé: Vas-tu voter? J'ai dit oui. Il a dit: si tu veux aller voter, je vais aller te chercher une passe. Je lui ai dit: C'est bien correct. Dans l'après-midi, il est venu avec une passe, ou un ticket; c'était pareil à celui qui est exhibé; je puis vous la montrer.

Q.—Montrez-le donc? R.—Je produis cette passe comme exhibit "C" des pétitionnaires à l'enquête.

Q.—Etes-vous parti plusieurs ensemble? R.—Oui monsieur, on a parti, je vais vous les nommer tous: *Delphis Massé*, le *Steward*, son frère, *Zéphirin Massé*, *Joseph Plouffe*, moi, *Alexandre Godin*, *Octave Boucher*, *Louis Valois*, à bord du *Chambly*.

Q.—Tous ceux que vous venez de nommer, à part de *Valois*, étaient employés à bord du *Trois-Rivières*? R.—Oui, monsieur; *Alfred Bruneau* et *Delphis Rocrais*.

Q.—A bord du *Trois-Rivières*? R.—Oui monsieur.

Q.—Avaient-ils tous des passes, comme vous? R.—Oui, ils avaient tous des passes.

Q.—Aller et retour? R.—Oui monsieur.

Q.—Combien coûte le passage de *Montréal* à *Berthier*, aller et retour? R.—Sept chelins et demi, je suppose; c'est trois trente sous pour descendre.

Q.—En première classe? R.—Je ne sais pas, je ne connais pas le prix de la première classe.

Q.—C'est une piastre et demie dans la première classe? R.—Oui monsieur.

Q.—Naturellement, vous avez été dans la première classe cette fois-là? R.—Oui.

EXHIBIT C.

Quebec, Montreal, Ottawa and Occidental Railway.

One first-class passage.

From *Hochelaga* to *Berthierville* and return.

Special. In consideration of the reduced rate at which this ticket is sold it will only be valid until 22nd June, 1882.

FORM 2 R. 5708

L. A. Sénecal,
General Superintendent.

The witness *Massé* received, from the captain of the boat, a ticket left by *Lamarche* for distribution similar or nearly so to Exhibit C, under these circumstances:—

Q.—La veille de la votation vous étiez à bord de votre steamboat, dans le port de *Montreal*? R.—Oui monsieur.

Q.—Comment êtes-vous venu à *Berthier*? R.—Je suis venu dans les chars du Nord.

Q.—Du chemin de fer du Nord? R.—Oui.

Q.—Avez-vous payé votre passage? R.—Pardon, j'ai eu une passe.

Q.—De qui avez-vous eu une passe? R.—J'ai eu une passe du capitaine *Duval*.

Q.—Le capitaine de votre steamboat? R.—Oui, le capitaine de mon steamboat.

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Q.—Est-ce une passe comme celle-ci: exhibit "C" produite à l'enquête des pétitionnaires?

Objecté à cette question comme illégale.

Objection réservée.

R.—C'est à peu près semblable. Je ne puis pas sermenter qu'elle est parceille, mais c'est une passe mince.

Q.—De cette couleur-là à peu près? R.—Oui, à peu près.

Q.—C'était une passe pour la première classe du train de chemin de fer du Nord? R.—Oui monsieur.

Q.—Vous savez lire? R.—Oui.

Q.—C'était signé: "*L. A. Sénécal?*" R.—La signature, je ne l'ai pas examinée parfaitement.

Q.—Qu'est-ce que vous a dit le capitaine *Duval* quand il vous a donné cette passe-là? R.—Premièrement, M. *Lamarche* est venu à bord demander quels étaient les voteurs qu'il y avait dans le *steamboat*, moi-même, je lui ai nommé des gens que je connaissais qui avaient droit de vote; il a marqué les noms, et il a monté en haut au salon; il a demandé au capitaine *Duval* la permission d'avoir les voteurs; le capitaine a dit: avec plaisir, je ne puis pas refuser cela; ils sont maîtres d'aller pour qui bon leur semblera; de sorte que monsieur *Lamarche* a parti; il est allé à terre, et je n'ai pas vu rien de plus.

Q.—Il a vu les électeurs? R.—Pardon; il a eu la permission du capitaine, et il est venu à bord dans l'aprés-midi; il a monté au salon; il est venu trouver le capitaine; il a vu plusienrs des gens qui sont ici présents et qui ont été entendus comme témoins. Je n'ai pas vu donner les passes moi-même, mais au moins il a monté en haut, et il a donné des passes au capitaine. J'en ai eu une qui venait du capitaine. Je ne peux pas dire si elle venait de monsieur *Lamarche* ou de d'autres, mais je l'ai eue du capitaine.

It is suggestive that the witness, on cross-examination, says the captain did not, when giving him the ticket, tell him for whom he was to vote, but when the question is put to him: "Q. Vous a-t-il demandé pour qui vous alliez voter?" we find no answer given.

And this likewise negatives, if it does not dispose of, the hypothesis that these voters being employées of the *Richelieu Navigation Co.* were travelling by the railway free under an alleged usage whereby the employées of the railway company and the *Richelieu* Navigation Co. were permitted to travel free, a usage by no means

clearly proved to have existed, and which, had it existed, there is no evidence it was acted on in this case; on the contrary, had it been acted on, there would have been no need for the interference or instrumentality of *Lamarche*, who was in no way connected with either company.

Inasmuch then as the statute has specially mentioned the paying of railway fares, and section 96 was expressly passed to put an end to any doubts that might arise in reference thereto, considering the great, dangerous and corrupt influence that can be exercised in favour of particular candidates through the instrumentality of railway tickets, I think when such means are resorted to for bringing voters to the polls (by the candidate or his agents) the operation should be very narrowly watched and very strictly scrutinized, and as the fair and natural inference *primâ facie* is that passengers travelling on railways, do so by paying the regular fares, a certain presumption is raised that when voters travel on a railway to the polling place on tickets supplied by the candidate, or his agent, that such tickets have been paid for by such candidate, or his agent, in accordance with the usual course of the business of the railway, and this, in the absence of evidence to the contrary, appears to me to be much strengthened when the ticket shows on its face that it had been paid for, and it does seem to me to be a thin and flimsy cover indeed, under which to allow the candidate or his agents supplying voters with such paid tickets, for what the law designates a corrupt practice, to screen the transaction by simply alleging that these tickets came to his or their hands enclosed in an envelope, and leave the matter there. If there were any exceptional circumstances to withdraw the transaction from the operation of the statute, the burthen of disclosing such circumstances would, in my opinion, rather be on the

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candidate or his agents than on the petitioner, as the former have the knowledge within themselves, and were the persons who can best explain the matter, while on the other hand, in almost, if not quite every case, the means of exposing the details of the illegality of the transaction (by the petitioner) would be a matter of impossibility, establishing that a candidate or his agent has supplied voters with paid tickets, by the instrumentality of which they have gone to and returned from the polls, clearly, to my mind, establishes a *primâ facie* case. I cannot for a moment suppose that this strong partizan and supporter of the respondent obtained these passes with the patriotic, philanthropic or charitable view of enabling all these men to vote free of expense at the election, wholly irrespective of whom they would vote for. I cannot believe that he did not know that if he got them to *Berthier*, they would vote for the respondent, and that he obtained the tickets and distributed them so that he might in the interest of the respondent secure their attendance and their votes at the polls for the respondent. No one can believe that *Lamarche*, who says he knew all these seafaring men, and who adds, "Je connais nos ennemis et nos amis," would furnish a ticket to any voter whom he thought would be an enemy at the poll? nor doubt that he had a full reliance as to how the votes would be given. Giving these tickets to the voters was not as *Willes*, J., in *Cooper* v. *Slade* suggests:—

> Merely to induce the voters to come to the place of polling, and not to vote at all, or come there and vote for the rival candidates. Such suppositions, he says, are possible, but, speaking mildly, improbably in a high degree, because plainly inconsistent with the object for which the party was striving, namely, to get votes for his side.

Mr. *Cuthbert*, though examined, says nothing of this transaction, and neither Mr. *Labelle* nor Mr. *Senecal*, in

whose name the tickets were issued, nor any other person connected with the railway, have been examined to explain at whose instance, or on what consideration, these passes were issued, if they were not issued in the interest of the candidate to be used by his agents as tickets duly paid for, or otherwise than as expressed on their face. It is not suggested that *Labelle* did anything wrong, and in the absence of any evidence to show that the tickets were not regularly issued on being duly paid for, or that the tickets expressed on their face what was not literally true, I have very great difficulty in seeing how they can be treated as issued gratuitously. This was then a Government railway run in the interest of the Province at large, and not in the interest of any individual election candidate. It is not, therefore, to be presumed that the Government allowed it to be so used, or that it was so used by the employées of the Government of their own mere motion.

I have, therefore, the greatest difficulty in arriving at any other conclusion than that these tickets were paid for, and that their distribution and user in the manner detailed in the evidence should be regarded in no other light than as amounting to a payment by the agent of the candidate on his behalf of the travelling expenses or railway fares of voters going to and returning from the election at *Berthier*, which, if so, would be an unlawful act under section 96, and by virtue of section 98 a corrupt practice, that section enacting that any wilful offence of section 96 shall be a corrupt practice, which simply means purposely doing that which the section forbids, and which by virtue of section 100 avoids the election, that section declaring that any corrupt practice committed by a candidate or his agent shall render the election of such candidate, if he has been elected, void.

Though I am strongly impressed with these considerations I cannot lose sight of the principle which governs

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courts of appeal in dealing with the decisions of courts of first instance on questions of fact.

The learned judge of the first instance has found against this view of the evidence which has so strongly impressed me—his decision on the evidence being, that these tickets were not paid for, in which conclusion I understand my brothers *Strong* and *Gwynne* entirely concur. As this is a question of fact, pure and simple, the finding of the judge who tried the case should not be lightly disturbed, nor should an election be lightly set aside. When this finding is thus supported by two of the five judges sitting in this court, making three of the six judges who have heard this case, I cannot but distrust my own judgment, and such doubts are thereby raised in my mind as to the correctness of the conclusion I should have been disposed to arrive at if the decision rested with myself alone, without any conflict of opinion that, considering an Appellate Court should not reverse on a question of fact without its being made apparent that the court below was clearly wrong, and the so often expressed opinions of judges that before a judge should upset an election, he should be satisfied beyond reasonable doubt that the election was void, under such circumstances I think I am bound to give the respondent the benefit of the doubt thus created.

I am unable to say that I feel such confidence in my own impressions, strong though they be to the contrary, as would justify me in saying that I am entirely satisfied that the Judge was clearly wrong in the conclusion at which he arrived, and therefore I do not feel that I should be justified in reversing his decree.

I think taking, unconditionally and gratuitously, a voter to the poll by a Railway Company, or an individual of whatever his occupation may be, or giving a voter a free pass over a railway, or by boat or other conveyance, if unaccompanied by any conditions or

stipulations that shall affect the voter's action in reference to the vote to be given, is not prohibited by the statute. If it is against public policy, as I may think it is, that railway companies or others, having control of public conveyances, should be permitted to do this, its prohibition not being provided for by the statute, it is a *casus omissus*, which can only be remedied by Parliament. The courts cannot declare any Act illegal and corrupt, though one candidate may be thereby much benefitted, to the injury of the other, which has not been made so by the law.

Objectionable, as unquestionably in my opinion such a proceeding is, as unfairly and unduly affecting the election, and possibly illegal as it may be as against the public interest and public policy, that officers or employées having the management of government railways, in which the public at large are individually and collectively equally interested, should issue free tickets to be distributed gratuitously, though unconditionally, in the interest of a particular candidate or party, yet, as the statute has not prohibited such a proceeding, and has not declared such an Act to be illegal, and a corrupt practice, or provided that it should invalidate the election, I do not think this court has, without statutory authority, any power to avoid an election for this cause.

The second charge is the *Coté* and *Rithier* case. The learned judge says: "I see no proof at all sufficient to establish the agency of *Coté*"—a conclusion from which I do not feel myself justified in differing.

As to the case of *Maxwell*, of *St. Damien*, I have no doubt the money was sent to bribe *Maxwell*, and if it can be established that it was done by an agent of the respondent, must annul the election. The evidence is full of suspicions, but whatever suspicions there may

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be, there is no evidence of the agency of *Daveluy* that I can put my hand on.

The case of *Hénault* is not quite so clear. *Daveluy* gives the letter containing this money to *St. Cyr*, who was not proved to be defendant's agent, at *Hochelaga*, to be forwarded to *Maxwell* at *Berthier*, he meets *Lamarche*, the acknowledged agent of the respondents, and asks him who was going to *St. Damien*, and was informed by him that it was *Hénault*. The inference is clearly that in asking who was going to *St. Damien* he was seeking to discover who was going there in the interest of the respondent. He seeks *Hénault* and gives him the money, telling him he was told there was money in it. *Hénault* was going to speak for respondent, as the judge says, evidently with his knowledge and consent. Though the money passed through the hands of *Hénault*, and however suspicious the transaction is throughout, I cannot say the evidence sufficiently establishes that he was anything more than the bearer of the letter, ignorant of the nature of the transaction, and therefore not a participator as the agent of the candidate in the act of bribery.

This case, surrounded as it undoubtedly is by the gravest suspicions, is not, however, so clearly made out as to justify me in reversing the judgment of the learned judge.

As to the *Chalut* case, I think this was nothing more than a *bonâ fide* payment of the expenses of *Chalut*, and was neither colorable nor corrupt, and therefore I agree with the learned judge that in this case petitioners have also failed to establish a charge of personal bribery against the respondent. The appeal will therefore be dismissed, but I think without costs, following the course of the judge below, as I think the case a most proper one for the fullest investigation.

STRONG, J.:—

The appeal was confined to four distinct cases of alleged corrupt practices, which I will consider separately.

The first case is that of *Olivier Lamarche*, the facts of which may be concisely stated as follows:—*Lamarche* had his home at *Berthier*, where his family resided, but carried on business at *Montreal*. He was constantly passing between the two places on board the steamers of the *Richelieu Navigation Company*, and thus came to know the men comprising the crews of their vessels. He was, undoubtedly, as the learned judge has found on most ample evidence, an agent of the respondent, being an active member of his committee at *Berthier*. On the day before the polling day, *Lamarche* went on board the steamer "*Three Rivers*," having a list of the names of those men of the crew who were voters in this County, and asked some of them if they would go to *Berthier* to vote. He says he knew all these men, the friends as well as the enemies of the political party with which he was allied. Some of the men thus appealed to, said that they would not go to *Berthier* unless they were furnished with free passes over the railway. It appears that *Lamarche* then went to Mr. *Labelle*, the ticket agent of the Northern Railway, and applied for free passes for 17 or 20 men. These passes were furnished to him, being handed to him the same day enclosed in an envelope, by Mr. *Goodeve*, a clerk employed in the railway office. In my view of the evidence it appears very clearly established that these tickets were granted freely by the railway authorities; that they were not paid for by *Lamarche*, or by any one else, nor was it intended they should be paid for. *Lamarche* took these passes on board the steamer "*Three Rivers*" and left some of them with the captain, and gave others to men

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who were voters—and some 8 or 10 men went by the railway, travelling on these passes the same day to *Berthier*, and voted there the next day. It does not appear that *Lamarche* imposed any conditions upon those to whom he delivered passes, as to how they were to vote, or that he requested them to vote for the respondent, or made any enquiry of them as to their intentions with regard to the candidate for whom they were to vote. Upon this state of facts, two questions of law arise—1st. Was the furnishing of these railway passes or tickets to the voters in question a payment of travelling expenses within the 96th section of the Dominion Elections Act, 1874? 2nd. Did it constitute bribery or a corrupt practice, within the 92nd section of the same Act?

On both these questions I concur in the conclusions arrived at by the learned judge before whom this petition was originally heard, that *Lamarche*, in delivering these railway passes to the voters named, did not commit a corrupt act under either of these sections.

As regards section 96, by which "the payment by any candidate, or by any person on his behalf, of the travelling and other expenses of any voter in going to or returning from any election" is declared to be an unlawful act, and which, by section 98, is further declared to be a corrupt practice, and consequently an act avoiding the election by the express provision of sec. 102, it cannot apply for the plain reason that there was no payment of expenses. The tickets or passes are proved to have been granted gratuitously by the railway authorities and consequently all that was done amounted to just this, and no more—that the railway, at the request of an agent of the respondents, carried certain voters from *Montreal* to *Berthier* free of charge, and it cannot be contended that this is equivalent to a payment of

travelling expenses any more than the carrying of a voter to the poll by a third person in his own carriage, at the request of a candidate or his agent, could be said to come within this provision of the statute (1).

In order to bring a case within this 96th section, there must be a payment of money for the expenses. If money is paid by a candidate or his agent for the travelling expenses of a voter, I should not consider it material, in order to avoid the election within this 96th section, as distinguished from the case of section 92, that any condition was imposed upon the voter that he should vote for any particular candidate. The case would be within the words and spirit of the enactment if it could be shown that there was an actual disbursement made by the candidate, or his agent, for the purpose of paying any voter's expenses, regardless altogether of any stipulation or promise that his vote should be cast for a specified candidate. I repeat, however, that here there was no disbursement of money, and consequently there has not been, in this respect, the commission of any such corrupt act as involves an avoidance of the election under section 96. If, as in the *Bolton* case (2), the tickets had been paid for, or even agreed to be paid for by *Lamarche*, I should have considered that that would have amounted to a payment of travelling expenses and that consequently the election ought to be set aside.

When the *Bolton* case was decided the state of the law in *England* was such that the payment of travelling expenses did not avoid the election but was merely an illegal act, subjecting the person committing it to a penalty, and Mr. Justice *Mellor* in that case, although he decided that sending a railway pass which had been paid for and which entitled the holder of the pass to

(1) See per Alderson, B., *Cooper v. Slade*, 25 Jur., N.S., 330.

(2) 2 O'M. & H. 147.

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exchange it for a ticket, did not, having regard to the statutory provisions which then existed, avoid the election, was still of opinion that it was an illegal act within the statute; and this opinion, as I understand that case, was founded upon the fact of the pass having been paid for.

Then as regards section 92, it seems to me that the conclusion of Mr. Justice *Doherty*, and the reasons upon which that conclusion was founded, was upon the authorities also entirely correct. This 92nd section is as follows:—

> Every person who directly or indirectly, by himself, or by any other person on his behalf, gives, lends, or agrees to give or lend, or offers or promises any money or valuable consideration, or promises to procure, or endeavour to procure, any money or valuable consideration, to or for any voters, or to or for any person on behalf of any voters, or to or for any person, in order to induce any voter to vote or refrain from voting, or corruptly does any such act as aforesaid on account of such voter having voted or refrained from voting at any election.

Shall be deemed guilty of bribery and punishable accordingly.

This provision is a literal transcript of sub-sec. 1 of sec. 2 of the Imperial Act, 17 and 18 *Vic.*, c. 102, and consequently the English decisions upon this latter enactment are express authorities to guide us in applying this 92nd section of our own act. Then the question we have to decide here is narrowed to this: Did the giving of these railway passes or tickets to the voters named constitute a giving of valuable consideration to such voters to induce them to vote? That the giving of these passes or tickets by *Lamarche* was the giving of a "valuable consideration" within the meaning of the statute, I entertain no doubt. That a railway ticket is a token of value is plain, since it enables the holder of it to procure an advantage which, without it, he could only obtain by the payment of money. So far, there-

fore, the case is brought within the statute, and it is shown that a valuable consideration was given to voters by the respondents' agent, *Lamarche*. Is it, however, shewn that the case is brought within the other condition of the statute, which requires that the valuable consideration shall have been given "to induce such voter to vote?" Upon the construction to be placed upon these words, the decision must depend. Whatever doubt we might have felt in placing an interpretation upon this expression, if we had been called upon now to do so for the first time, we are relieved from any difficulty on this score by the decisions upon the corresponding Imperial enactment, which, being many in number and emanating from courts and judges of the highest authority, are conclusive of the present case, if any question of statutory construction can be concluded by authority. It is to be observed that there is nothing in the evidence to establish that *Lamarche* imposed any condition upon the voters to whom he gave the passes, that they were to vote for the respondent, or that he even invited or requested them so to vote, or to vote at all. It may indeed well be presumed that, from his constant and familiar intercourse with these men, he knew their political bias so well that he considered it superfluous to attach any such condition, or make any such request. Indeed, I gather from his expression, "*Je connais nos ennemis et nos amis*," that he admits this was the case. It does not not appear, however, that he witheld any tickets from any voters amongst the crews because he supposed they were adverse to his party, but that the tickets were given to all the men who had votes. These being the well established facts, the case of *Cooper* v. *Slade*, decided in 1856 in the Exchequer Chamber, is an authority conclusively showing that the conduct of *Lamarche*, in the present case, did not amount to an act

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of bribery within this 92nd section of the Act of 1874. It was there held that in order to make out a promise to pay, or the payment of travelling expenses, to be a promise, or giving of a valuable consideration, to induce a voter to vote within the words of the claim under consideration, it must be shown that such a payment or promise was conditional upon the voter voting for a particular candidate. This decision was approved of as regards the law by the House of Lords in an action brought to recover a penalty, and, the judgment of the House having been delivered by Law Lords of great eminence, it must be deemed conclusive of the law upon this point. In the judgment delivered in the Exchequer Chamber in this case of *Cooper* v. *Slade*, with which the House of Lords agreed, so far as the law and the construction of the statute and the meaning to be attached to the words, "induce a voter to vote," were involved, though it differed as to the application of the principles of law to the facts there proved in evidence, *Alderson*, B., lays down the law in the following words:—

> An unconditional promise of travelling expenses to a voter to go to the place of polling, with leave to him to vote or not, as and how he likes, seems to us certainly not a promise of money to induce the voter to vote, being neither a promise with that view nor directly calculated to cause it.

And *Williams*, J., who differed from the rest of the court, did so expressly upon the ground that the letter which had been written to the voter by the agents of the candidate was to be construed, not as an absolute, but as a conditional promise to pay the expenses—an opinion which was also that of the House of Lords. This case of *Cooper* v. *Slade* was followed in the case upon which the decision of the learned judge in the case now under appeal was founded, that of the petition

(1) 2 O'M. & H. 146.

for the Borough of *Bolton*, decided in 1874 by Mr. Justice *Mellor* (1), where it was held, upon state of facts undistinguishable from those before this court in the present case (with the single exception that there the ticket or pass sent to the voter had been paid for, whilst here it was granted by the railway company gratuitously), that the delivery of a railway pass to a voter to enable him to go to the poll free of expense, accompanied with a request to him to vote for the candidate by whose agent the pass was sent, was not, in the absence of any expressed condition that the pass was only to be used for the purpose of enabling him to vote for the candidate in whose interest it was furnished, bribery or a corrupt act, either at common law or within the statute. The principle of the decision in these cases is very clearly defined in the opinion of Baron *Channel* in *Cooper* v. *Slade*, in the House of Lords, and in that of Mr. Justice *Mellor* in the *Bolton* case, where he points out that a pass or ticket being given unconditionally, as the facts establish beyond dispute that the passes or tickets furnished by *Lamarche* were given in the present case, that there is no bargain or agreement at all that the voter shall vote in a particular manner, or that he should vote at all, that he may go to the poll and there refuse to vote, or vote against the candidate from whose agent he has received the ticket or pass, without being guilty of the breach of any obligation. I will quote a short passage from the judgment in the *Bolton* case, which appears to me to have a direct application here. The learned Judge says:—

> The voter was not bound by any other consideration than an honorable one, that is to say, this is sent to me that I may go to the poll. If I were to take advantage of the opportunity afforded by this ticket, not to vote, but to go to *Bolton* on my own business, or to

(1) 2 O'M. & H. 147.

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vote for the other side, I should be doing a shabby thing. That appears to me to be the only sort of obligation, something arising from the idea of honor or good faith, by which a voter receiving such a pass might be affected. But it is entirely free from that question which was the turning point in *Cooper* v. *Slade*. If he had voted for the other candidates, could they have recovered back the value of this pass from him? They could not. He was under no other obligation by accepting that pass than that which his own sense of honor might dictate; he was under no legal obligation whatever, and therefore it is not, in my opinion, within the case of *Cooper* v. *Slade*.

Every word of this is applicable to the facts in evidence here, and I am of opinion that the learned judge who heard this petition was entirely right in adopting the law as thus expounded by Mr. Justice *Mellor*, and dismissing the charge accordingly.

For the sake of distinctness, and in order that there may be no misapprehension of the grounds on which this opinion is founded, I think it right to add, though it may involve repetition, that had the tickets been purchased by *Lamarche*, and either paid for or agreed to be paid for, I should have considered the case as coming within the 96th section, which prohibits the payment of travelling expenses; and had the tickets been given to the voters upon the express condition or stipulation that they were to vote for the respondent, or had they promised so to vote, I should have thought the case within the principle of the actual decision in *Cooper* v. *Slade*, and so a corrupt act, avoiding the election under sec. 92.

It was forcibly argued by the learned counsel for the appellants, that although the railway authorities were not in any sense agents of the respondent, yet the granting free tickets by the managing officer of a government railway, or a railway company, was a practice so liable to abuse, and one which would open the door to such an overwhelming amount of undue influence, that we ought, on grounds of public policy, and irres-

pective of any identification of the railway authorities with the candidate, and in the absence of all proof of agency, to mark it with disapproval by setting aside the election upon that ground alone. To this argument I can only repeat the answer already given by the Chief Justice, that if we were to accede to this argument we should be making, not administering, the law, and that whatever grounds such considerations may afford for alteration of the law, that is a matter for the appreciation of the Legislature and not one which can influence the decision of the courts.

Chalut's Case.

The conduct of the respondent and his agents in this case seems to me entirely free from any taint of illegality. Mr. *Chalut* was a warm supporter of the respondent, and the chairman of his principal committee. He was asked to go to a parish at some distance to canvass and make arrangements for the election, and $20 were sent him by the respondent for his expenses, and $5 by Mr. *Tranchemontagne*, a member of the committee. I can see no objection to this. The money was not an unreasonable indemnity for the ex-expenses and the loss of time of a professional man—a notary—for some four days. It is not and could not have been pretended that it was a colourable payment, cloaking a bribe, and I know of no law which prohibits the *bonâ fide* employment of electors for lawful purposes incidental to the election. The case was rightly dismissed by the court below.

Coté-Rithier's Case.

It is sufficient to say, as the learned judge held, that there was no evidence of any agency to identify the respondent with any act of Mr. *Coté*, and it is matter of surprise that this case, decided on grounds so very plain and satisfactory as those on which it has been

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placed by Mr. Justice *Doherty*, should have been made the subject of appeal.

Maxwell's Case.

Strong, J.

It cannot be denied that the contents of the letter sent by *Daveluy* to *Maxwell* create a strong presumption that the money enclosed in it was intended, under color of paying for the entertainment of voters at a preceding provincial election, for the purpose of unduly influencing *Maxwell* and inducing him to support the respondent; in plain words, for the purpose of bribing him, and this presumption is not removed or weakened, but rather strengthened, by the extremely unsatisfactorily account which *Maxwell* gave of the transaction between *Daveluy* himself, and especially by his story about the account for butter and shingles, which is only put forward after the adjournment of the court has given him an opportunity of conversing with others. But the evidence wholly fails, in my opinion, to connect the respondent with the corrupt act of *Daveluy*, if we are to assume such an act as established. There is no proof of the agency of *Daveluy* himself. *St. Cyr*, though an agent of the respondent, as being a member of the committee, is not shown to have been privy in any manner to the purpose of *Daveluy*, or to have been cognizant of the contents of the letter in which the money was enclosed, or of the purpose for which it was designed. As to *Hénault*, his agency was a limited agency—that of a public speaker—and for his acts beyond those performed in that character the respondent cannot be made liable. No proposition in election law is better established than that an agent, who is not a general agent, but an agent with powers expressly limited, cannot bind the candidate by anything done beyond the scope of his authority. *Windsor* (1); *Dur-*

(1) 1 O'M. & H. 2.

ham (1); *Bodmin* (2); *Westbury* (3); *Blackburn* (4); *North Norfolk* (5); *Harwich* (6).

Hénault was a paid agent, not a voter, having no connection with the election or with the respondent beyond this, that he was brought from *Montreal* and employed to make a speech on the Sunday after mass at the church door at *St. Damien*. Anything he did in the course of this special agency would have bound the respondent, but everything done out of the line of his special employment as an orator can, on the authorities referred to, have no such effect. I therefore concur with Mr. Justice *Doherty* in the conclusion at which he arrived, in this as well as in the other cases, and I am of opinion that the appeal must be dismissed with costs. It is satisfactory to be able to come to this conclusion, as upon a consideration of the whole evidence, I am convinced that the respondent desired and did his best to ensure a pure election, and I cannot help adding that I think the learned judge who tried the petition should have dismissed it with costs, which is the only respect, either as regards the results arrived at in the court below, or the reasons given for those results, in which I find any ground for differing from the judgment appealed against.

FOURNIER, J.:

La pétition attaque l'élection de l'Intimé pour menées corruptrices pratiquées par lui-même et par ses agents. Le siège n'est pas demandé pour son adversaire. Aux accusations portées contre lui, l'Intimé a répondu par une dénégation générale.

Lors de l'audition de la cause, plusieurs de ces accusations ont été abandonnées comme n'étant pas suppor-

(1) 2 O'M. & H. 137.
(2) 1 O'M. & H. 119.
(3) 1 O'M. & H. 47.
(4) 1 O'M. & H. 199.
(5) 1 O'M. & H. 236.
(6) 3 O'M. & H. 69.

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tées par la preuve. Les pétitionnaires n'ont insisté que sur cinq cas de corruption comme légalement prouvés, mais l'honorable juge *Doherty* qui présidait au procès étant d'un avis contraire, a renvoyé la pétition avec dépens, par son jugement du 21 fevrier 1883. C'est de ce jugement qu'il y a appel à cette cour.

Le premier de ces cas est celui de *Lamarche*, accusé comme agent de l'Intimé d'avoir payé les dépenses de voyage de dix-neuf électeurs pour se rendre de *Montréal* à *Berthier*, à leurs polls respectifs. L'honorable juge en parlant du fait reproché à *Lamarche*, le qualifie de la manière suivante :

> That *Lamarche* gave passes from seventeen to twenty, and that he gave them to the voters referred to and that they travelled free on them from *Montreal* to *Berthier* to vote, and voted there is not and cannot be disputed.

L'honorable juge ayant reconnu que l'agence de *Lamarche* était prouvée, il est inutile d'analyser les témoignages pour faire voir que ce fait a été légalement constaté, d'autant plus que le conseil de l'Intimé a positivement admis devant cette cour que cette agence était prouvée.

D'ailleurs la preuve ne laisse aucun doute sur ce sujet.

Afin d'apprécier le véritable caractère de l'acte reproché à *Lamarche*, il est important de faire connaître le détail de ses entrevues avec les électeurs auxquels il a fourni des billets de passage.

Lamarche est conservateur et bien connu comme tel par la part active qu'il prend aux élections de son comté. Il demeure à *Berthier*, mais tient un bureau d'affaires à *Montréal* où il se rend tous les jours. Ayant été navigateur, il dit qu'il connaît tous les navigateurs. " Je connais *nos ennemis et nos amis.*" La veille de l'élection il se rendit à bord des bateaux à vapeur *Trois-Rivières*, *Chambly*, *Terrebonne* et *Québec* pour y voir les électeurs

de *Berthier* qui étaient employés à bord de ces bateaux. Il ajoute qu'il a toujours fait cette besogne dans les élections qui ont eu lieu l'été.

Il fit ce jour-là deux visites à bord de ces bateaux, la première entre neuf et dix heures du matin, pour s'assurer de la présence et des dispositions des électeurs qui se trouvaient à bord de ces bateaux, et la seconde vers une heure de l'après-midi pour leur donner les billets de passage qu'ils avaient exigés de lui lors de sa première visite pour aller voter.

D'après le témoin *Joly*, c'est entre 8½ et 9 heures du matin que *Lamarche* s'est rendu à bord du *Trois-Rivières.*

En arrivant, dit ce témoin, il a hâlé un papier ; il a nommé tous les voteurs à bord ; après qu'il a eu fini, il y a une couple de voteurs qui ont dit: "on aimerait à partir aujourd'hui ; si on ne part pas "aujourd'hui, on n'y va pas et on aimerait à avoir notre passage "pour aller et revenir, et on aimerait à aller chacun chez nous "avant d'aller voter." C'est tout ce que j'ai vu.

Q—Il avait une liste des électeurs qui travaillaient à bord, il les a appelés ?

R—Oui, monsieur ; il avait leurs noms sur un petit papier.

Q—Et tous les électeurs appelés sont-ils venus ?

R—Il manquait peut-être bien quelques-uns.

Q—Combien y en avait-il à peu près ?

R—Six à sept.

Q—Voulez-vous nous en nommer quelques-uns ?

R—Oui, monsieur: *Alfred Bruneau*, il y avait : *Dolphis Rocrais*

* * * *

Q—Ensuite ?

R—Il y en avait d'autres, je ne me rappelle pas de leurs noms là, mais je sais qu'il y en avait d'autres.

Q—Ils ont dit qu'ils voulaient avoir leur passage pour aller et revenir.

R—Oui, monsieur.

Q—Qu'est-ce que *Lamarche* a dit, là ?

R—Il a dit : "J'ai affaire à aller à bord d'un autre *steamboat*, je viendrai tous vous les apporter." Je n'ai pas connaissance quand il est revenu.

Q—Savez-vous si ces gens-là sont partis, toujours, pour aller voter.

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R—Oui monsieur.

Q—Vous dites que vous n'avez pas connaissance quand il est revenu ?

R—Non, monsieur.

Q—Quelle heure pouvait-il être quand il est venu dans ce temps-là ?

R—Entre huit heures et demie et neuf heures.

Q—Du matin ?

R—Oui, monsieur.

Q—Pour qui *Lamarche* cabalait-il ?

R—Il cabalait pour M. *Cuthbert.*

Q—Etait-il bien connu comme un partisan du Défendeur ?

R—Je pense que oui.

Q—Le saviez vous vous-même que c'était un partisan de M. *Cuthbert ?*

R—Il avait l'air joliment chaud.

Q—Dans toutes les élections précédentes où M. *Cuthbert* s'était présenté avait-il l'habitude de travailler ?

R—Oui, monsieur.

Q—C'est un partisan zélé, n'est-ce pas ?

R—Oui, monsieur.

Dolphis Rocrais est un de ceux qui sont allés voter avec un billet de passage fourni par *Lamarche.* L'extrait suivant de son témoignage, confirme le fait important rapporté par *Joly* que ce sont les électeurs qui ont demandé des passes pour aller voter lorsque *Lamarche* s'est présenté à bord des bateaux la première fois le matin ; qu'il est ensuite revenu pour leur apporter les passes.

Il s'exprime comme suit à ce sujet :

Q—Qui vous avait donné cette passe ?

R—C'est M. *Lamarche.*

Q—M. *Olivier Lamarche* ?

R—Oui.

Q—Quand a-t-il été vous donner cette passe ?

R—Je ne puis dire le temps.

Q—Est-ce la veille ou l'avant-veille de la votation ?

R—C'est la veille.

Q—Le matin ?

R—Il est venu à bord le matin.

Q—Qu'est-ce qu'il est venu faire le matin ?

R—Il est venu voir comment il y avait de voteurs à bord.

Q—Lui avez-vous parlé ?

R—J'étais auprès.

Q—Qu'est-ce qu'il a dit ?

R—Il a dit qu'il avait affaire à aller à terre.

Q—Quand il est venu pour demander les noms, comment a-t-il demandé cela et à qui parlait-il ?

R—A M. *Pagé* et à plusieurs autres.

Q—Qu'est-ce qu'il a dit ?

R—Il a demandé le nom des voteurs.

Q—Avait-il une liste à la main ?

R—Je ne peux pas dire.

Q—A-t-il demandé : un tel, un tel est-il ici, comment a-t-il demandé ça ?

R—Je sais qu'il a demandé les noms des voteurs.

Q—Les voteurs d'où ? de Chicago, de Québec, de la Chine ?

R—De Berthier.

Q—Qu'est-ce qu'ils ont répondu ?

R—Ils ont dit qu'il y en avait et ils sont venus ; pas tous.

Q—Plusieurs sont venus ?

R—Oui, d'autres étaient en avant.

Q—Qu'est-ce qui s'est dit, ont-ils parlé de billets de passage ?

R—Ils ont demandé des passes ?

Q—Qui a demandé ces passes ?

R—Quelqu'un de nous.

Q—Pour aller et revenir ?

R—On a demandé des passes pour descendre.

Q—Qu'est-ce que M. *Lamarche* a dit ?

R—Il a dit : je vais aller à terre, j'ai d'autres affaires, et il nous a laissés comme ça. Ensuite il est revenu, il s'en allait midi, je crois, il nous a apporté des passes. Premièrement, il a été au salon et ensuite il nous a donné nos passes.

Dolphis Massé confirme les mêmes faits :

Q—Qu'est-ce que vous a dit le capitaine *Duval* quand il vous a donné cette passe-là ?

R—Premièrement, M. *Lamarche* est venu à bord demander quels étaient les voteurs qu'il y avait dans le *Steamboat*, moi-même, je lui ai nommé des gens que je connaissais qui avaient droit de vote ; il a marqué les noms, et il a monté en haut au salon ; il a demandé au capitaine *Duval* la permission d'avoir les voteurs ; le capitaine a dit : avec plaisir, je ne puis pas refuser cela ; ils sont maîtres d'aller pour qui bon leur semblera ; de sorte que M. *Lamarche* a parti ; il est allé à terre, et je n'ai pas vu rien de plus.

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Q—Il a vu les électeurs ?

R—Pardon ; il a eu la permission du capitaine, et il est venu à bord dans l'après-midi ; il a monté au salon ; il est venu trouver le capitaine ; il a vu plusieurs des gens qui sont ici présents et qui ont été entendus comme témoins. Je n'ai pas vu donner les passes moi-même, mais au moins il a monté en haut, et il a donné des passes au capitaine. J'en ai eu une qui venait du capitaine. Je ne peux pas dire si elle venait de M. *Lamarche* ou de d'autres ; mais je l'ai eue du capitaine.

Q—A-t-il été question de passes devant vous quand *Lamarche* est venu ?

R—La question des passes, je ne puis pas dire rien à l'égard des passes des autres. J'entendais dire que plusieurs désiraient en avoir, mais je ne peux pas dire rien de plus.

Octave Parent constate aussi le fait des deux visites de *Lamarche* de la manière suivante :

Q—Avez-vous vu M. *Olivier Lamarche* ce jour-là ?

R—Oui, monsieur.

Q—Eh bien, dans quelle occasion et à quel propos, l'avez-vous vu ?

R—Je l'ai vu au *gangway* de l'arrière qui s'informait des gens qui avaient droit de vote, et il appelait leurs noms.

Q—Il avait une liste ?

R—Celui qui était là, il avait un petit morceau de papier et celui qui se trouvait présent, il disait : il est ici.

Q—Ensuite ?

R—Il m'a demandé : Vas-tu voter ? J'ai dit oui. Il a dit : Si tu veux aller voter, je vais aller te chercher une passe. Je lui ai dit : C'est bien correct. Dans l'après-midi, il est venu avec une passe, ou un *ticket* ; c'était pareil à celui qui est exhibé ; je puis vous la montrer.

Joseph Pagé parle aussi de la visite du matin—mais il commet une erreur évidente en disant que c'est alors qu'il a eu sa passe :

Q.—Dites à la Cour dans quelles circonstances et où il vous a donné cette passe.

R.—Il est venu le matin à bord du steamboat le *Trois-Rivières*, il m'a demandé si je descendais ; j'ai dit : oui ; il a dit : " Voilà une passe si tu veux descendre, descends." J'ai descendu.

Q.—Aviez-vous besoin de cette passe-là pour descendre ?

R.—Eh bien ! je pense que oui.

.....

Q.—Vous connaissez bien M. *Lamarche* ?

R.—Oui, on a été élevés ensemble ici.

Q.—Il avait une liste, je suppose, avec le nom des électeurs ?

R.—Oui, je lui ai vu une liste.

Q.—A-t-il demandé des informations pour savoir si un tel et un tel étaient à bord ?

R.—Oui, je le lui ai dit.

Q.—Vous lui avez donné les noms des électeurs de *Berthier* qui étaient à bord ?

R.—Oui, de ceux que je pensais qui avaient droit de voter.

Q.—Il les a tous vus ces électeurs-là ?

R.—Oui.

Q.—Et il leur a donné une passe comme à vous ?

R.—Je pense bien que oui ; ils ont tous descendu.

Dans son témoignage, *Lamarche* dit qu'il est allé deux fois à bord des bateaux pour y voir les navigateurs qui étaient électeurs ; il y est d'abord allé le matin et y est ensuite retourné dans l'après-midi vers une heure ou deux. C'est après sa première visite aux bateaux qu'il a vu M. *Labelle*, l'agent des billets (*ticket agent*) du chemin de fer Q. M. O. & O., pour se procurer les billets qu'il a remis aux électeurs.

Tous ces témoignages établissent d'une manière certaine que *Lamarche* est d'abord allé aux *steamers* une première fois pour s'assurer du nombre de voteurs qu'il y avait et de leurs dispositions à aller voter. Les connaissant tous d'avance et depuis longtemps des conservateurs comme lui-même, il n'a pas eu, paraît-il, le trouble de les solliciter de voter pour son candidat, l'Intimé, car ils étaient eux-mêmes de ses partisans, bien disposés à voter, mais à une condition cependant, celle d'avoir leur passage pour aller et revenir. C'est la première chose dont on l'informe, comme le rapporte le témoin *Joly* : " On aimerait à partir aujourd'hui ; " si on ne part pas aujourd'hui on n'y va pas, et on " aimerait à avoir notre passage pour aller et revenir, " et on aimerait à aller chacun chez nous avant d'aller " voter." Ils ont demandé des passes, dit *Rocrais*.

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"J'avais besoin de cette passe-là pour descendre," dit *Pagé*.

Ainsi renseigné sur la disposition de ces électeurs de ne pas aller voter à moins d'avoir leur passage gratuitement, *Lamarche* se rend auprès de M. *Labelle*, le preposé à la vente des billets de passage (*ticket agent*) sur le chemin de fer Q. M. O. et O., alors la propriété du gouvernement de *Québec* qui l'exploitait pour son propre compte.

Lamarche rapporte comme suit son entrevue avec M. *Labelle*:

Q—Vous n'avez pas eu besoin de demander d'autorisation, il vous les a accordés de suite?

R—Oui, quand je suis allé au bureau de M. *Labelle* je lui ai dit que j'avais vu M. *Lamère* et que je lui avais demandé de laisser descendre les navigateurs. Je lui ai dit que M. *Lamère* leur donnait la permission de venir voter. Quand je lui (M. *Lamère*) ai demandé cela il ne m'a pas demandé si c'était pour M. *Cuthbert* ou M. *Sylvestre*. Je lui ai dit: Je voudrais les avoir pour venir voter. Il m'a dit: c'est malaisé, il faudra que vous vous arrangiez avec le capitaine, il faudra qu'il les remplace par les matelots du *Chambly*. Tâche de voir le capitaine *Lamoureux* et le capitaine *Duval* pour qu'ils s'arrangent. Je les ai vus et le capitaine *Lamoureux* du *Chambly* a promis des hommes au capitaine *Duval* du *Trois-Rivières* si ce dernier allait faire son voyage de plaisir le lundi soir.

Ensuite, c'est alors que je suis allé au bureau de M. *Labelle*. Je lui ai dit qu'il me fallait des passes et il m'a dit: "combien t'en faut-il? Je lui ai dit: dix-sept à vingt. Il m'a dit: "tu reviendras tantôt." Je suis repassé, j'allais voir M. *Wurtele* pour avoir deux hommes qui devaient venir voter; il y en avait un qui était employé sur le chemin à l'*Epiphanie*. Il m'a dit: tout ça sera arrangé. M *Grondines* m'a dit: vous avez une lettre ici pour vous.

Cettre lettre contenait les passes ou billets demandés. A l'argument l'Intimé a prétendu que ces passes avaient été données gratuitement. Il est vrai que *Lamarche* n'a rien payé pour les obtenir; mais en examinant les passes on voit de suite que ce sont des billets de passages ordinaires faits dans la forme suivante:

QUEBEC, MONTREAL AND OCCIDENTAL RAILWAY.

ONE FIRST CLASS PASSAGE.

Special.

From Hochelaga to Berthierville and Return.
In consideration of the *reduced rate* at which this ticket *is sold*, it will only be valid until 22nd June 1882.

L. A. SENECAL,
General Superintendent.

Form E.R.—5708.

A leur face il appert que les billets ont été vendus quoique à un taux réduit, et la preuve établit que la valeur de ces billets était de $1.50 chaque.

Ce fait constitue-t-il une violation de la section 96 de l'acte des élections de 1874 ? Cette section défend le louage de voitures pour le transport des électeurs aux polls, le paiement des passages de chemin de fer ou autres dépenses des voteurs, par un candidat ou ses agents et déclare tels actes illégaux et punissables d'une amende de $100. La section 98 met en outre ces actes au rang des menées corruptrices.

Dans le cas actuel il y a une preuve *primâ facie* du paiement des billets de passage en question. C'est celle qui résulte des billets eux-mêmes comportant la déclaration qu'ils ont été vendus à prix réduits. *Lamarche* dit bien qu'il n'a rien payé lui-même, mais comme ils ne lui sont parvenus qu'après avoir passé en diverses mains, il n'est pas en état de dire s'ils ont été donnés ou remis en échange du prix ordinaire. L'agent des billets, *Labelle*, n'ayant pas été appelé comme témoin, on ne doit point présumer contre la preuve faite par les billets, qu'il les a donnés sans en recevoir le prix. D'autres partisans que *Lamarche* ont pu en payer le prix. *Labelle* lui-même, s'il ne l'a pas reçu de quelqu'un a dû sans doute s'en charger puisqu'il les a vendus, ainsi que les billets le comportent. Il est donc certain que ces billets ont été vendus, bien qu'on ne sache pas par qui ils ont été payés. Toutefois, d'après la preuve il n'est pas possible de dire qu'ils ont été donnés. Pour

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en arriver à cette conclusion, il aurait au moins fallu faire entendre *Labelle* pour constater qu'il n'a reçu de personne le prix des passages en question, et qu'il était autorisé à faire de pareilles libéralités. En l'absence d'une telle preuve on doit présumer que *Labelle* n'a livré les billets qu'après en avoir reçu le prix, ainsi que les billets en font foi.

En conséquence je considère la preuve faite comme étant suffisante pour constater que le paiement des passages de chemins de fer de ces 17 ou 20 voteurs a été fait en contravention à l'acte des élections de 1874. Ce paiement étant, par la section 98, mis au rang des menées corruptrices, doit entraîner la nullité de l'élection.

Si *Labelle* a donné les billets et s'il avait le pouvoir de le faire, on n'aurait sans doute pas manqué d'en faire la preuve Aucune tentative à cet effet n'a été faite. Si les billets ont été donnés sans autorisation, ce serait un détournement frauduleux commis au détriment du gouvernement, propriétaire du chemin de fer, et le prix lui en serait dû par *Labelle* aussi bien que par ceux qui en ont profité. En admettant même qu'il n'ait rien été payé et qu'il ne soit rien dû pour ces billets, leur remise aux électeurs en question et dans les circonstances particulières ci-dessus rapportées, ne constitue-t-elle pas une violation de la section 92 de l'Acte des Elections de 1874 ?

Le premier paragraphe de cette section est ainsi conçu :

> Every person who directly or indirectly, by himself, or by any other person on his behalf, gives, lends, or agrees to give or lend, or offers or promises any money or valuable consideration, or promises to procure, or endeavour to procure, any money or valuable consideration, to or for any voters, or to or for any person on behalf of any voter, or to or for any person, in order to induce any voter to vote or refrain from voting, or corruptly does any such act as aforesaid on account of such voter having voted or refrained from voting at any election.

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Sur ce point de la cause, en prenant pour vrai que les billets en question ont été remis gratuitement, l'honorable juge *Doherty* s'exprime ainsi :

This proposition raised the question which has not, so far as I know, been as yet extensively discussed in the trials of election cases : as to whether a railroad pass given *gratis* and unconditionally to a voter to go to vote, is, within the meaning of the sec. 92 sub. section 1, " a valuable consideration " or of any such value as would support a promise.

Se fondant sur l'autorité du juge *Mellor* dans la cause de *Bolton* (1) l'honorable juge *Doherty* en vient à la conclusion que des billets donnés comme l'ont été ceux dont il s'agit ne constitue pas une valable consideration (*valuable consideration*) suivant l'intention de l'acte des elections.

Dans cette cause, il s'agissait de savoir si le paiement des dépenses de voyage des voteurs constituait un acte de corruption.

Une circulaire conçue dans les termes suivants avait été adressée à des électeurs :

CROSS AND KNOWLES', COMMITTEE ROOMS,

2nd February, 1884.

DEAR SIR,—Your name being on the list of Parliamentary voters for this borough, you are entitled to vote at the forthcoming election We inclose you a railway pass, on presenting which at the railway station named you will be furnished with a railway ticket to convey you to Bolton and back again. I trust you will be able to make it convenient to come over and record your vote in favor of Messrs. *Cross* and *Knowles*.

Les pétitionnaires prétendaient que l'envoi de cette lettre et des passes de chemin de fer constituait soit un acte de corruption, conformément à la doctrine consacrée par la Chambre des *Lords* dans la cause de *Cooper vs Slade*, soit encore un acte de corruption en contravention à la sec. 2 de l'acte des menées corruptrices de 1854 ; et 2° que si ce n'était pas un acte de cor-

(1) 2 O'M. et H., p. 147-8-9.

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ruption que c'était dans tous les cas un acte illégal qui, ayant été volontairement et systématiquement fait dans le but d'influencer l'élection, devait avoir l'effet de la faire déclarer nulle.

Il serait inutile de rapporter les arguments faits par l'honorable juge pour établir une distinction entre cette cause et celle de *Cooper* et *Slade* dont il admet la doctrine. Il suffit de dire que suivant son interprétation la circulaire dans cette cause ne faisait pas comme dans celle de *Cooper* et *Slade*, de la remise des passes une condition du vote, et que dans son opinion les passes ne pouvaient pas être considérées comme une considération valable (*valuable consideration*) suivant l'intention de la section 2 de l'acte des menées corruptrices. Ayant écarté ces deux objections, il lui restait à décider si le paiement des dépenses de voyage des électeurs qui n'était alors, d'après la loi impériale, que simplement traité comme un acte illégal, punissable par amende, pouvait avoir de plus l'effet d'entraîner la nullité de l'élection.

L'honorable juge, après avoir fait l'historique de la législation impériale au sujet du paiement des dépenses de transport des voteurs, et bien clairement constaté que la loi anglaise en déclarant ce paiement illégal n'en avait pas fait une menée corruptrice, qu'elle avait soigneusement évité d'en faire la déclaration (1), conclut en ces termes :

> I agree with the opinion of the late Mr Justice *Willes;* he was decidedly of opinion that a violation of an Act of Parliament which itself created the offense and provided the penalty could not avoid the election; all it did was to inflict penal consequences upon the persons who did the act.

Cette dernière proposition est certainement correcte, et la conclusion à laquelle en vient l'honorable juge que le paiement des frais de transport des voteurs

(1) 2 O'M. et H. 149.

tout en étant illégal ne pouvait avoir l'effet d'entraîner la nullité de l'élection et qu'il ne constituait pas une menée corruptrice ayant cet effet, est en stricte conformité à la loi anglaise. Mais c'est faire une étrange confusion et méconnaitre complètement l'état de notre propre législation sur le même sujet que de vouloir faire application à la présente cause des principes de la décision rendue par l'honorable juge *Mellor*, en conformité de lois différentes.

Au contraire de la loi impériale notre acte d'élection, de 1874, déclare positivement que le paiement du transport des voteurs, est une menée corruptrice. La section 96 déclare comme suit:

And whereas doubts may arise as to whether the hiring of teams and vehicles to convey voters to and from the polls, and the paying of railway fares and other expenses of voters, be or be not according to law, it is declared and enacted, that the hiring or promising to pay or paying for any horse, team, carriage, cab, or other vehicle by any candidate or by any person on his behalf to convey any voter or voters to or from the poll, or to or from the neighbourhood thereof, at any election, or the payment by any candidate, or by any person on his behalf of the travelling and other expenses of any voter, in going to or returning from any election, are and shall be unlawful acts.

Le reste de la section prononce une pénalité de $100 pour chacune de ces offenses, et la peine de déqualification contre tout voteur pour louage de voitures en contravention à cette section. La loi anglaise, comme notre section 96, a prononcé la peine d'amende contre ces offenses,—mais la nôtre est allée beaucoup plus loin;—par la section 98, elle a déclaré que les offenses énumérées dans la sec. 96 constitueraient des menées corruptrices, suivant l'intention de l'acte desélections. La sec. 98 déclare que:

The offence of bribery, treating, or undue influence, or any of such offences, as defined by this or any other Act of the Parliament of Canada, personation, or the inducing of any person to commit personation, *or any wilful* offence against any one of the six next

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preceding sections of this, Act shall be corrupt practices within the meaning of the provisions of this Act.

Il est évident, d'après la dernière partie de cette section que la section 96 se trouve sujette à l'effet de la sec. 98—et que partant tous les actes mentionnés dans cette dernière section, sont déclarés être des menées corruptrices. C'est ce qu'a décidé cette Cour dans la cause de l'élection de Selkirk, (1)

Comme on le voit notre législation ne laisse aucun doute sur la question de savoir si le paiement du transport des voteurs constitue une menée corruptrice. L'honorable juge *Mellor*, s'il avait eu à décider cette question d'après nos lois, n'aurait sans doute pas eu un seul moment d'hésitation à déclarer le contraire de ce qu'il a décidé correctement d'après la loi anglaise.

L'appelant essaie encore de tirer avantage de l'argument fait par l'honorable juge *Mellor* pour établir que la remise des passes ne pouvait pas être considérée comme une *valable considération* suivant l'intention de la sec. 2, acte de 1854—menées corruptrices, acte imp. Essayant de démontrer qu'il n'y avait pas en cela un acte de corruption, l'honorable juge dit à ce sujet :

It is difficult to see in what it can be a valuable consideration to a voter. The coming to vote and voting may be so deemed by the sender; he may think he may get value, but it is difficult to see what value the voter gets by a free pass to the poll.

L'honorable juge ne fait aucun raisonnement pour démontrer que la remise d'une passe n'est pas en réalité une valable considération ; et il faut avouer qu'il est difficile, pour ne pas dire impossible, d'en faire pour démontrer une pareille proposition. Il se borne à dire qu'il est difficile de voir quelle valeur reçoit le voteur par la remise d'une passe pour aller au poll. Ceci serait assez vrai si l'on fait abstraction des devoirs du voteur, si l'on considère que son intérêt matériel du moment, et que pour lui c'est un dérangement de ses affaires

(1) 4 Can. S. C. R. 494.

ordinaires, que c'est une perte de temps d'aller au poll pour laquelle la promenade qu'on lui fait faire gratuitement n'est pas une compensation, on peut alors dire comme l'honorable juge qu'on ne serait pas où est l'avantage du voteur. Mais si on se place à un point de vue plus élevé, si on considère que le droit de franchise accordé au voteur est un devoir de la plus haute importance qu'il doit exercer librement et sans aucune considération dans l'intérêt public; si on l'envisage au point de vue du principe énoncé par *Lord Mansfield*:

That one of the principal foundations of the constitution depends on the exercise of the franchise, that the elections of members of Parliament should be free, and particularly that every voter should be free from pecuniary influence;

on comprendra alors bien facilement quel avantage, valeur ou considération reçoit le voteur qui au lieu d'aller de lui-même, à ses dépens, enregistrer son vote, reçoit ses frais de transport sous la forme d'une passe. Deux voteurs voisins partent ensemble pour aller voter disons, comme dans le cas actuel, de *Montréal* à *Berthier*, l'un paie son billet dont le prix est de $1.50, l'autre a reçu d'un *Lamarche* quelconque une passe avec laquelle il fait le même voyage sans rien débourser. Par quel étrange abus du raisonnement peut-on dire que le dernier n'a pas effectivement reçu sous la forme de cette passe une valable considération au montant de $1.50. Cette passe pour lui avoir été donnée n'a-t-elle pas autant de valeur que le billet, n'en coûte-t-il pas autant à la compagnie du chemin de fer pour les frais du transport de celui qui a une passe gratuite que pour celui qui a un billet dont il a payé le prix. Tous deux reçoivent par leur transport un service de même valeur, avec la différence que l'un le reçoit gratuitement et que l'autre en paie le prix. Pour appuyer cette prétention si contraire au plus simple bon sens, on fait encore une comparaison qui n'a de valeur que par son manque

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absolu de justesse. C'est celle de comparer une passe de chemin de fer au service que rendrait un particulier se rendant au poll qui dépassant en route un électeur qui s'y rend à pied, lui offre de monter dans sa voiture pour faire ce trajet. Mais on oublie qu'il y a plus de points de dissimilitude que de ressemblance entre les deux choses comparées. Le particulier est absolument libre dans l'emploi de sa voiture ; il n'est sujet au contrôle de personne ; il peut la louer s'il le veut, en donner l'usage gratuitement il n'a de compte à rendre à personne. Il n'en est pas de même des administrations de chemins de fer, elles ne sont que des fidéicommissaires administrant la propriété des actionnaires, spécialement dans le but d'en tirer du profit ; leur administration est réglementée dans ses plus petits détails. Elles ne pourraient pas comme un particulier user généreusement de leurs moyens de transport, les mettre gratuitement à la disposition des électeurs, sans une autorisation spéciale à cet effet, à moins de forfaire à leur mandat. On ne peut donc pas comparer le fait du particulier qui prend en route un voteur dans sa voiture, avec le fait d'émission gratuite de passes par les compagnies de chemins de fer.

Il est inutile de faire remarquer à quels abus extraordinaires donnerait lieu l'admission de la doctrine que la remise de passes aux électeurs pour les faire transporter au poll n'est pas une valable considération constituant un acte de corruption, suivant le parag. 1er de la sec. 92, en même temps qu'une violation de la sec. 96, déclarée une menée corruptrice par la sec. 98. La décision de la Chambre des Lords dans la cause de *Cooper* et *Slade* est tout à fait applicable à la présente cause. La condition d'avoir des passes pour aller voter, quoique imposée à *Lamarche* par les électeurs eux-mêmes et acceptée par lui, n'en constitue pas moins une considération sans laquelle, il est clair, comme le disent

ces électeurs, ils ne seraient pas allés voter. Cette condition fait rentrer exactement le cas actuel sous l'effet de la décision de *Cooper* et *Slade*.

La question du paiement des frais du transport des voteurs au poll est déjà venu devant nos cours et a été déclaré dans la cause de *Hickson vs Abbott* (1) constituer un acte de corruption. La question a été soulevée dans les circonstances suivantes:

'A person had been furnished with a list of voters in *Montreal*, which he had given to one *Boswell* with instructions to see them. The respondent telegraphed him two names to be added to the list, and asked him to procure certain canvassers at *Montreal* and to send them to the county. This person sent to *Boswell* to obtain the canvassers, and gave him nine railway tickets to be furnished to them. *Boswell* seeing two persons on the platform whom he knew to be voters, *going up to vote*, gave to each of them one of the tickets. He returned two, but it was not proved what he did with the remainder.

Held: That under the circumstances *Boswell* was an agent of the respondent, and that the delivery of the tickets to the voters were corrupt and sufficient to avoid the election.

Dans cette cause de *Hickson vs Abbolt* on voit que non-seulement les voteurs comme dans le cas de *Berthier* étaient disposés à voter, mais qu'ils s'y en allaient de fait, *he knew the voters were going up to vote*. Malgré cela, la remise des billets de passage dont les électeurs n'avaient pas fait une condition, comme l'avaient fait ceux dont il s'agit en cette cause, fut considérée comme un acte suffisant de corruption. A plus forte raison doit-on conclure de la même manière lorsque la remise du billet a été exigée par le voteur comme condition pour aller voter. Dans la cause de *North Simcoe*, il a été décidé par l'honorable vice-chancellier *Strong*, maintenant membre de cette cour, que le paiement des dépenses de voyage des électeurs pour aller au poll et en revenir, était une menée corruptrice entraînant la

(1) 25 L. C. Jurist 290.

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nullité de l'élection. La loi d'*Ontario* sur laquelle cette décision a été rendue contenait la même disposition à cet égard que la loi fédérale.

Dans les deux derniers cas cités, il est vrai que la preuve du paiement des billets dans un cas et celle du paiement du prix d'un train de chemin de fer dans l'autre a été faite, mais la position du voteur n'était pas différente de celle de celui qui reçoit une passe gratuite. L'avantage dans les deux cas est le même, et en réalité il y a toujours paiement des frais de transport C'est aux dépens du candidat ou de ses agents lorsque le prix des billets est acquitté par ceux-ci, et aux dépens de la compagnie de chemin de fer lorsque le voteur est transporté au moyen d'une passe donnée par celle-ci, et dans tous les cas il y a un acte de corruption suffisant pour faire déclarer l'élection nulle.

Il y a un autre cas bien flagrant de corruption, c'est celui de *Maxwell*. Ce voteur, ordinairement partisan zélé et actif, avait manifesté de la mauvaise humeur et de l'indifférence dans l'élection dont il s'agit à propos d'une prétendue dette qu'il réclamait pour une élection antérieure. Deux jours seulement avant la votation, il reçut une lettre sans signature, contenant $25.00, et les seuls mots "envoyez fort vous et vos garçons." La lettre ne contenait aucune autre explication. La lettre et l'argent furent remis à *Maxwell* par le témoin *Hénault*, envoyé par le comité central conservateur de *Montréal* pour prendre part à l'élection, etc.

Sur invitation, il changea sa première destination et s'arrêta à *Berthier*. Comme le comité local du défendeur avait besoin de quelqu'un pour aller porter la parole aux électeurs de *St-Damien*, le lendemain, dimanche, on demanda *Hénault* pour remplir cette fonction. Ce doit être le président du comité, dit-il, qui lui fit cette demande.

Je me rappelle qu'on m'a dit quand je suis arrivé ici le soir, le samedi soir, la veille de ce dimanche, je ne connaissais personne dans le comité. Mais on m'a dit, je sais que les autorités du comité, le président ou un autre m'a dit : vous allez à *St Gabriel* et ensuite on m'a dit : vous irez à *St Damien*.

Il ajoute que ce sont les gens du comité qui lui ont dit cela et qu'on l'y a fait conduire en voiture.

Dans cette entrevue au comité, il se rappelle avoir vu M. *Tellier*, M. *Chalut*, des membres importants de ce comité, et le défendeur lui-même qui savait que *Hénault* allait à *St-Damien*. C'est au comité qu'il dit avoir reçu ses instructions et qu'on lui a dit qu'il devait aller à *St-Damien* représenter le défendeur et rencontrer suivant toute probabilité le sénateur *Guévremont*. *Hénault* avait en outre, le même soir, reçu de *St. Cyr*, un autre membre du comité, la commission de remettre personnellement, au nommé *Maxwell* de *St-Damien* une lettre en lui disant : " fais-y attention, il y a de l'argent dedans." La lettre avant d'avoir été remise s'étant trouvée décachetée dans ses poches, il a vu qu'elle contenait la somme de $25 et les mots rapportés plus haut : " Envoyez fort, vous et vos garçons."

Après s'être acquitté de la première partie de ses fonctions en adressant la parole aux électeurs de *St-Damien*, après la messe, il se rendit chez *Maxwell* et lui remit la lettre et les $25.00. Ce dernier joua la surprise, et dit en recevant cet argent qu'il devait y avoir erreur.—" Cà doit être une trompe," dit-il. Il a ajouté qu'il n'attendait d'argent de personne dans le moment. Sur les instances de *Hénault*, il prit l'argent en disant : " C'est bon, si c'est pour moi, je le garderai, et si ce n'est pas pour moi, je le renverrai, et il l'a gardé."

Dans son témoignage il donne plusieurs versions contradictoires pour expliquer l'origine de cet argent. Dans ses réponses comme témoin il dit que c'est de l'argent que *Daveluy* lui devait et qu'il lui a envoyé

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pour les dépenses de l'élection de M. Robillard; aussi pour une promesse de donner la majorité dans la paroisse et pour des dépenses faites chez lui. Ce n'est pas vingt-une piastres qu'il lui avait promis, c'était une récompense. *Hénault* lui a dit que c'était l'argent pour l'élection; mais il ne savait pas si c'était pour celle-là ou bien pour l'autre. Questionné de nouveau sur ce que *Hénault* lui a dit en remettant l'argent, il fait le récit incohérent qui suit :

R.—Il ne m'a dit rien que cela : " Voilà de l'argent que j'apporte pour les élections " ..... J'ai dit : " de l'argent pour les élections, j'en porte pas pour personne..... M. *Cuthbert* ne m'a jamais mis ou donné d'argent en mains "..... J'ai dit : " l'argent laissez-le en dépôt "..... Il a dit : " Ils m'ont dit de le laisser ici, je le laisse." Il a mis l'argent dans les mains de ma femme et il y est encore. Je n'ai pas promis une *cent* dans l'élection de M. *Cuthbert*, ni je n'ai donné une *cent* à personne.

Q.—Dans ce temps-là, vous prétendez qu'il vous était dû vingt-cinq piastres pour l'élection de M. *Robillard* ?

R.—Je ne vous dis pas qu'il m'était promis vingt-cinq piastres ; je vous ai dit qu'il m'était promis une récompense.

Par la suite de son témoignage on voit qu'il prétend qu'une promesse de récompense lui avait été faite par *Daveluy* dans une élection précédente entre *Robillard* et *Sylvestre*, et que c'est en exécution de cette promesse que les $25 en question lui avaient été envoyées. Il confirme cette assertion dans plusieurs autres parties de son témoignage.

Comprenant le danger d'une telle preuve, le savant conseil du défendeur fait de grands efforts pour faire admettre à *Maxwell* que ce devait être en paiement d'un compte que *Daveluy* lui avait fait remettre la somme en question. Malgré cela, *Maxwell* persiste toujours à dire que c'est pour une récompense promise. Il dit positivement qu'il n'avait rien vendu à *Daveluy* ; que *Daveluy* ne lui devait rien en dehors de cette promesse, ni pour provisions ni autre chose qu'il

aurait eu de lui. Il répète encore une troisième fois, positivement, que *Daveluy* ne lui devait rien. Mais chose extraordinaire, la cour s'ajourne pendant quelques instants, et de suite, *Maxwell* est approché par *Lamarche*, l'homme aux billets de chemin de fer, et après quelques instants d'entretien avec lui, il revient reprendre la suite de son témoignage dans lequel il contredit, avec une audacieuse impudence, tout ce qu'il vient de dire au sujet des $25. Après son entretien avec *Lamarche*, il demande à ajouter ce qui suit à son témoignage:

Quand j'ai dit dans mon examen que *M. Daveluy* ne me devait rien en dehors de cette promesse, je me suis trompé. Depuis que j'ai rendu mon témoignage je me rappelle, en effet, que *M. Daveluy* me devait une tinette de beurre de trente-sept livres et cinq ou six caisses de bardeau. Le tout évalué à vingt-deux piastres. Quand j'ai rencontré *M. Daveluy* il m'a demandé si j'étais content; mais ne m'a pas dit que l'argent qu'il m'avait envoyé était à cause de la récompense; c'est moi qui l'ai compris comme cela.

Les transquestions qui lui ont été soumises font voir que ce récit n'est qu'un tissu de faussetés qui mériterait plus d'être discuté dans une poursuite pour parjure que dans une contestation comme celle-ci. Quoi qu'il en soit, dans tout cet amas de faussetés, de contradictions et de mensonges qui forment son témoignage, *Maxwell* en a dit beaucoup plus qu'il ne faut pour prouver l'acte de corruption dont il s'est rendu coupable. Sur ce point je ne crois pas que les opinions de la cour soient partagées.

Il ne reste donc qu'à savoir si l'on peut en faire remonter la conséquence jusqu'au membre siégeant et si la preuve de l'agence est suffisante pour produire cet effet.

Les faits rapportés plus haut au sujet d'*Hénault* constatent amplement son agence. C'est de *St-Cyr*, un des membres du comité et partisan actif du défendeur, qu'il reçoit la lettre qu'il doit remettre à *Maxwell*, et du comité qu'il prend ses instructions pour aller soutenir

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les intérêts de la candidature du défendeur, à *St-Damien*, et à la connaissance de ce dernier. C'est encore dans le comité que le lendemain il reçoit ses instructions et ses documents pour aller représenter le défendeur à un poll dans l'Isle *Dupas*.

Il n'est pas possible de ne pas considérer *Hénault* comme agent du défendeur en appliquant aux faits de cette cause la doctrine énoncée au sujet de l'agence par le juge *Blackburn* dans la cause de *Taunton*. Après avoir fait observer que les règles concernant l'agence en matières parlementaires sont bien différentes de celles de l'agence d'après la loi commune. Il ajoute :

But in parliamentary election law, it has long been established that where a person is employed for the purpose of procuring his election, he, the candidate is responsible for the act of that agent in committing corruption, though he himself did not intend it, but even *bonâ fide* did his best to prevent it.

Quoique les faits établissent suffisamment que *Hénault* était un agent, si cependant on le considérait que comme un sous-agent, ses actes auraient encore les mêmes conséquences sur la validité de l'élection. Sir *William Ritchie*, le président de cette cour, a énoncé ce principe de la manière suivante dans la cause de *Cimon* et *Perrault* (1).

The law would indeed be childishly weak were it not able to reach the corrupt acts of a sub-agent. The law as to the employment of sub-agents seems to me very clear. A candidate cannot take the benefit of the services of the individual and repudiate them at the same time (1).

Mellor, J., dans la cause de *Barnstable*.

Les principes en matière d'agence électorale sont trop bien connus pour qu'il soit nécessaire de citer beaucoup d'autorités sur ce point. Il suffit de référer à celles contenues dans le factum des Appelants et à celles mentionnées dans les causes citées.

Comme il est impossible d'ajouter foi à l'explication

(1) 5 Can. S. C. R. 146.

donnée en dernier lieu par *Maxwell* que les $25 étaient en paiement d'un compte, et que l'on ne peut faire autrement que d'adopter sa première version tant de fois répétée que c'était en paiement d'une dette d'une élection précédente, il n'est pas douteux qu'un semblable paiement est un acte de corruption. Cette question a déjà été décidée bien des fois, et entre autres dans la cause de *North Ontario* (2), dans celle de *Coventry* (1) et aussi dans la cause d'*Argenteuil* (3.)

Sil eût eté possible de donner une explication de ce paiement qui n'eût pas été aussi compromettante que celle de *Maxwell*, le Défendeur eût sans doute fait entendre *Daveluy*. L'omission de faire entendre ce témoin forme une forte présomption que le fait en question ne pouvait pas être contredit. Cette doctrine est adoptée dans la cause de *Bewdley* (4) et dans celle de *Tewkesbury* (5). Il doit donc rester établi d'après les autorités que les $25 étaient pour payer une ancienne dette d'élection. Ce paiement n'eût sans doute pas été fait pendant l'élection qui était à la veille de se terminer, si l'on n'eût pas senti la nécessité de réveiller le zèle de *Maxwell*. Aussi c'est avec une espèce de cri de guerre qu'on lui remet cet argent: "Envoyez fort, vous et vos garçons."

Je n'ai aucun doute sur les deux points soulevés par ce cas ; je suis d'opinion que le paiement des $25, constitue un acte de corruption et que l'agence de *Hénault* est amplement prouvée.

Il reste encore deux autres cas, ceux de *Rithier* et de *Chalut*.

Dans le premier il s'agit des frais de transport d'un électeur au poll, je suis d'opinion que l'agence de *Côté* qui a fait l'engagement n'est pas suffisamment prouvée.

(1) Hodgins Election Cases, 341.
(2) 1 O'M. et H., 98.
(3) 26 L. C. Jur. 94.
(4) 44 L. T. N. S. 283.
(5) Même vol., p. 192.

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Quant au notaire *Chalut*, il s'agit d'une somme qui lui a été payée pour l'envoyer dans la paroisse de *Saint-Gabriel* pour organiser les partisans du défendeur. C'est comme cabaleur payé (*paid canvasser*) qu'il a été envoyé là. Il n'est pas prouvé qu'il ait fait aucun acte de corruption ou autre acte illégal quelconque pendant les quelques jours qu'il a passés dans cette paroisse à soutenir les intérêts de la candidature du défendeur. La section 73 de l'acte des élections autorise l'emploi de cabaleurs salariés,—mais dans le cas où le cabaleur est voteur il est déqualifié. C'est la seule peine prononcée par la loi. Dans l'élection de *Québec-Est* (1), on a mis en question la légalité de cette faculté qui mène fatalement à l'abus. On y avait employé un nombre assez considérable pour faire voir que l'emploi des cabaleurs était un moyen indirect de s'assurer le vote par une considération pécuniaire. Toutefois l'honorable juge *Meredith* qui décida la cause, quoique d'opinion qu'il y avait eu de l'imprudence dans l'emploi d'un aussi grand nombre de cabaleurs, ne crut pas qu'on s'était rendu jusqu'à l'abus. Mais comme il était évident, que l'emploi de cabaleurs salariés ne pouvait avoir que de mauvais effets, la législature de *Québec* a fait disparaître cette disposition de ses lois électorales. La législature d'*Ontario* en a fait autant. Cette disposition ne fait plus tache que dans les lois électorales qui, il faut l'espérer, feront bientôt disparaître la faculté d'employer ces personnages de caractère le plus souvent plus que douteux —ignorants, absolument incapables de traiter des affaires publiques, n'ayant presque pas d'autres armes que la calomnie—faisant la plupart du temps leur vile besogne la nuit—toujours hors la présence d'un adversaire et qu'on devrait proscrire comme n'étant que des calomniateurs à gage. Cependant cette disposition existant encore dans la loi fédérale, il était loisible au défendeur

(1) 1 Q. L. R. 295.

d'en prendre avantage, et comme son cabaleur *Chalut*, que je ne veux pas du tout comparer à ceux auxquels j'ai fait allusion plus haut, n'a fait aucun acte illégal en s'acquittant de sa mission, l'élection du défendeur ne saurait être aucunement affectée en conséquence de ce fait.

En terminant je veux ajouter une observation sur le principe que l'on a essayé d'établir dans cette cour, viz. :—qu'une fois qu'un juge en première instance a prononcé sur les faits, qu'il a rendu, comme on dit, son *finding* sur ces faits, qu'une cour d'appel ne doit pas renverser ce *finding*. Je crois qu'admettre ce principe est une violation directe du statut qui a créé cette cour. Le droit d'appel est sans limite sur le droit comme sur les faits, et il est du devoir de tous les juges d'examiner la preuve comme le juge de première instance et de rendre le jugement qu'ils croient que ce juge de première instance aurait dû rendre. Les juges de cette cour ne sont aucunnement liés par le jugement de la cour inférieure C'est une grave erreur, suivant moi, et c'est une erreur qui priverait un grand nombre de plaideurs de leur droit d'appel. Ce principe n'a jamais été énoncé comme il l'a été dernièrement, et je crois devoir protester contre une pareille doctrine qui tend à faire disparaître le droit d'appel dans le neuf-dixièmes des causes. Je dois ajouter cependant que lorsque le juge en première instance prononce sur la crédibilité d'un témoin, son appréciation du témoignage doit indubitablement prévaloir, car il a l'avantage d'apprécier le témoignage par l'apparence du témoin, son hésitation ou sa promptitude à répondre, et si, dans un pareil cas, le juge déclare qu'il croit un témoin plus qu'un autre, alors une cour d'appel ne doit pas intervenir, mais autrement, je le répète, je proteste contre l'admission d'une pareille doctrine.

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Having come to a conclusion with regard to the matter of the railway tickets supplied by *Lamarche* to seventeen or eighteen voters to go from *Montreal* to *Berthier* to vote which, to my mind, is sufficient to avoid the election under consideration in this case, I think it unnecessary to refer to the other corrupt practices charged. The fact of the agency of *Lamarche* was satisfactorily proved and admitted on the trial. Is then the giving of the tickets in the way they are shown to have been given by *Lamarche*, a corrupt act under statutory provision so as to avoid the election ?

They were issued at a reduced rate for going and returning, and are on their face *primâ facie* evidence that they had, or were to have, been paid for. The railway was then owned by the Province of *Quebec* and operated by a general manager under its government. They were issued by the ticket agent at the request of *Lamarche*. The latter had been at a previous election a supporter and active canvasser for the respondent, and was well known as such at the late election. He asked for the tickets to be made good from the day he applied for them until the evening of polling day. No names were inserted in them as is done in the case of free passes. This took place at the railway office in *Montreal* before polling day.

From the testimony of *Lamarche*, it appears that he saw the several voters who were sailors working on board of four steamers and obtained their consent to go to *Berthier* to vote on certain conditions hereinafter referred to. He subsequently obtained the consent of the masters of the steamers to the sailors going to *Berthier* to vote. He then obtained the tickets, and the parties, or the most of them, went to that place and voted, as we may assume, for the respondent. The

same thing, it appears, had been done at a previous elections, but if it was illegal the repetition must also be illegal. The first, then, that is told us about obtaining the tickets is what took place between *Lamarche*, and *Labelle*, the ticket agent. Neither the latter nor *Grondine*, who gave them to *Lamarche*, were examined, nor did the respondent, in his evidence, refer to them, or in any way negative payment for them. *Lamarche* says he did not pay for them, but there is nothing to shew that they were not paid for. *Lamarche*, then, having given them, and they being worth to each voter that used them about a dollar and a half, we must conclude that they were of value to that extent to the parties that got them. Although *Lamarche* did not pay for them, it does not follow that they were not paid for. He says he got them as he had done before, but without any explanation as to how, or upon what terms, they had been previously obtained. If they were gratuitously given, that could easily have been shown by *Labelle* or some other in the ticket office. If they had not been purchased it was easy to have shown it. When it was in the power of the respondent to have shown it, and he fails to do so, the conclusion should be that they were purchased. The presumption in the absence of any explanation is that they were paid for by, or charged to, some one. I think the onus was upon the respondent, to show that a public officer situated as *Labelle* was had assumed the responsibility of giving away the revenue of his employers. I do not mean to say that it might not have been shown that that officer acted by direction from those above him, but as far as the evidence upon the point goes,—and by that alone are our conclusions to be arrived at—before we reach the point that the tickets were given gratuitously, we must assume that *Labelle* had done a wrong to those in whose interest he was engaged. I think under the

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evidence I am not warranted in arriving at that conclusion. That they were not paid for must be an exception to the general rule, and if such an exception was made, it was for the respondent to prove it. In election cases, where attempts are so common to avoid statutory prohibitions, proof of such circumstances are more imperatively required. I am not, however, compelled to decide whether the tickets were paid for or not, as I view the law. *Lamarche* first ascertained how many were willing to go, and then he got a sufficient number of tickets for them. The greater number of the recipients, if not the whole of them, went to *Berthier* and voted. Would all, or any of them, have gone if they had not got them? and had not other conditions insisted on by the voters also been complied with? To see the effects and trace the results of the means adopted by *Lamarche* to secure the votes of the electors in question, I will refer to one of many statements in evidence. It may be alleged that he, when giving the tickets, did not make any condition as to the party for whom the parties were expected to vote. We have, however, the fact that *Lamarche* was actively engaged as the respondent's supporter at previous elections, and no doubt knew how these men had voted previously. His residence was at *Berthier* (although he had an office in *Montreal*), and he personally knew them, and no doubt had good reason to believe that every one of them that could be induced to go to the election, would vote for the respondent. His object would be gained if they were induced to go. When on board one of the steamers, the *Trois-Rivières*, he asked a certain number of the employés of that steamer to go to vote at that election. One of the witnesses (*Joly*) referring to *Lamarche*, says :—

Il est arrivé à bord du "Trois Rivières," en arrivant il a hâlé un papier; il a nommé tous les voteurs à bord; après qu'il a eu fini,

il y a une couple de voteurs qui ont dit: "on aimerait à partir aujourd'hui; si on ne peut aujourd'hui, on n'y va pas, et on aimerait à avoir notre passage, pour aller et revenir et on aimerait aller chacun chez nous avant d'aller voter."

It is shown that *Lamarche* agreed to those conditions. It appears also from the testimony of other witnesses that at least some of the parties would not have gone to vote but for the inducements offered by *Lamarche*. In the first place, that their passage by rail going and returning should be provided for free; that they should go the day they were spoken to, and that they should be permitted to remain over a day or more with their families at *Berthier*. *Lamarche*, in order to secure their votes, had to obtain leave from the masters of the steamboats for the absence of the men from their employment and to provide for their passage by rail, going and returning, as before mentioned. Votes were thus, we may assume, secured for the respondent that otherwise, we must also assume, he would not have received. The law by which we are to be governed in this case is to be found in sub-sections 1 and 3 of section 92, and in sections 96 and 98. Sub-section 1 is as follows:

The following persons shall be deemed guilty of bribery and shall be punished accordingly. Every person who directly or indirectly by himself or by any other person on his behalf, gives, lends or agrees to give or lend, or offers or promises any money or valuable consideration, or promises to procure, or to endeavour to procure, any money or valuable consideration, to or for any voter, or to or for any person on behalf of any voter, or to or for any person in order to induce any voter to vote or refrain from voting, or corruptly does any such act as aforesaid on account of such voter having voted or refrained from voting at any election.

Sub-section 3 is as follows:

Every person who directly or indirectly, by himself or by any other person on his behalf, makes any gift, loan, offer, promise, procurement or agreement as aforesaid, to or for any person, in order to induce such person to procure, or endeavour to procure, the return of any person to serve in the House of Commons, or the vote of any voter at any election.

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Section 96 is as follows:

And whereas doubts may arise as to whether the hiring of teams and vehicles to convey voters to and from the polls, and the paying of railway fares and other expenses of voters, be or be not according to law, it is declared and enacted that the hiring or promising to pay or paying for any horse, team, carriage, cab or other vehicle, by any candidate or by any person on his behalf, to convey any voter or voters to or from the poll, or to or from the neighborhood thereof, at any election, or the payment by any candidate, or by any person on his behalf, of the travelling and other expenses of any voter, in going to or returning from any election, are and shall be unlawful acts.

For the purpose of showing the applicability of the provisions of sub-section (1) to the circumstances in evidence in this case, it may be briefly read thus:

Every person who directly or indirectly, by himself or any other person on his behalf, gives * * * any money or valuable consideration * * * in order to induce any voter to vote or refrain from voting, shall be guilty of bribery.

It will be observed, and it is in the decision of this case necessary and of the utmost importance to observe, that in that provision there is no reference to any condition as to the party to be voted for. It is simply a provision against the doing of either of two things—first, the inducement to vote, and the other to refrain from voting. As I read the prohibition, it matters not whether the party offering the illegal inducement knew or cared how the influenced party would vote. It need not be done corruptly. The mere giving an inducement is the offence. The offence is consummated when a party is induced by any valuable consideration to vote, and the offer of the inducement is an offence, whether accepted or not. What, then, have we to try in this case? The fact of the inducement which caused the parties to go and vote, and the question as to their having done so through the means of a valuable consideration. I have already stated it as my opinion that we, under the evidence, should hold that the tickets in question were purchased at a reduced rate and paid, or

to be paid for, by some one in the interest of the respondent. Those tickets are as follows:

Special.

Quebec, Montreal, Ottawa & Occidental Railway.

One First-class Passage.

From *Hochelaga* to *Berthierville* and return.

In consideration of the reduced rate at which this ticket is sold, it will only be valid 22nd June, 1882.

(Signed), *L. A. Sénécal,*
General Superintendent.

Without some other evidence it might be alleged that although the tickets were issued in that form they were given by the ticket agent as *free* passes. We have, however, one of the free passes over that railway in evidence, which goes to show that the tickets were purchased. The specimen in evidence of the free passes issued is as follows:

Countersigned, *A. Davis.*

No. 19, *North Shore Railway* (which is another name for the same railway) *Aug.* 29, 1882.

Pass Mr. *A. Buron* from *Berthier* to *Montreal.* Why issued—on acc.of *Richelieu & Ont. Navig. Co.* Not transferable. Free passengers by the acceptance of this pass assume all the risk of accident to their person or property without claims for damages on the corporation. Void after Sept. 29, 1882. Good for one trip only.

A. Davis,
Superintendent.

FORM C.

Not transferable.

Any one looking at such a ticket would most irresistibly conclude it had been purchased, and there is nothing in the evidence to show that it was not. It is quite consistent with the statement of *Lamarche* that such tickets had been arranged about and paid for at the election in question, as well as at previous ones.

Compare, also, the terms of the tickets and those of the free passes. The first were transferable and entitled the travellers under them to seek compensation in case of a negligent accident. The latter were not transferable, and, therefore, only valuable to the party named in them, and the holder was prevented by its provisions from seeking compensation in case of an accident. The tickets represented money, as they could have been sold

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by any one who held them, and the right to travel under one of them would pass to the purchaser. If nothing was paid or to be paid for them, we should expect to have seen that free passes would have been issued by which liability would be limited. My reason for drawing attention to this distinction will be more obvious when I hereafter refer to the judgment of *Mellor*, J., in the *Bolton* case (1), when referring to a free pass. It is, however, contended that if the tickets were given by the ticket officer gratuitously to *Lamarche*, the latter not having paid anything for them, could legally make use of them in the way he is shewn to have done. They were undoubtedly of value to those to whom *Lamarche* gave them, in two ways: first, as a saleable article; and next, they enabled each holder to do without cost what he could only have done by paying a dollar and a-half. If in place of the tickets given by the ticket officer (as for this argument we may assume gratuitously), he or some one else had given *Lamarche* a sum of money, and that he had employed it in a way made corrupt by statute or Common Law, are we to consider how he got the money? He was the acknowledged agent of the respondent, and the latter is as to this inquiry, answerable for his acts; and, regardless how he got the tickets if they were of value, as they undoubtedly were, the offence consisted in the illegal disposition of them. We may be properly told that a candidate or any of his agents might give a seat in his carriage to a voter and drive him to the poll, and I might not possibly decide that the voter had received a valuable consideration within the terms of the section in question, but that is not the case under consideration. The section forbids any one, by a valuable consideration, to induce a party to vote or refrain from voting.

(1) 2 O'M. & H. 138.

I am decidedly of opinion that under the evidence we should assume the tickets in question were paid for, and by the use shown to have been made of them an offence committed against the provisions of section 66.

If, however, our conclusion in that respect should be in the opposite direction, I still am of opinion that an offence was committed under sub-section 2 before cited.

In the leading case of *Cooper* v. *Slade* (1) decided by the House of Lords in 1858, the question turned upon the construction of section 2, ch. 102, of the Imperial Act 17 and 18 *Vic.*, and of a letter given in evidence. That section is, in its provisions and language, identical with sub-section 2 before referred to, but the former has a proviso, not in sub-section 2, that it "shall not extend, or be construed to extend, to any money paid or to be paid for or on account of any legal expenses *bonâ fide* incurred at or during the election."

The letter was as follows:

SIR,

The mayor having appointed Wednesday next for the nomination and Thursday for polling, you are earnestly requested to return to *Cambridge* and record your vote in favor of Lord *Maidstone* and *F. W. Slade*, Esq., Q.C.

Yours truly,

Charles Balls,
Chairman.

Your railway expenses will be paid.

Nine out of the ten learned judges decided that the offer to pay the railway expenses of the voter was bribery under section 2 of the Imperial Act before cited. The decision rested upon the promise contained in the letter. It was written by a party for whose acts the candidate was responsible, and although the decision turned on the construction of the letter as embodying only a conditional promise to pay the travelling ex-

(1) 27 L. T. (N. S.) Q. B. 449.

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penses, I can find little or nothing in the language of the learned judges to show that if the promise had not been conditional the judgment would have been the other way.

Baron *Channell* said:

It is, in my opinion, unnecessary to decide whether prior to 17th and 18th *Vic.*, ch. 102, the *bonâ fide* payment of travelling expenses was illegal. Nor is it, in the view that I take of this case, necessary to decide, whether, since the act, a promise to pay travelling expenses is void within that statute, if unaccompanied by a condition that the person to be paid is to vote for the party promising to pay.

Baron *Watson*, referring to section 2 of the same Act, said:

It is not necessary that the voter should vote or even promise to vote, to constitute an act of bribery under that provision. It has been suggest that to bring a promise within the provision it must be a conditional promise to pay the travelling expenses if the elector vote for the promiser. It appears to me that it would be equally within the meaning of the act if the promise was unconditional, simply to pay money on the elector voting at all, inasmuch as the candidate may have a full reliance (perhaps erroneously) how the vote would be given, and that such promise would be an inducement to vote, whether conditional or unconditional.

Mr. Justice *Wightman* was, however, of the opinion (and I must say, contrary to the plain meaning of the words used) that the promise must be to induce the person to whom the promise is made, to vote for a particular candidate.

Coleridge, J., said:

This then was a promise of money in order to induce a voter to vote, and whether the payment of travelling expenses *per se* be legal or not, I am clearly of opinion that to promise to do so, in order to induce a voter to vote, is within the second section of the statute.

No other of the judges remarked specifically on the difference between a conditional and unconditional promise. The 98th section of the Dominion Act before mentioned makes the offences created by sub-section 2 corrupt practices to avoid an election. There is no such

provision in the Imperial Act before referred to, and under which the decision in *Cooper* v. *Slade* was given. I am, however, of the opinion that the decision of all the judges together in that case does not fully decide the question before us, as it was unnecessary they should do so, but I adopt the views of Mr. Justice *Watson*, before cited. I am induced to believe that the Dominion Parliament in enacting the provisions of sub-sec. 2 intended to provide for cases then unprovided for. To promise a voter money or other valuable consideration, provided he voted for a particular candidate, would, if he so voted, be bribery at common law, and by previous statutes the promise alone would have been bribery, and if made by a candidate or his agent, would have been cause for avoiding the election. We must assume the legislature intended to go further in the direction of removing improper influences against the perfect freedom of the voters, either to vote or refrain from voting. The legislation was, as I think, intended to prevent cases such as the present one. The policy is evidenced by the statutory provisions against the hiring of conveyances and the paying of the travelling expenses of voters. What difference in principle can be found between the paying for an ordinary carriage and the providing of railway tickets? When, therefore, we find from the legislative declaration against the use of undue influence in one direction, the policy of the legislature in respect to freedom from such influences, we have the right and it is our duty to construe other provisions enacted by the same legislature in a way to give effect to that policy. The 2nd sub-section should then be read in the light of that policy. It says, in so many words, that the giving of a valuable consideration to induce a party to vote shall be considered bribery, and by section 98 the election wherein it is given is avoided. Surely if the legislature meant the provision

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only to apply to cases of conditional promises, we would find it so expressed. In the case of *Cooper* v. *Slade* the declaration did not charge the offence as a promise founded on any condition, but simply on the charge of inducing the voter to vote at the election; and no objection was taken to the count on that ground. If the count had been open to that objection we have every reason to conclude that the learned Attorney-General and other eminent counsel for the defendant in that case would have raised it.

It is alleged, however, that the decision of Mr. Justice *Mellor* in the *Bolton* case before referred to (1) modifies to some extent the law as laid down in *Cooper* v. *Slade*, but I cannot find it to be so. In that case it was proved that letters with a railway pass were sent by an agent of the respondent to a number of voters who lived at a distance from the borough. The letter was as follows:

Cross and Knowles' Committee Rooms,
February 2, 1874.

Dear Sir,—

Your name being upon the list of parliamentary voters for this borough, you are entitled to vote at the forthcoming election. We enclose you a railway pass, on presenting which at the station named, you will be furnished with a railway ticket to convey you to *Bolton* and back again. I trust you will be able to make it convenient to come over and record your vote in favour of Messrs. *Cross* and *Knowles*.

The learned judge fully admitted the correctness of the law as laid down in *Cooper* v. *Slade*, but undertook to distinguish the two cases. He had, however, to decide upon the gift of a railway pass which he pronounced of no intrinsic value. It was not a railway ticket but a pass, upon the production of which at the railway office the party would obtain a ticket. It might not in that case have amounted to a valuable consideration, as it really was nothing more than an authority

(1) 2 O'M. & H. 148.

to get what was valuable—a railway ticket. If the ticket was not issued the candidate was at no expense, and it appears to me that it was that consideration that induced the judgment in that case. There was no promise to pay anything as in the case of *Cooper* v. *Slade*. After the decision in the latter case the Act 21 and 22 *Vic*, ch. 87 was passed, by which a candidate or his agent, "by him appointed in writing," might provide conveyance of any voter for the purpose of polling at an election. By a subsequent statute the provision was limited to county elections. The learned judge referred to sections 2 and 23 of 17 and 18 *Vic.*, the latter of which subjects a person who offends against either to a penalty only, but does not avoid an election. The learned judge referred also to section 36 of the Reform Act of 1867, which repeals the provision of the Act 21 and 22 *Vic.* ch. 87, as to boroughs, and decided that inasmuch as no legislative enactment provided for the avoidance of the seat, he declared the respondent duly elected.

The learned judge said:

> I do not say that a judge could act upon historical evidence when he found the words clear. Yet, when I am asked to decide that the words of the statute which enact that this should be deemed an illegal payment, should have a more extensive meaning than that, I look to the words to see whether they compel me to say so, and I come to the conclusion that they do not. Do they convey an inference to the contrary? I think they do.

He then stated the fact that a member of Parliament proposed an amendment to the bill that the providing for such conveyance should be a corrupt practice within the meaning of the Corrupt Practices Act, but that that was negatived. He was, therefore, dealing with a matter totally different under statutory provisions from that now under consideration. His decision was founded on two propositions—first, that the pass sent to the voter was of no absolute intrinsic value; and second, that had it been so, it was

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by law no cause for avoiding the election. The case before us is essentially different on both points. I have shewn that the tickets were of intrinsic value, and section 98 supplies what the learned judge found absent in the English statutes.

Looking at the whole of the Dominion legislation respecting elections, we may safely conclude that freedom to exercise the elective franchise, unaffected by any improper influence, was intended. There are influences which exert themselves that may or may not be legitimate, but which no legislation can prevent, but those that are prohibited should not be allowed to prevail. As far as I have been able to discover the policy of the legislation, in this country at least, it is not to provide for the return of a member by a majority of the votes in an electoral district, who may by any means be induced to poll their votes, not by a majority made up by the votes of those who, but for improper inducements, would not have voted at all, not of those who go to the polls at the expense of some other person—a candidate or one of his friends—but by a majority of those who, uninfluenced by such means, and who, at their own cost, be it great or small, go to the polling places provided for the purpose, and declare their uninfluenced choice. That such is the true policy, will not be questioned, and as I construe the election statutes which prohibit the giving of any valuable consideration to induce a voter to go to the poll to vote, and which provide that doing so shall avoid an election, I consider that it would be in direct opposition to that policy if we decide, under the circumstances in uncontradicted proof here, that the respondent was duly elected. I am, therefore, of the opinion that the appeal herein should be allowed, and the respondent declared to have been unduly elected, with costs.

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I adhere to the opinion already expressed by me more than once, that in these election cases, upon the trial of the matters of facts raised in which so much depends upon the manner in which the witnesses give their evidence—their intelligence—and the degree of credibility to be attached to each, we, sitting in appeal from the judgment of a learned judge, who having had the advantage of seeing and hearing the witnesses give their evidence, has passed upon the matters of fact, should never overrule his finding, unless (a thing which, when the evidence is wholly oral—not contained in any written document—it is difficult to conceive to be possible) the evidence is of such a nature as to convey to our minds an irresistible conviction that the finding of the learned judge upon those mere matters of fact is clearly erroneous. It may be that in some cases, upon reading the evidence as taken down, and without the light thrown upon it by the demeanor of the witnesses, I might arrive at a different conclusion from that arrived at by the learned judge, but that would afford no justification for my overruling—upon mere matters of fact—his judgment formed under advantages, which, sitting in appeal, I have not, and cannot have; but when the appeal is, or in so far as it is, upon a point or points of law, it is a different matter. Then it becomes my duty to express my opinion upon the law involved in the points appealed, according to the best and utmost of my independent judgment.

The points involved in this appeal (all other charges having been abandoned at the trial of the election petition) are comprised in four charges of specific acts of bribery and corrupt practices, alleged to have been committed by duly authorized agents of the respondent, supplemented by a general charge that each and every of those fraudulent, illegal and corrupt practices spe-

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cifically charged, were committed with the knowledge and actual consent of the respondent. The first of these charges, which is called the *Lamarche* case, in short substance, is to the effect that one *Olivier Lamarche*, a duly authorized agent of the respondent, with the knowledge and actual consent of the respondent, paid the travelling expenses and other expenses of a great number of electors of the electoral division of *Berthier*, to enable them to go to and return from the polling places, and among others, to nineteen named qualified electors of the electoral division of *Berthier*, by giving to each of the said persons a railway passenger ticket of the *Quebec, Montreal, Ottawa & Occidental Railway*, and other valuable consideration to pass them into the said electoral division to the polling places where each of the said persons had a right to vote, and that the said persons afterwards sold again the said railway passenger tickets, which they had so gratuitously received, and with a fraudulent, illegal and corrupt motive, and to induce them to vote for the said respondent, and from those sales have derived sums of money and other valuable consideration, which they have kept for their own exclusive use.

What is comprised in this charge, eliminating from it all superfluous and irrelevant matter, which the allegations of the re-sale of the railway tickets by the persons to whom they were given appears to me to be, is, I think, beyond doubt an offence charged as having been committed against the provisions of the 96th section of the Dominion Election Act of 1874, and the charge in substance is, that *Lamarche* being an agent of the respondent did, with respondent's knowledge and consent, pay the travelling expenses of the persons named in going to and returning from the place where the election was held, by giving to them respectively railway passenger tickets to convey them to and from

the polling places where they respectively had votes at the election, free of charge for such conveyance. The charge, however, was treated at the trial as comprising also an offence charged to have been committed against the provisions of the 92nd section of the Act, namely, as an act of bribery, and not merely an illegal act, as an act within the contemplation of the 96th section only is, and which by the 98th section is made what is called a corrupt practice as distinct from bribery. This construction is put upon the charge by force of the words in the sentence relating to the alleged re-sale of the railway tickets by the persons to whom they were given, wherein the railway tickets, (which the persons to whom they were given are alleged to have re-sold, and so not to have used at all for the purpose for which they are alleged to have been given), are described as having been received by them gratis and with a fraudulent, illegal and corrupt motive, and to induce them to vote for the respondent. Now, charges of corruption of this nature should, as it appears to me, be stated in these election petitions with the same preciseness and certainty as would be required in an indictment or in an action for penalties, in neither of which should a defendant be compelled to go to trial, or have a judgment pronounced against him upon a count containing two charges so distinct from each other, as an offence against the provisions of the 92nd section is from one against the provisions of the 96th section of the Act. The respondent has, however, raised no objection upon this head, but the charge has been treated at the trial of the election petition, and in the argument before us as a *single one*, but as one which it is competent for the petitioners to sustain as an offence against the provisions of one or other of the above sections in one or other of the alternative cases following, that is to say:—either, 1st, as an act of

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bribery committed by *Lamarche*, as the agent of the respondent, and with the actual knowledge and consent of the respondent; or 2nd, as an act of bribery committed by *Lamarche* in his character as agent for the respondent, but without the latter's knowledge or consent; or 3rd, as an illegal and corrupt practice, though not an act of bribery committed by *Lamarche*, as respondent's agent, with the actual knowledge and consent of the respondent; or 4th, as a like act committed by *Lamarche*, in his character of agent of the respondent, without the latter's knowledge or consent. A charge of such a many-faced and ambidextrous character, is well calculated, if permissible, to take a respondent at great disadvantage, but as no objection upon that head was taken on the respondent's behalf in the court below, I propose to treat the case as it was treated there. By the 96th section of the Dominion Election Act, it is enacted as follows :—

[The learned judge then read the 96th section (1).]

By the 98th section any wilful offence against this 96th section is declared to be a corrupt practice, and by the 101st any corrupt practice committed by any candidate, or by his agent, whether with or without the actual knowledge and consent of such candidate, shall avoid his election if he has been elected, and by the 102 section it is enacted, that if any candidate himself personally commit any corrupt practice, or if any person on his behalf, with his actual knowledge and consent do so, the candidate, besides having his election declared void if he has been elected, shall be incapable of being elected and of sitting in the House of Commons and of voting at any election of a member of the House and of holding any office in nomination of the Crown or of the Governor in *Canada*. The learned judge before whom the election petition was tried, has found, as matter of

(1) *Ubi supra* P. 143.

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fact, that there was no sufficient proof of hiring or promise to pay, or paying for any horse, team, &c., &c., as prohibited by the 96 section, or of the payment of travelling or other expenses of any voter in going to or returning from the election in question, nor of any unlawful act within the meaning of this section. "On the contrary," he says in his judgment:

I am satisfied from the proof and circumstances that the railroad ticket agent, with what degree of propriety it is not for me to decide here, gave the passes upon which the said voters went to the polls gratis, and that they were never paid for, nor promised to be paid for, and that the proof fails to bring the charge under this head of objection within the provisions of the said 96th section of the Act.

And he, therefore, found in favour of the respondent upon this charge, although he found, as matter of fact, also, that *Lamarche* was an agent of the respondent at the election. This finding of the learned judge upon a mere matter of fact, I cannot, sitting in appeal, venture to pronounce to be erroneous without violating the rule, by which, as I have said, I consider myself to be bound in cases of mere matter of fact. But, indeed, the finding of the learned judge is in strict accordance with the only evidence which was given upon the subject, which was that of *Lamarche* himself, who, if he is to be believed—and the learned judge has believed him—never paid or promised to pay for the tickets, but received them from the ticket agent by whom they were issued gratuitously, whether upon his own authority or upon the authority of a superior officer does not appear, and as the charge is that it was *Lamarche* who, as the respondent's agent, and on his behalf, paid the travelling expenses of the voters in question, *Lamarche's* evidence, if true, disproves the charge.

The charge, as framed, is somewhat peculiar. It is not merely that *Lamarche*, as respondent's agent and on his behalf, &c., paid the travelling expenses of the voters in question in going to or returning from the

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election, but that he did so by giving to each of the voters named a railway ticket to convey him to the polls. The giving of the railway ticket to the voters named is alleged as the mode by which *Lamarche* paid their travelling expenses, which tickets, as the charge alleges, the parties to whom they were given sold instead of using them for the purpose for which they were given. As, however, the learned judge who tried the case has found, as matter of fact, that *Lamarche* neither paid nor promised to pay anything for the tickets, and that they were given to him by the company's agent gratis, the conclusion of the learned judge upon the charge is well founded in law—that no offence within the provisions of the 96th section was proved. It was contended by Mr. *Mercier*, in his able argument before us, although no such point is made in the appellant's factum, that as the tickets upon their face purport to limit the time during which the tickets should be available, in consideration of the tickets having been issued at a reduced rate, a presumption is raised that the tickets were paid for by some one, which is not displaced by *Lamarche's* evidence. But the answer to this contention appears to me to be plain; that upon this charge the respondent is not concerned, whether the tickets were or were not paid for, if they were not paid for, or promised to be paid for, by the respondent's agent, *Lamarche*, whose conduct alone is involved in this charge. The respondent cannot be found guilty of corrupt practices committed by his agent *Lamarche*, nor can the election be avoided upon the suggestion of such a presumption. The presumption might arise in an action to which the company was a party; if in such action a question should be raised whether, in point of fact the tickets, were or were not paid for by some one other than *Lamarche*, but against this, respondent or his agent *Lamarche*, who is

charged with having paid for the tickets, the evidence of *Lamarche*, who swears that he did not pay for them but that they were issued to him gratis, if true, as the learned judge has found it to be, is conclusive. The law, as at present existing, does not prevent railway companies, if they please, gratuitously giving tickets which will pass passengers on their railway, even though they be given to voters going to vote at an election. If it be thought expedient to abridge the powers of railway companies in this particular, it is for the legislature to interfere, but there is nothing to prevent companies issuing tickets gratis nor in the form which they use for tickets which are sold at a reduced rate, and, in the presence of the testimony, upon oath, of the person to whom these very tickets were issued, that they were issued gratis, the presumption that they were not issued gratis, but were, in fact, paid for, if any such presumption be raised by the form of the tickets, is removed.

The finding of the learned judge upon the above charge, treating it as containing the allegation of an offence committed against the provisions of the 96th section of the Act, disposes, as it appears to me, of the whole charge. The learned judge, however, in his judgment, says as follows:

> But the petitioners contended at the argument that the passes given to the voters by *Lamarche* were things of value, and that they were given as a valuable consideration to induce the voters to vote for respondent at the election; thus *arguendo* contending that respondent, by his agent, had made himself amenable to the provisions of section 92, sub-section 1 of the Act, and thus that he was guilty of bribery through his agent within the meaning of said section. This proposition, (he proceeds to say,) raised the question which has not, so far as I know, been as yet extensively discussed in the trial of election cases: as to whether a railroad pass given gratis and unconditionally to a voter to go to vote is within the meaning of the section 92, sub- section 1, a valuable consideration, or of any such value as could support a promise.

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And after referring to the judgment of Mr. Justice *Mellor*, in the *Bolton* case (1), he says:

I am of opinion that the passes handed to these voters, unpaid for as *Lamarche* swears on cross examination, and presented to the voters under the circumstances proved in this case, do not constitute the valuable consideration to them contemplated and prohibited by the statute, and that the passes in question are not such considerations within the meaning and intention of section 92 of the Act, and I find that the petitioners have failed to establish the said first charge of bribery and corrupt practices against the respondent or his agent.

It is plain, to my mind, from this language of the learned judge, that he found, as matter of fact, upon a point as to which the most that can be said is that there was contradictory evidence, which however, it was for him to estimate, in the light of the value set by him upon the evidence of the respective witnesses, who gave evidence upon the point, that *Lamarche* gave the tickets to the several voters, without imposing upon them any condition, express or implied, to vote for respondent, and without requiring from them any promise that they would so vote. The question which, as the learned judge says, he had to decide was, whether a railroad pass given *gratis* and *unconditionally* to a voter to go to vote, is within the 92nd section. The manner in which he refers to the judgment of Mr. Justice *Mellor* in the *Bolton* case, which proceeded wholly upon the question whether the promise there relied upon was conditional or unconditional, confirms me in the view which I take of the judgment of the learned judge. He says:

Before seeing this authority, I felt inclined to say after much anxious consideration, that tickets, given as these in question were, were not valuable consideration in the sense of, or within the meaning of the Act; in my uncertainty upon this point, I need not say that I felt relief in finding authority so strong, and in the direction of my own inclination.

I must therefore regard the judgment of the learned

(1) 2 O'M. & H. pp. 147-8-9.

judge as finding that as matter of fact the tickets given by *Lamarche* were not given upon or subject to any condition, express or implied, that the voters to whom they were given should go and vote for the respondent, and as adjudging as a point of law that the tickets having been unconditionally given, no offence against the provisions of the 92nd section was proved. So regarding his judgment, the point which in my opinion we have now to decide is whether, assuming the matter of fact to be well found, the law as applied to that matter by the learned judge is correct; for the reason already given I cannot undertake to pronounce the finding of the learned judge upon the matter of fact to be erroneous. That the giving a railway ticket, whether purchased for money or obtained from a railway company gratis, by a candidate or any agent of his on his behalf, to enable a voter to go to and return from the polling place, and by the production of which to the train conductors he could go to and return from the polling place free of charge to himself, if it be given in order to induce the voter to whom it is given to vote for a particular candidate, is the giving of valuable consideration and bribery within the meaning of the 92nd section of the Dominion Act, I cannot entertain a doubt; but the law as laid down by the House of Lords in *Cooper* v. *Slade* (1), and followed in the *Bolton* case (2), establishes that to make a promise to pay the travelling expenses of a voter, bribery within the provisions of the English Act 17 and 18 *Vic.*, ch. 102, sec. 2, which are identical with the provisions of 92nd section of the Dominion Act, the promise must be qualified by a condition express or implied that the voter to whom the promise is made should vote for a particular candidate. The same principle, as it seems to me, must apply when instead of a promise to pay the travelling expenses of

(1) 4 Jur. N. S. 791. (2) 2 O. M. & H. 183.

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the voter, there is given to him a railway ticket for the express and *bonâ fide* purpose of relieving the voter from payment of any thing for his conveyance to and from the polling place, and which is of a nature that it can only be used by way of payment of travelling expenses as the railway tickets in this case were. The effect of *Cooper* v. *Slade*, as it appears to me, is, that in order to constitute the gift of these railway tickets, given for the mere purpose of passing the voters on the railway to and from their respective polling places, to be consideration given in order to induce the persons to whom they were given to vote, within the meaning of the 92nd section, the gift of the tickets must have been qualified by a condition express or implied that the voter should go and vote for a particular candidate. The gift of a railway ticket by which a voter could pass on the railway free of charge to himself must be regarded in the same light and considered in the same manner as the promise to pay travelling expenses. Assuming, therefore, that upon the appellants failing to prove such facts as would establish an offence against the 96th section of the Act, which the particular charge in question clearly alleges, it is competent for them to insist that the charge also sufficiently alleges an offence against the 92nd section, I am of opinion, that as the learned judge who tried the case has found, as matter of fact (as I understand his judgment as already explained), that the railway tickets given to the voters by *Lamarche* were clogged with no such nor any condition express or implied, the learned judge was quite right in concluding that no offence against the 92nd section had been established.

As to *Coté's* case, the learned judge has found, as matter of fact, that *Coté* was not proved to be an agent of the respondent, so as to affect the respondent with his acts. Upon this case it is sufficient to say

that I do not see enough to justify me in reversing the judgment of the learned judge upon this pure question of fact. The learned judge was also of opinion that assuming *Coté* to have been the respondent's agent, the act alleged in the charge was not proved. I have not thought it necessary to enter upon this point, as I do not feel justified in reversing the judgment of the learned judge upon the point of agency. The onus in these appeals is cast upon the appellants to satisfy me beyond all doubt that the finding of the learned judge upon the matters of fact is clearly erroneous, and this they have failed to do.

The third charge, which is called the *Hénault-Maxwell* case, in short substance, is, that during the election the respondent, through and by one *Joseph Hénault*, his authorized agent, gave money to one *Joseph Maxwell*, a qualified elector, in order to induce him to vote in favor of the respondent.

This case is certainly one pregnant not merely with suspicion, but with the conviction that corrupt conduct was committed by one *Daveluy*, who, however, was not called as a witness, and who, as the respondent swore, was not directly or indirectly authorized by him to act in any way as his agent, and the question we have to decide is, whether the respondent is to be affected, and his election is to be avoided, by the conduct which appeared in evidence of *Hénault*, the person named in the charge as the person by whom the bribery therein charged is alleged to have been committed.

This *Hénault* was nominated by the respondent's committee to go to a place called *St. Damien*, on the Sunday before the election, for the sole purpose of speaking in favor of the respondent at the church door after mass, where Senator *Guevremont* was expected to speak, and, as it seems, did speak in favor of the opposing candidate.

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At this time *Hénault* had no other duty or agency whatever on behalf of the respondent entrusted to him. The learned judge premises his finding upon this charge by stating what the evidence adduced before him upon the point was. He states the evidence of a witness named *St. Cyr*, thus:

On *St. Cyr's* way home from *Montreal* (to *Berthier* where he lived), on Saturday before the voting, *George Daveluy*, of *Montreal*, who is not otherwise shewn to have had anything to do with the election, gave him a sealed letter at *Hochelaga* to be forwarded to *Maxwell*, and on arriving at *Mile End* Station, *Daveluy* told him there was money in the letter and to pay attention to it. On *St. Cyr* arriving at *Berthier* the same forenoon, meeting *Lamarche* in the street, he asked him who was going to *St. Damien*, and that *Lamarche* told him it was a person named *Hénault*. He asked for *Hénault*, and gave him the letter, telling him that "it is a letter which was given to me for Mr. *Maxwell*. I am told there is money in it."

Again, the learned judge says:

There is no proof of agency on the part of *Daveluy*, and none at all of the part of *St. Cyr*, sufficient to compromise the respondent or to affect the election.

And again:

As to *Hénault*, this was his first visit to the division. He was a stranger there for aught that appears.

And again:

He arrived in *Berthier* the Saturday evening, the eve of his going to speak. He knew none of the committee. The president or some other of the committee told him, "You will go to *St. Gabriel* and then to *St. Damien*. He was sent to *St. Damien* to speak after mass. He did so and left the money with *Maxwell*, as stated, but did not in any way canvass or ask his vote. He returned to *Berthier* and represented the respondent at one of the polls on the next Tuesday under power of attorney to do so.

And again:

It is undoubtedly true that *Hénault* came to the division to speak, as he says, for the respondent. As a general agent or canvasser he would have been useless, as being a stranger. He knew nothing of the letter and money referred to until his arrival here (at *Berthier*).

There is no proof that the respondent or his committee knew anything of *Hénault* having such a letter.

And again:

The only proof of his agency, apart from his representing respondent at the poll on election day, is the fact that the committee sent *Hénault* the Sunday before the polling, evidently with the knowledge and consent of the respondent, to speak for him at the church doors at *St. Damien* after mass. This appears to be the only act done or part taken by him in connection with the election, except representing the respondent at the poll on the Tuesday as stated.

And the learned judge upon this evidence concludes thus:

After much consideration, I am of opinion that the committee, by sending him for this special purpose, did not make, or intend to make him respondent's agent to act as such generally at his own discretion; and that what passed between *Hénault* and *Maxwell* was entirely out of and beyond the scope of his authority from the committee, express or implied.

The letter handed to *Hénault* to be conveyed by him and delivered to *Maxwell* contained the sum of $25, and the sole words following, "*envoyez fort vous et vos garçons*," but was signed by no one.

That the money so sent by *Daveluy* to *Maxwell* constituted such corruption as to avoid the respondent's election if *Daveluy* had been an agent of the respondent, cannot, I think, admit of doubt, even if the money had been sent, as the learned judge seemed disposed to think, and as *Maxwell* swore, to pay for services corruptly rendered by *Maxwell* to Mr. *Robillard*, whose agent *Daveluy* was during an election which had taken place two years previously for the Local Legislature. It is impossible to disconnect the words "*envoyez fort vous et vos garçons*," from the respondent's election or from the payment of the money, although sent in payment of services rendered at Mr. *Robillard's* election for the Local Legislature. It may be that *Daveluy*, who was an agent of Mr. *Robillard*, as

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the candidate for the Local Legislature, of the party of which the respondent was the candidate for the Dominion Parliament, was himself a partizan of that party, although not an agent of the respondent, and that he had reason to know or suspect that the services of *Maxwell* and his boys would not be rendered for the respondent, if the old debt incurred by *Maxwell*, for like services rendered to Mr. *Robillard*, should not be paid, and that this was his motive for sending the money, but whatever his motive, the respondent could not be affected by his act, if he was not an agent of the respondent, and of his being such, as the learned judge has found, no evidence whatever was offered, and the charge against the respondent was rested wholly upon the contention that *Hénault* was guilty of bribery in delivering the letter with the money to *Maxwell*, and that the respondent is affected by this act of *Hénault*.

The learned judge has found as matter of fact, that neither the respondent or his committee knew anything of the sending of the letter. The act of sending it must, upon the finding of the learned judge, and the evidence, to be taken to have been the act of *Daveluy* alone, who was not attempted to be proved to have been an agent of the respondent. All persons made instrumental by *Daveluy*, in having the letter conveyed and delivered to *Maxwell*, must therefore be taken to have been *Daveluy's* agents. When he delivered the letter to *St. Cyr*, asking him to have it forwarded to *Maxwell*, and when *St. Cyr*, finding that *Hénault* was going to *St. Damien*, delivered it to him with directions to deliver it, he was acting in accordance with authority derived from *Daveluy*, from whom he had received the letter, and *Hénault*, by accepting the bailment, became the agent of, and his act in delivering it the act of, *Daveluy*. The fact that

Hénault was going to *St. Damien* upon a special limited agency on behalf of the respondent, could not make his receipt of the letter, addressed and sent by *Daveluy* to *Maxwell*, a receipt of it, in his, *Hénault's*, character of, and as, the agent of the respondent. If *Hénault*, when he delivered the letter to *Maxwell*, was wholly ignorant of its contents, such a proposition could not be entertained for a moment; so to hold would be contrary to every principle of justice, but his having become aware of its contents in the manner explained by him, whether such knowledge was acquired wrongfully or accidentally, cannot make any difference in this respect; for if upon receipt of the letter he became *quoad it*, the agent of *Daveluy*, for the purpose of conveying it and delivering it to *Maxwell*, he must have continued to be *Daveluy's* agent until that purpose should be fulfilled. His wrongful or accidental acquisition, before its delivery to *Maxwell*, of knowledge that *Daveluy* must have had a corrupt motive in sending it, could not constitute his act of delivering to *Maxwell* the letter which he had received upon a bailment so to deliver it, derived from *Daveluy*, to be an act done by *Hénault* in his character of special agent for the respondent, and by which, therefore, the respondent should be affected. *Quoad* the letter, *Hénault* must continue to hold it until he should deliver it in pursuance of the bailment upon which he received it, in the same character as that in which he had received it, namely, as the agent of *Daveluy*.

Neither the *Bewdley* case nor any of the other cases relied upon by the learned counsel for the appellants support the proposition contended for by them, that the respondent can be affected by an act of *Hénault* done by him in the character of agent of another person, and in pursuance of a bailment derived from that other

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with whom and whose conduct, as in this case, we must hold the respondent was in no wise connected.

The fourth and last case is the *Chalut* case As to this case there does not appear to me to have been any foundation whatever for the charge that the money given to Mr. *Chalut* was given to induce him to support the election of the respondent, and to vote for him within the sense and meaning of the statute. There cannot be entertained a doubt that the money given to this gentleman, who was president of the respondents committee, and one of the most zealous of his supporters, was given by way of remuneration for his travelling expenses to an outer part of the electoral division, and his services as a lawyer in organizing a canvass upon behalf of the respondent in such part of the division; a purpose in itself quite legal and proper. There is no pretence of anything illegal having been done by Mr. *Chalut* in pursuance of the commission intrusted to him; if there had been, the charge would have been presented in a different shape, but that it was given, as charged, for the purpose of corrupting Mr. *Chalut* there does not appear to be any foundation whatever, nor, therefore, any for calling in question the finding of the learned judge upon this charge.

I think that the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for appellants: *Mercier, Beausoleil & Martineau.*

Solicitors for respondent: *Lacoste, Globensky, Bisaillon & Brosseau.*

ALPHONSE POULIN .....APPELLANT; 1883

AND *Mar. 5.

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THE CORPORATION OF QUEBEC.....RESPONDENT. *Feb'y. 19.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR THE PROVINCE OF QUEBEC (APPEAL SIDE).

42 & 43 Vic., ch. 4, sec. 1 (P.Q.), construction of—Prohibition, writ of—Sale of liquors—Police regulation.

Under the authority of the Act of the Legislature of *Quebec*, 42 & 43 *Vic.*, ch. 4, sec. 1, a penal suit was, on the 20th of January, 1880, instituted against *P.* in the name of the corporation of *Q.*, before the Recorder's Court of the city of *Q.*, alleging that "on Sunday the 18th day of January, 1880, the said defendant has not closed, during the whole of the day, the house or building in which he the said defendant, sells, causes to be sold, or allows to be sold, spirituous liquors by retail, in quantity less than three half pints at a time, the said house or building situate, &c." *P.* was convicted.

A writ of prohibition, to have the conviction revised by the Superior Court, was subsequently issued, and upon the merits was set aside and quashed.

Held (Per *Ritchie*, C.J., and *Strong* and *Fournier*, JJ.),—That the provisions of the Provincial Statute 42 & 43 *Vic.*, ch. 4, ordering houses in which spirituous liquors, &c., are sold, to be closed on Sundays and every day between eleven o'clock of the night until five of the clock of the morning, are police regulations within the power of the Legislature of the Province of *Quebec*, and as the complaint was clearly within the Act, the recorder could not be interfered with on prohibition.

Per *Henry*, *Taschereau* and *Gwynne*, JJ., That the penalty imposed upon *P.* by the recorder was not authorized by the statute, even if such statute was *intra vires* of the Provincial Legislature, and that the prohibition was therefore rightly granted.

The court being equally divided, the appeal was dismissed without costs.

PRESENT.—Sir W. J. Ritchie, C.J., and Strong, Fournier, Henry, Taschereau and Gwynne, JJ.

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APPEAL from a judgment of the Court of Queen's Bench for the Province of *Quebec* (Appeal side). The following case was submitted to the Supreme Court of *Canada*;

"At its session of 1879, the Legislature of *Quebec* passed an Act containing the following enactments:

"Every person licensed or not licensed to sell by retail in quantities less than three half pints in any city, town or village whatsoever, spirituous liquors, wine, beer, or temperance liquors, shall close the house or building in which such person sells or causes to be sold, on any and every day of the week from midnight until five o'clock in the morning, and during the whole of each and every Sunday in the year; and during the same period, no person shall sell, or cause or allow to be sold or delivered, in such house or building, or in any other place, spirituous liquors, wine, beer, or temperance liquors, the whole under a penalty for each and every infringement of the present provisions, of a fine not less than thirty dollars and not exceeding seventy-five dollars and costs, and in default of payment of such fine, to an imprisonment for a period not exceeding three months in the common gaol of the district in which the said infringement occurred."

"On the 18th of January, 1880, the appellant was, and had been for some time before, keeping a restaurant within the limits of the city of *Quebec*.

"Being prosecuted by the respondent before the Recorder's Court of the city of *Quebec* for infringement of that statute, he pleaded to the jurisdiction of the court, and especially the unconstitutionality of the Act as being *ultra vires* of the Legislature of *Quebec*. He was, nevertheless, on the 17th of February, 1880, condemned to pay a fine of $40 and $1.65 costs.

"The appellant sued out and obtained a writ of prohibition to prevent execution of that judgment.

"It was proved in the case, that on the day mentioned in the conviction, viz., the 18th of January, 1880, the appellant was keeping a restaurant within the limits of the city of *Quebec*, where he used to retail spirituous liquors in quantities less than a half pint, and that, although the said day was on Sunday, he had not kept his establishment closed.

"On that proof the Superior Court quashed the writ of prohibition."

Mr. *F. Langelier*, Q. C., for appellant:

This appeal involves the decision of two questions of law: 1st. Can a local legislature pass a law prohibiting the sale of spirituous liquors on Sundays and at certain hours of other days? 2nd. Does the statute of *Quebec*, 42-43 *Vic.*, ch. 4, sec. 1, punish the selling only of liquors within the prohibited time, or also the opening of the establishment where they are sold.

1st. Can a local legislature prohibit the sale of spirituous liquors on Sundays and at certain hours of other days?

It is now beyond all doubt that local legislatures cannot totally prohibit the sale of such liquors. This court, in the case of the *City of Fredericton* v. *The Queen* (1), has laid down as a rule. 1st. That the power to enact such a prohibition cannot belong to both the local legislatures and the Parliament of *Canada*. 2nd. That it belongs to the Parliament of Canada; and that ruling has been confirmed by the Privy Council in the case of *Russell* v. *The Queen* (2).

There would be no difficulty, therefore, if the statute in question contained a complete prohibition; but it is contended that the ruling of this court cannot apply to it because it does not prohibit, but only restricts the sale of spirituous liquors.

(1) 3 Can. S. C. R.. 505 & 574. (2) 7 App. Cases 829.

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I submit that this is a mere quibble. A restriction is a partial prohibition; in the present case the prohibition is for Sundays and for certain hours of other days. If this reasoning was to prevail, nothing would be easier for a local legislature than to encroach upon the exclusive power of the Parliament of *Canada* to prohibit such trade; all they would have to do would be to prohibit the sale at all times, save a few minutes every day, or every week.

It has been contended that such a statute is within the class of local statutes, or of statutes concerning municipal institutions.

Even were that true, it would not affect the question at issue. That statute unquestionably deals with and regulates a certain trade or commerce. Therefore, according to the decision in the case of *Fredericton*, it cannot be considered as being within the powers of local legislatures.

But it is not true that the statute in question is a mere municipal regulation, or a law of a local nature. It is admitted to be intended to repress intemperance, to prevent drunkenness; therefore its object is one of general interest; intemperance and drunkenness are just as much evils in *Halifax* as in *Quebec*.

If the object of the law is of general interest, are the means enacted for that purpose of a local nature? Not at all; those means consist in compelling those who sell spirituous liquors by retail, to close their establishments at certain times, and in preventing them from selling within certain hours. Now there is nothing local in those means; they would be just as effective at *Winnipeg* as at *Charlottown*. *Russell* v. *The Queen* (1).

The power to enact such a law is not included in the power given to local legislatures to regulate municipal institutions. The object of such institutions is to

(1) 7 App. Cases 829.

give to each locality the particular regulations required by its local wants. No municipal institutions would be needed if the making and keeping of roads, bridges, the prevention of abuses prejudicial to agriculture, could be regulated in the same manner all over the country. But they are necessary on account of the fact that a special regulation is required for each locality.

My second point is that even under the statute (if constitutional) the conviction is illegal.

The object of the statute is the prevention of drunkenness on Sundays. The means adopted to arrive at it consist in prohibiting the sale on such days of intoxicating liquors. Therefore, what it must punish is the selling, not the keeping open of the establishments where such liquors are sold. The order given to close them is only to secure the non-selling, it is a mere directory enactment. Knowing that there is more danger of liquor being sold there than elsewhere, it is directed that those establishments must be kept closed.

So much for the spirit of the law. The letter of the statute is in accordance with it. It orders first the closing of establishments where spirituous liquors are retailed, but enacts no penalty against those who keep them open. Then, in another sentence it forbids the selling of such liquors either in those establishments, *or in any other place* under a penalty of $30 to $75 *for every infringement of the present provisions.* The present provisions are those prohibiting the selling, the causing to be sold, the allowing to be sold, the allowing to be delivered, spirituous liquors.

The statute being a penal law, it is needless to say that it cannot be extended from one case to another; the penality it inflicts cannot be imposed for an offence for which it does not enact it.

Mr. *C. P. Pelletier*, Q. C., for respondent:

The writ of prohibition is an extraordinary remedy,

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which cannot be used as collateral if there exists any other recourse. In the present instance, the law (42-43 *Vict.*, ch. 4, sec. 3) seems desirous to admit such recourse, by enacting: that if a writ of *certiorari* is issued to have a conviction rendered under the said law revised by the Superior Court, the party convicted shall be obliged to deposit into the hands of the clerk of the inferior court the amount of the fine and costs.

The writ of prohibition, moreover, cannot be issued after conviction, unless the want of jurisdiction of the inferior tribunal appears upon the face of the record. See *High*, Extraordinary Legal Remedies (1).

Then as to appellant's contention that the only fact of not closing his tavern during the time prescribed for that by the statute does not constitute an offence, and that according to the wording of the statute, there is no offence, if there is not at the same time a sale of liquors. Such pretension will be found not maintainable, if we merely refer to the preamble of the statute above cited, 42–43 *Vic.*, ch. 4, which reads as follows:

"Whereas doubts have arisen with respect to the right of certain city and town corporations, in virtue of the laws and statutes relating to them, to compel tavern keepers to close their taverns at certain hours of the day; and whereas it is expedient to dispel such doubts, and to clearly define and extend the powers which the said corporations should possess: Wherefore, &c., &c."

Before the other courts, the appellant has pretended not only that to establish an offence it would have been necessary for the respondent to prove a sale of liquors, but he has also pretended that the Legislature of *Quebec* had no right to prohibit the sale of intoxicating liquors on Sundays.

(1) Nos. 767, 769, 770, 772, 774.

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As the complaint in this case is only "for not having closed," and not for "having sold," if the statute is interpreted as making an offence of the mere fact of "not closing," and if the conviction against the appellant is found to be valid, it is of little moment, for the ends of this case, to consider the question of the prohibition of selling liquor on Sundays.

However, as that incidental question has been strongly dwelt upon before the other Courts, and as the other courts have considered it with much attention, it may be convenient also to consider it just now.

Although the Parliament of *Canada*, under the power given to it to regulate trade and commerce alone, has the power to prohibit the trade in intoxicating liquors, yet the provincial legislatures, under the power given to them, may for the preservation of good order in the municipalities which they are empowered to establish and which are under their control, make reasonable police regulations, may to some extent interfere with the sale of spirituous liquors;

The provisions of the provincial statute 42–43 *Vic.*, ch. 4, ordering houses in which spiritous liquors, etc., are sold to be closed on Sundays and every day between eleven o'clock of the night until five of the clock of the morning, are police regulations within the power of the legislature of the Province of *Quebec*.

The reasons for arriving at this conclusion are fully stated by the Chief Justice *Meredith* in the case of *Blouin* v. *The Corporation of the City of Quebec* (1), and I rely upon that decision.

RITCHIE, C. J.:—

I cannot see how it can be said that prohibition will not lie without first determining whether the Act is *ultra vires* or not, for if the Act is *ultra vires*, then I can

(1) 7 Q. L. R. 18.

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see no reason why prohibition would not be a proper remedy, because there could then be no pretence that the Recorder's Court could have jurisdiction over an offence alleged to be created by a statute which had no legal existence; but holding the Act to be *intra vires*, I fully appreciate the position taken by Mr. Justice *Ramsay*, that the Recorder's Court having jurisdiction over the subject-matter legislated on, however badly it may judge, it cannot be stopped by prohibition, on the pretext that it has misconstrued the Act.

Mr. Justice *Ramsay* clearly acted on this view, for before holding that prohibition would not lie, he expressly held that the Local Legislature had authority to prohibit or regulate the sale of liquors in saloons or taverns on Sundays, or at particular times, as being purely a matter of police regulation, and consequently within the powers of municipal corporations.

When, in the case of *Regina* and the *Justices of Kings* (1), I was called upon to adjudicate on the right of the Provincial Legislatures to prohibit absolutely the sale of spirituous liquors, and I arrived at the conclusion that the legislative power to do this rested with the Dominion Parliament, I advisedly and carefully guarded the enunciation of that conclusion in these words: "We by no means wish to be understood that the Local Legislatures have not the power of making such regulations for the government of saloons, licensed taverns, &c., and sale of spirituous liquors in public places, as would tend to the preservation of good order and prevention of disorderly conduct, rioting or breaches of the peace. In such cases, and possibly others of a similar character, the regulations would have nothing to do with trade or commerce, but with good order and local government, matters of municipal police and not of commerce, and which municipal institutions are peculiarly competent to manage and regulate."

(1) 15 New Brunswick R. (2 Pugs.) 535.

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I still think, as I did then, that a provision such as section 1, of the 42 and 43 *Vic.*, ch. 4, *Quebec* Act, is within the legislative authority of the Provincial Legislature, as being simply a local police regulation, and which the Local Legislature has, as incident to its power to legislate on matters in relation to municipal institutions, a right to enact.

As at the time of the passing of this Act and at the time of the committing of and conviction for the alleged breach of the law, there was no Dominion legislation contravening in any way the provisions of this provincial law, it is not necessary, for the purposes of deciding this case, to inquire or determine if, and in what particulars and to what extent, the legislation of either will prevail over that of the other, when the Dominion Parliament, is legislating for the peace, good order, &c., of the Dominion—or on the subject of trade and commerce in connection with the traffic in intoxicating liquors—should the Dominion legislation conflict with the Provincial.

In the view I take of the inapplicability of the remedy by prohibition, the Act being, in my opinion, *intra vires*, it is unnecessary to express any opinion as to the construction of the 1st. sec., 42 and 43 *Vic.*, ch. 4, though I by no means wish it to be understood that I think the construction placed on the statute by the Recorder's Court incorrect. I merely express no opinion on it, as not being necessary for the determination of the case before us.

STRONG, J.:—

I agree with the Chief Justice that the attempt to impeach the constitutional validity of the statute under which the appellant was convicted, as being *ultra vires* of the Legislature of the Province of *Quebec*, altogether

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Strong, J.

fails. In the *Queen* v. *Taylor* (1), I expressed my concurrence in the decision of the Supreme Court of *New Brunswick*, in the case of the Justices of *Kings*, in which it was held that under the authority conferred by the *British North America* Act to legislate respecting Municipal Institutions, the Provincial Legislature possessed that power generally denominated the police power, to regulate the sale of spirituous and intoxicating liquors, and I adhere to that opinion. Then, I think that this appeal must be disposed of without pronouncing any opinion upon the question of statutory interpretation which was argued before us, for it is plain, as I read the authorities, that this is not a case in which the writ of prohibition will lie.

Article 1031 of the *Quebec* Code of Civil Procedure is in these words:

> Writs of prohibition are addressed to courts of inferior jurisdiction whenever they exceed their jurisdiction.

This is an exact definition of a writ of prohibition, according to English law, and I therefore assume, in the absence of any further provision upon that head in the code of procedure and of any jurisprudence of the courts of the Province of *Quebec* to the contrary, that the use of and the proceedings upon this writ of prohibition, which is derived from the law of *England*, is to be regulated by the well established practice of the English courts relating to it.

The office of the writ of prohibition is, as in the article of the code of civil procedure before extracted is declared in so many words, to restrain inferior courts from exceeding their jurisdiction,—that is, not from exercising a jurisdiction which they alone can exercise, if any court can exercise it at all, but from usurping jurisdiction by encroaching upon that of other and superior tribunals.

(1) 36 U. C. Q. B. 218.

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That the proper use of the writ is restricted to such cases as those first mentioned is shown by Mr. *High* in the following passage from his treatise on Extraordinary Remedies (1).

It follows from the extraordinary nature of the remedy, as already considered, that the exercise of the jurisdiction is limited to cases where it is necessary to give a general superintendence and control over inferior tribunals, and it is never allowed except on a usurpation or abuse of power, and not then unless the existing remedies are inadequate to afford relief. If, therefore, the inferior court has jurisdiction of the subject-matter in controversy, a mistaken exercise of that jurisdiction, or of its acknowledged powers, will not justify a resort to the extraordinary remedy by prohibition.

And the case of *Lord Camden* v. *Home* (2), referred to in the judgment of Mr. Justice *Ramsay* in the Court of Queen's Bench, is decisive to the same effect. In that case it was expressly decided that it afforded no ground for a prohibition that a court having a special statutory jurisdiction, which it alone, to the exclusion of all other courts, possessed, had so construed a statute as to exclude from its operation a case which, upon a proper legal construction of the enactment, was embraced in its terms. Mr. Justice *Ashurst* there says:

It is admitted that the Courts of Admiralty have exclusive jurisdiction in all cases of prize; and if so, they must have the same jurisdiction over all other matters that arise incidentally, either in construing acts of parliament or proclamations, in order to form their opinion on the principal question.

Again, in the same case, Mr. Justice *Buller* says:

In such cases the only point for our consideration is whether the court to which the prohibition is prayed has a jurisdiction over the subject. Whatever may have passed in the several cases on this subject in the last century, the grounds for granting and refusing prohibitions are now clearly and accurately defined. If the court below have jurisdiction over the subject, though they mistake in their judgment, it is no ground for a prohibition, but is only matter of appeal.

(1) Sec. 767. (2) 4 T. R. 382.

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Upon the principles of these authorities it has long since been decided that this writ cannot be used as a substitute for a *certiorari* or an appeal, for it is now well settled to be a preventive and not a corrective remedy. Applying these authorities to the present case, it is clear that in the proceedings before the Recorder of *Quebec* there was no such excess of jurisdiction as warranted the issuing of a writ of prohibition. It cannot be pretended that if any offence within the 42 and 43 *Vic.*, cap. 4, sec. 1, was committed by the appellant, the Recorder's Court had not jurisdiction of it and was not bound to proceed to try and determine the complaint summarily; there was, therefore, no encroachment upon the jurisdiction of any other court in the course which was taken by the recorder. He was bound to interpret the statute and to convict or acquit according to his interpretation of it, and upon the evidence before him, and he did this and no more.

To say this, is sufficient to show that the writ of prohibition issued improvidently and was properly quashed. No one can say it was not the bounden duty of the recorder to interpret the statute and proceed according to the construction he placed upon it,—and if that be so to award a writ of prohibition in such a case would be to prohibit a judicial officer from doing his duty. At most, the appellant can only complain that he has been aggrieved by an erroneous judgment, not that he has been prejudiced by the sentence of a court which had no jurisdiction of the subject-matter, and his proper remedy in this case is an appeal, if one is given by statute, or a writ of *certiorari* to remove the conviction into the Superior Court, where it may be quashed if error appears upon its face.

I am of opinion that we ought to hold the writ of

prohibition to have been properly quashed, and to dismiss the appeal.

FOURNIER, J., concurred with the Chief Justice.

HENRY, J.:

Independently of the question—the main one argued before us—of the constitutionality of the statute under which the prosecution in this case was commenced, there are two others demanding our previous consideration.

The particular section of the Act in question is as follows: [His Lordship read the section (1)].

The appellant was prosecuted under that section by the respondent corporation in the Recorder's Court of the city of *Quebec*, and the charge against him is that—

On Sunday, the eighteenth day of January, one thousand eight hundred and eighty, the said defendant (now appellant) has not closed, during the whole of the day, the house or building in which he, the said defendant, sells, causes to be sold, or allows to be sold, spirituous liquors by retail, in quantity less than three half pints, at a time, the said house or building situate at the corner of *St. John* and *St. Ursule* streets, in the Province of *Quebec*.

The first question then is, does the charge against the appellant, as so stated, of not keeping closed on the Sunday named, his house or building, he being a person holding a license to sell spirituous liquors in quantities less than three half pints, render him liable to the penalty imposed by that section; or, in case of failure to pay the fine, as therein mentioned, to be imprisoned for a period not to exceed three months. Penal statutes are to be strictly construed; and, if the construction is reasonably doubtful as to the offence created by a penal Act, we are bound, by every authority, to declare it inoperative to that extent. A penal offence must be reasonably certain;

(1) See page 186.

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and if open to two constructions, it cannot be so. There are two provisions in the section, one obliging the keeping closed, during every Sunday, the house or building in which a person sells liquors; the other, forbidding the selling, during the same period, in such house or building, or in any other place, spirituous liquors, wine, beer or temperance drinks, "the whole under a penalty for each and every infringement of the present provisions of a fine," &c. The second provision is coupled to the first by the copulative "and," which makes, as I read the section, the one a part of the other, and requiring a breach of both to constitute the offence, "the whole under a penalty for each and every infringement of the present provisions." The penalty is for the infringement of the present provisions,—that is a breach of both. When the provisions are connected by the word "and," I read the section and construe it as if, instead of the words used, the provision was worded thus: "and during the same period shall not sell, &c., in such house or building, or in any other place, spirituous liquors, &c.,—the whole, that is, for not closing the house and for selling spirituous liquors, &c., under a penalty, &c. We are to construe the language of a statute as it is commonly used and understood. We may speculate as to what the Legislature intended; but we are bound to ascertain the true meaning of a statute by its own language; and if thereby we are forced to any particular conclusion, we are not permitted to say that the Legislature meant other than what the language used warrants. If the two provisions had been coupled by the disjunctive "or," with suitable accompanying language, we might be disposed and permitted to give a different construction to that part of the section which creates the penalty for infringement. An opposite construction would be, at all events, open to serious doubts, and the double

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penalty should not therefore be imposed. I am of opinion that the writ against the appellant charges no complete offence, but merely one of the two ingredients necessary to constitute it. No offence in law being charged there could be no valid conviction.

The other question, although not raised on the argument, is taken by one of the learned judges in the court below, and therefore is entitled to consideration. The learned judge referred to gave it as his opinion, that "prohibition" does not lie in this case and that the writ should be quashed under the decision in the case of *Lord Camden* v. *Home* (1), but more especially from the dicta of Mr. Justice *Buller* in that case. I have studied that case and the dicta referred to. The learned judge referred to, in his judgment in that case, said:

> Whatever may have passed in the several cases on this subject in the last century, the grounds for granting and refusing prohibitions are now clearly and accurately defined. If the court below have jurisdiction over the subject and though they mistake in their judgment, it is no ground for a prohibition, but is only a matter of appeal. And the rule equally clear is, that after sentence the courts of common law never grant a prohibition to inferior courts, unless the want of this jurisdiction appear on the face of the libel.

I will deal with the matter before us in the light of the two rules so laid down.

In the first place, as to the jurisdiction of the Recorder's Court over the subject. If I am right in my construction of the section before given, can it be said that that court had jurisdition to try, as an offence, what was not one? The prosecution against the appellant was to cause the imposition of a penalty upon him for not keeping his house closed on a Sunday. If that was *per se* an offence for which no penalty was imposed, how could the Recorder's Court give itself jurisdiction to try what was not an offence and to impose a penalty, under circumstances unauthorized by the section? As

(1) 4 T. R. 396.

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I construe the statute, he would have jurisdiction only where the two provisions were alleged to have been infringed. I think, therefore, the prohibition in this respect was properly awarded, and the want of jurisdiction was sufficiently apparent on the face of the process by which the prosecution was commenced. I think this case is, therefore, within the terms of the two legal propositions asserted by Mr. Justice *Buller*.

The writ of prohibition in this case was issued after judgment. *Lloyd*, in his treatise on the writ of prohibition, at page 11, says :

> No prohibition, therefore, can go before the commencement of the action, but as soon as the action is commenced, for instance, as soon as the plaint is entered in the new county courts, the application may be made. * * * This, however, can only be done in cases where the defect of jurisdiction appears on the face of the pleadings.

At page 12:

> It has long been settled that whenever the want of jurisdiction appears on the face of the proceedings, prohibition will go after judgment. It is thus laid down in all the old authorities, and this doctrine has been frequently confirmed since, and is now fully established in practice.
>
> So, if the matter be apparent on the face of the proceedings, it will go after appeal, though the parties have thereby affirmed the jurisdiction of the inferior court *Gouche* v. *Bishop of London* (2).

In *Buggin* v. *Bennett* (3), Lord *Mansfield* said :

> If it appears, on the face of the proceedings, that the court below have no jurisdiction, a prohibition may issue at any time, either before or after sentence, because all is a nullity ; it is *coram non judice*.

There is a case to be found, *Jones* v. *Owen* (4), where prohibition was granted by the Court of Queen's Bench, in 1848, which overrules the judgment attributed to Mr. Justice *Buller*, and which goes to show that the writ is grantable, even if the court to which it is directed had

(1) See *Roberts* v. *Humby*, 3 M. & W. 120 ; *Jones* v. *Jones*, 17 L. J. Q. B. 170.

(2) Str. 870.

(3) 4 Burr. 2037.

(4) 18 L. J. Q B. 8.

jurisdiction over the subject-matter, and that even after the judgment was executed.

Several other cases, with the same result, are cited by Lloyd.

I am of opinion the writ of prohibition in this case was properly issued after judgment.

I am, for the reasons I have given, of the opinion that the appeal herein should be allowed, and that the prohibition should be sustained, with costs.

TASCHEREAU, J.:

This Act, 42 and 43 *Vic.*, ch. 4, sec. 1, enacts that:

[His Lordship read the section 1.]

Under the said Act, the present appellant has been prosecuted for that:

On Sunday, the eighteenth day of January, one thousand eight hundred and eighty, the said defendant (now appellant) has not closed, during the whole of the day, the house or building in which he the said defendant, sells, causes to be sold, or allows to be sold spirituous liquors by retail in qunntity less than three half pints at a time, the said house or building situate at the corner of *St. John* and *St. Ursule* streets, in the city of *Quebec*.

And, on the 17th day of February, 1880, was condemned for the said offence to pay a fine of $40, and $1.65 for the costs, and in default of payment of the said sums, to an imprisonment in the common gaol of the district of *Quebec* for a term of two months.

One of the grounds (one taken at the trial before the Recorder) upon which the appellant impugns that conviction is, that it is not authorized by the statute, as no penalty is, as he contends, imposed thereby, for keeping open on Sunday a house or building where liquors are usually retailed; his contention being that the penalty imposed by this latter part of the section, for every infringement of the present provisions, must be read as applying only to the selling, the causing to be sold, the allowing to be sold, the allowing to be

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delivered, spirituous liquors, in such house or building or in any other place.

I think that this objection is well taken. The clause is ambiguous, and the appellant is entitled to the strict construction that must be given to all penal statutes. Assuming, but without deciding, that it had power to do so, the Legislature has no doubt made it an offence to keep a tavern open on Sunday, but, as I read this statute, no penalty is provided for that offence. It, then, is simply an indictable misdemeanor, according to the Federal Act, by which it is decreed that "any wilful contravention of any Act of the Legislature of any of the provinces within *Canada*, which is not made an offence of some other kind, shall be a misdemeanor and punishable accordingly."

I am of opinion, consequently, that the penalty imposed upon the appellant by the Recorder, and that the conviction against him, is not authorized by the statute, and that it is a complete nullity. The Recorder cannot have had jurisdiction to impose a penalty that the statute does not authorize. The whole proceedings before him were *coram non judice*, even if the Act in question was *intra vires*. In the Province of *Quebec*, there are a number of cases where the prohibition has been held to lie in such a case. I would not, in fact, have any doubt upon the subject, if it was not for what has been said by some of my learned brethern.

And while it is undoubtedly true that after a court has proceeded as far as verdict and judgment, or sentence, prohibition will not lie for a want of jurisdiction not apparent upon the record, yet the rule is supported by an overwhelming array of authority, that where the defect or failure of jurisdiction is apparent upon the face of the proceedings which it is sought to prohibit, the superior tribunal may interpose the extraordinary

aid of a prohibition at any stage of the proceedings below, even, after verdict, sentence or judgment (1).

In *Buggin* v. *Bennett* (2), Lord *Mansfield* says:

> If it appears upon the face of the proceedings that the court below have no jurisdiction, the prohibition may be issued at any time, either before or after sentence, because all is a nullity—it is *coram non judice*.

I am of opinion to allow the appeal.

GWYNNE, J.:

I am of opinion that the statute in question, namely, 42nd and 43rd *Vic.*, ch. 4, sec. 1, of the Province of *Quebec*, does not impose the penalty in that section mentioned, upon the person who, although licensed to sell spirituous liquors in quantities in that section mentioned, does not close the house or building in which he sells, or causes to be sold, such liquors during the whole of the Sunday, unless such keeping open, which I take to be equivalent to not closing such building, is accompanied by the sale or delivery in such house or building, of some spirituous liquor, wine, beer or temperance liquor. The words of the statute, shortly expressed, so far as is necessary for the decision of the point in question, are (3). [His Lordship read the words of the statute].

It appears to me to be free from reasonable doubt that this language does not profess to impose the penalty upon the person so licensed to sell for the not closing alone, without more, of the house or building in which the sale usually takes place. If the Legislature contemplated making the not closing, without more, the house or building during the whole of Sunday a distinct offence in itself, subjecting the proprietor of the house or building to the penalty, such intention, to

(1) High Extr. Legal Rem., sec. 774, and cases there cited.

(2) 4 Burr. 2,037.

(3) See page 186.

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say the least, is very inadequately expressed, and I confess, that to my mind, it is not clear what would constitute the offence in the absence of the fact of any liquor being sold or delivered to any person in the house or building; for example, whether, if the licensed person usually sells the liquors in a room or shop forming part of the house in which he lives, the whole house is to be closed, so that nobody, not even the proprietor, can enter or leave it; or if the door from the street into the room or shop in which the liquors are usually sold, constitutes the sole mode of egress and ingress for the proprietor, between the house and the street, must that door be so closed that the proprietor himself shall not pass out of it, although to go to church or on his return re-enter his house by it? Or if the liquors are all kept in cases behind a bar or counter, would the statute be sufficiently complied with by keeping the cases and the bar or counter locked? Or should the keeping closed be considered as being directed against all persons frequenting the house for the purpose of procuring spirituous liquors there?

But we are not now, in my opinion, called upon to decide what state of facts would constitute the committal of the offence of not closing, if not closing, without more, be an offence under the statute, but whether it is made by the statute an offence in itself, and subject to the penalty mentioned in the statute. and in my opinion it clearly is not—the words "the whole" in the sentence which enacts "the whole under a penalty for each and every infringement of the present provisions of a fine," &c., &c., seem, I think, to express the intention of the Legislature to be that to subject a person to the penalty he must be guilty of a violation of the whole of what is prescribed and prohibited in the section; so, likewise, the use of the words, "every infringement of the present provisions," indicates an

intention to attach the penalty to each infringement of all the provisions of the section. The penalty is not imposed upon every infringement of any of the present provisions, but upon every infringement of the provisions in the plural; that is, of both the provisions of the section, viz.:—on the keeping open and selling.

So reading the Act, it is plain that the complaint charged no offence cognizable under the statute, and the prohibition was therefore rightly granted; and inasmuch as there is no pretence that any spirituous liquor was sold or delivered to any person on the occasion referred to in the complaint, the case does not, in my opinion, raise the question whether the statute which prohibits such sale or delivery be or be not *ultra vires* of the Provincial Legislature, and I do not think that we are called upon to express an opinion upon a point which the facts of the case do not raise, and which is, therefore, unnecessary for the decision of the case before us, and this is the course we pursued in a recent case from *New Brunswick*.

The appeal, in my opinion, should be allowed with costs.

Appeal dismissed without costs.

Solicitors for appellant: *Montambault, Langelier and Langelier.*

Solicitors for respondent: *Pelletier and Chouinard.*

1883
*Oct. 31.
1884
*March 8.

WILLIAM H. VENNING.....APPELLANT;

AND

JAMES STEADMAN.....RESPONDENT.

WILLIAM H. VENNING.....APPELLANT;

AND

EDGAR HANSON.....RESPONDENT.

WILLIAM H. VENNING.....APPELLANT;

AND

JAMES DEWOLFE SPURR.....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Trespass—31 *Vic., ch.* 60, *ss.* 2, 19 (*D*)—*Order-in-Council*, 11*th June*, 1879, *construction of*—*Fishery Officer*, *action against*—*Notice not necessary*—*Damages*, *excessive.*

Three several actions for trespass and assault were brought by *A.*, *B.* & *C.*, respectively, riparian proprietors of land fronting on rivers above the ebb and flow of the tide, against *V.* for forcibly seizing and taking away their fishing rods and lines, while they were engaged in fly-fishing for salmon in front of their respective lots. The defendant was a Fishery Officer, appointed under the Fisheries Act (31 *Vic.* ch. 60), and justified the seizure on the ground that the plaintiffs were fishing without licenses in violation of an Order-in-Council of June 11th, 1879, passed in pursuance of section 19 of the Act, which order was in these words:—"Fishing for salmon in the Dominion of *Canada*, except under the authority of leases or licenses from the Department of Marine and Fisheries is hereby prohibited." The defendant was armed and was in company with several others, a sufficient number to have enforced the seizure f resistance had been made. There was no actual injury. *A.*

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*PRESENT—Sir W. J. Ritchie, C.J.; and Strong, Fournier, Henry and Gwynne, JJ.

recovered $3,000, afterwards reduced to $1,500, damages; *B.* $1,200; and *C.* $1,000.

Held,—That sections 2 and 19 of the Fisheries Act, and the Order-in-Council of the 11th June, 1879, did not authorize the defendant in his capacity of Inspector of Fisheries, to interfere with *A.*, *B.* & *C.'s* exclusive right as riparian proprietors of fishing at the *locus in quo*; but that the damages were in all the cases excessive, and therefore new trials should be granted.

Held—Also, (*Gwynne*, J., dissenting,) that when the defendant committed the trespasses complained of, he was acting as a Dominion Officer, under the instructions of the Department of Marine and Fisheries, and was not entitled to notice of action under C. S., N. B., ch. 89, s. 1, or ch. 90, s. 8.

APPEAL from three judgments of the Supreme Court of *New Brunswick* refusing to enter non-suits or to grant new trials in actions brought in that court by the respondents respectively against the appellant (the defendant in the court below) for breaking and entering upon the respondents' land, and seizing and depriving them of the use and possession of fishing rods, lines and reels, with which the respondents were there fishing in certain waters situate on the said lands, or contiguous to, and flowing by the same.

A statement of facts for each case is given in the judgment of *Ritchie*, C. J.

Mr. *Harrison* and Mr. *Burbidge* (Deputy Minister of Justice) for appellant, and Mr. *Wetmore*, Q. C., for respondents.

The points relied on and authorities and statutes cited appear sufficiently in the judgments hereinafter given.

RITCHIE, C. J.:

In the cases of *Steadman* v. *Venning*, *Hanson* v. *Venning*, and *Spurr* v. *Venning*, the facts are stated as follows in the appellant's factum:

1st. *Venning* v. *Steadman*—"This was an action for trespass, assault and malicious prosecution, brought by

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the respondent against the appellant. The respondent claimed to be the owner or joint owner of a certain lot of land on the *Nepisiguit* river, situated above the ebb and flow of the tide, and while engaged in fly-fishing for salmon, on the said lot of land, the appellant, who was the Inspector of Fisheries for the Province of *New Brunswick*, and was at the time acting as such fishery officer, and under direct instructions from the Department of Marine and Fisheries, went upon the land when the respondent was fishing and made a formal seizure of respondent's fishing rod, reel and line, under the Fisheries Act, claiming that he had a right to do so by reason of the respondent's violation of the Order in Council, dated June 11th, 1879, which is in these words: 'Fishing for salmon in the Dominion of *Canada* except under the authority of leases or licenses from the Department of Marine and Fisheries, is hereby prohibited.' The respondent had no such lease or license, but claimed the right to fish without such lease or license by reason of his being a riparian proprietor.

"The case was heard before Mr. Justice *Wetmore* at the *Gloucester* circuit, and jury found a verdict for the plaintiff, for $1,220, and the Supreme Court of *New Brunswick*, on motion made for that purpose, refused to enter a non-suit, or to grant a new trial, and this appeal is now taken.

"2nd. In the *Hanson* case, the respondent claimed to be the owner or joint owner of a certain other lot of land on the south-west branch of the *Miramichi* river, situated above the ebb and flow of the tide. That case was also heard before Mr. Justice *Weldon*, at the *York* sittings, and the jury found a verdict for the plaintiff for $1,000, and the Supreme Court of *New Brunswick*, on motion made for that purpose, refused to enter a non-suit, or to grant a new trial.

"3rd. In the *Spurr* case the respondent claimed to be

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the owner or joint owner of a certain lot of land on the *Nipisiguit* river, situated above the ebb and flow of the tide, and the case was heard before Mr. Justice *Wetmore* at the *Gloucester* Circuit, and the jury found a verdict for the plaintiff for $1,220, and the Supreme Court of *New Brunswick*, on motion made for that purpose, refused to enter a non-suit, or to grant a new trial.

The two sections that bear particularly on this case are the 2nd and 19th of 31 *Vic.*, ch. 60."

Sec. 2 provides that:

The Minister of Marine and Fisheries may, when the exclusive right of fishing does not already exist by law, issue or authorize to be issued fishery leases and licenses for fisheries and fishing wheresoever situate or carried on; but leases or licenses for any term exceeding nine years shall be issued only under the authority of an order of the Governor in Council.

The 19th section reads as follows:

The Governor in Council may, from time to time, make and, from time to time, vary, amend or alter, all and every such regulation or regulations as shall be found necessary or deemed expedient for the better management and regulation of the sea coast and inland fisheries, to prevent or remedy the obstruction and pollution of streams, to regulate and prevent fishing, to prohibit the destruction of fish and to forbid fishing, except under authority of leases or licenses, every of which regulations shall have the same force and effect as if herein contained and enacted, notwithstanding that such regulations may extend, vary or alter any of the provisions of this Act respecting the places or mode of fishing, or the terms specified as prohibited or close seasons, and may fix such other modes, times or places as may be deemed by the Governor in Council to be adapted to different localities, or may be thought otherwise expedient.

Under this statute, on the 11th June, 1879, the Governor in Council passed an Order in Council, which was as follows:

On the recommendation of the Honorable the Minister of Marine and Fisheries, and under the provisions of the 19th section of the Act passed in the session of the Parliament of *Canada*, held in the 31st year of Her Majesty's reign, ch. 60, and intituled: "An Act for the Regulation of Fishing and Protection of Fisheries."

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His Excellency, by and with the advice of the Queen's Privy Council of *Canada*, has been pleased to order, and it is hereby ordered, that the following fishery regulation be, and the same is hereby made and adopted:

Fishing for Salmon in the Dominion of *Canada*, except under the authority of leases or licenses from the Department of Marine and Fisheries, is hereby prohibited.

In construing the 19th section of this statute, I think the authority vested in the Governor in Council to forbid fishing except under the authority of leases or licenses was intended to apply to cases such as are referred to in the second section, where the exclusive right of fishing does not already exist by law, or to cases where the Government may, as riparian proprietor, have the right as such to control the fishing, and ought not to be held to apply to cases where the exclusive right of fishing exists by law. Such an absolute prohibition of the enjoyment of their property by riparian proprietors, or what might be still worse by granting a license to one proprietor and witholding it from another, thereby destroying the value of the property of the one, and enhancing the value of the property of the other, would simply be an arbitrary interference with the rights of property pure and simple, and no statute should be so construed as to have such an effect, unless, assuming parliament has the power to enact such a law, it should appear that, possessing such power, such an intention is indicated by clear and unequivocal language or irresistible inference, which it is quite impossible to say exists here, in the face of that well settled canon of construction, that statutes which encroach on the rights of the subjects, whether as regards persons or property, are to receive a strict construction, or as *Cockburn*, C. J., in *Harrod* v. *Worship* (1), says:—

It is a canon of construction of acts of parliament that the rights

(1) 1 B. & S. 381.

of individuals are not interfered with, unless there is an express enactment to that effect, and compensation given them.

In this case, whether parliament has the power absolutely to prohibit, or when or under what circumstances riparian proprietors may be prohibited from exercising their rights, it is not necessary to discuss or determine, because I can find nothing in the statute to justify the conclusion that parliament intended, for no apparent reason, thus to prohibit the enjoyment of riparian rights, and so directly to interfere with property and civil rights.

I cannot think the legislature contemplated such an interference with the rights of property as the construction contended for would involve. To take away from a proprietor the right of using his property for no assignable reason, and thus to deprive him by statute of the ordinary rights of a subject, is a result which can only be arrived at by necessary and unavoidable construction.

On the contrary, reading the statute as a whole, I think a contrary intention may be fairly inferred, if from no other clause, from the second section which recognizes the existence of and protects the exclusive rights of fishing, indicating that those were not the rights with which Parliament was dealing, or to which the provisions relating to leases or licenses were applicable. I am therefore of opinion that the respondent has established that he had the right of fishing where he was fishing, and in doing so, he was not fishing illegally, and that the appellant had no right to enter on the property of the respondent and interfere with him as he did.

As to the defendant being entitled to notice by reason of his being and acting in this matter as a Justice of the peace, I think the evidence clearly shows, that in interfering with the respondents in all these cases, he

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was not acting as a justice of the peace, or in any way in a judicial capacity, or under judicial responsibility, but was acting in discharge of the duty of an Inspector of Fisheries, and that what he did was not done judically in the exercise of any judicial function or discretion whatever. He did not exercise any judicial discretion or profess to act under judicial responsibility. But, on the contrary, he acted merely ministerially under, as he said, explicit orders, over which he claims he had no control or discretion whatever, but which he was bound implicitly to obey. All that he did was as a fishery inspector in accordance with and in obedience to express orders and instructions from the Department of Marine and Fisheries.

As to the question of excessive damages, I am most reluctant to interfere with the finding of jurors, but in these cases I regret to say that I cannot differ from Chief Justice *Allen* in thinking the damages excessive in each case, nor from the rest of my brethren, that by reason thereof there should be a new trial with a view to a re-assessment of these damages by a jury, the legal and proper tribunal for determining that question and one, generally speaking, within their exclusive province. But in this case the damages being, in my opinion, unreasonably large, I think we are bound to send the matter for the consideration of another jury. I cannot bring my mind to the conclusion that the jury assessing these damages at such excessive amounts were not largely influenced in awarding these damages more by the idea that the damages would be paid by the Dominion Government than by the principle of awarding such fair and reasonable compensation or damages, as between the plaintiff and defendant are the natural and proximate consequences of the wrongful act of the defendant, not necessarily the actual pecuniary loss; for in an action such as this, the jury were

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not arbitrarily tied down to that, but taking into consideration the circumstances of each case, they are to award such damages as will be reasonable and fair, having reference to the relative position of the parties and the manner and circumstances attending the perpetration of the wrongs complained of.

I think there should be no costs on either side in this court, and that the rule in the court below should be made absolute for a new trial, on account of the damages being excessive, on payment of costs, as in accordance with the practice of that court.

STRONG, J. :—

These three cases were argued together, the questions involved being the same in each case.

I agree with the court below, that the justification was not proved. The 1st. sub-sec. of sec. 19 of the Fisheries Act, 31 *Vic.*, c. 60, is as follows:

The Governor in Council may, from time to time, make, and from time to time, vary, amend or alter, all and every such regulation or regulations as shall be found necessary or deemed expedient for the better management and regulation of the sea coast and inland fisheries, to prevent or remedy the obstruction and pollution of streams, to regulate and prevent fishing, to prohibit the destruction of fish and to forbid fishing, except under authority of leases or licenses, every of which regulations shall have the same force and effect as if herein contained and enacted, notwithstanding that such regulations may extend, vary or alter any of the provisions of this Act respecting the places or modes of fishing or the times specified as prohibited, or close seasons, and may fix such other modes, times or places, as may be deemed by the Governor in Council to be adapted to different localities, or may be thought otherwise expedient.

Pursuant to the authority conferred by this clause, the Governor General, on the 11th of June, 1879, made an Order in Council, which, amongst other provisions, contained the following:

Fishing for salmon in the Dominion of *Canada*, except under the

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authority of leases or licenses from the Department of Marine and Fisheries, is hereby prohibited.

The plaintiffs in each of these cases have proved that at the time the trespasses complained of were committed they were fishing in streams above the ebb and flow of the tide, and upon land which was their own private property, or the private property of persons from whom they had a license to fish. The defendant, however, contends that the Order in Council was *intra vires* of the Governor General, under the 19th section of the Act already read, and that according to the proper construction of its terms it applies to persons fishing on their own property. I cannot agree to the last branch of this proposition, and if it were correct, I should be of opinion that, so construed, the Order in Council would be clearly *ultra vires*.

In the *Queen* v. *Robertson* (1), this court determined that the right of riparian proprietors upon streams above tide water, and whose titles were such as to give them, according to the general common law principle the ownership of the beds of the streams to their middle lines, to fish within the limits of their own lands, was a private and exclusive right of property, a proprietary right of the same character as that to the herbage, or trees growing upon the land, or the minerals or game to be found upon it, and that this right of property could not be impaired by any legislation, but that of the Legislature of the Province in which the property was situated, which, under sub-sec. 13 of sec. 92 of the *B. N. A. Act*, 1867, possesses the exclusive right to legislate concerning "property." And we therefore held that the lease or license of the Dominion Government did not authorize the lessee or licensee to take fish in streams, the beds of which were vested in private owners. It was conceded, however, in that case of the *Queen* v. *Robert*

(1) 6 Can. S. C. R. 52.

son, that the Dominion Government might, under sub-sec. 12 of sec. 91 of the *B. N. A. Act*, make regulations forthe conservation of fisheries—what are called regulations respecting the police of the fisheries—such as prohibitions against taking fish at certain seasons, using destructive engines, and other rules of a cognate kind.

It is argued, now, that the license required by this Order in Council is of this kind, and that a land owner is, by the Order and the Act together, prohibited from fishing in streams upon his own land without a license. Such a power, if it exists, must be attributed to this section 19, which certainly confers unusually large powers of legislation upon the Governor in Council; but I am, nevertheless of opinion that this position cannot be sustained. Granting, for the present, that this clause of the statute is sufficiently comprehensive to include the power, as a matter of police regulation, of making, in the public interest and for the preservation of fisheries, an Order in Council restraining unlicensed owners of streams from exercising their full legal common law rights, of enjoying their own property as they may think fit, by requiring that no one should take fish unless licensed, I am still of opinion that the Order in Council falls short of indicating any intention to make such provision. This Order in Council is, of course, to be construed according to the general rules of intepretation applied to statutes. Then, nothing can be better settled than the proposition that no restraint upon the ordinary rights of property, no derogation from the fullest enjoyment of these rights, can be imposed by statute, except by express words. This principle has been so often recognized of late years that it needs but a slight reference to decided cases to show that it rests on the decisions of courts and judges of the highest authority, and ought not to be allowed to be called in

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question now. In the *Metropolitan Asylum District* v. *Hill* (1), Lord *Blackburn* says:

It is clear that the burden lies on those who seek to establish that the legislature intended to take away private rights to show that, by express words or necessary implication, such an intention appears.

In the appeal of the *Western Counties Railway Co* v. *Windsor & Annapolis Railway Co.* (2), the same principle was acted upon as an established canon of interpretation. The rule is thus stated by Sir *Benson Maxwell* in his work on statutory construction (3):

Statutes which encroach on the rights of the subject, whether as regards person or property, are similarly subject to a strict construction. It is presumed that the legislature does not desire to confiscate the property, or to encroach upon the rights of persons; and it is therefore expected that, if such be its intention, it will manifest it plainly, if not by express words, at least by clear implication and beyond reasonable doubt.

And this statement of the law is supported by the citation of numerous decisions referred to by the learned author. Applying this canon then to the construction of the Order in Council, it is plain that we cannot give the word "licenses," a meaning which would justify the trespasses complained of in this action. There are many fisheries for salmon, such as those in tidal rivers, where there is not, and indeed cannot be, without legislative sanction, any exclusive right of fishing, and to these it must be considered that the licenses required by the Orders in Council were intended to apply. The consequence is, that neither explicitly nor by implication is the requirement of a license made applicable to riparian owners as regards fishing in private streams. To hold otherwise and to determine that the right of fishing by a private owner on his own property was restricted by terms so general as those in which the Order in Council is expressed, would be a flagrant dis-

(1) 6 App. Cases 208. (2) 7 App. Cases 176.
(3) Ed. 2, p. 346.

regard of this most sacred rule for the exposition of written laws.

The 2nd section of the Act, by which it is provided that the Minister of Marine and Fisheries may issue fishery licenses where the exclusive right of fishing does not already exist by law, has manifestly no application to a case like the present, where the exclusive right of fishing did actually exist by law. Further, it seems to me, that construing the 19th section of the statute itself on the same principle as that applied to the Order in Council, that it does not empower the Governor General to make Orders in Council restricting the exercise of rights of property by prohibiting the owners of the beds of private streams from taking fish, which are their own property, without having been authorized to do so, by taking out a license.

This being, in my opinion, the construction of the Order in Council and the Act under which it was issued, it is not necessary to consider the constitutional question which was argued, as to the powers of the Dominion Parliament under the 12th sub-sec. of sec. 91 of the *B. N. A.* Act, so to legislate as to require private owners of streams to take out licenses.

In *Parsons* v. *Citizens Insurance Co.* (1) we are advised by the Privy Council to abstain from expressing opinions on constitutional questions as to legislative powers, unless such opinions are absolutely requisite for the decision of the case in hand, and the Privy Council has itself lately acted on this principle in the case before referred to, of the *Western Counties Ry. Co.* v. *The Windsor & Annapolis Ry. Co.*, (2) where their lordships, deciding against the appellants on the construction of the Act, declined to state their views on the question which had been argued before them, as to the constitutional validity of the legislation in question.

(1) 7 App. Cases 96. (2) 7 App. Cases 176.

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This rule is also invariably acted on in the Supreme Court of the *United States*, and has in its favor the weighty reasons which are well pointed out by Mr. Justice *Cooley*, in his work on Constitutional Limitations (1).

I entirely agree with the Supreme Court of *New Brunswick*, in holding that the defendant was not, in the commission of the acts complained of, acting in the character of a justice of the peace, and so entitled to notice of action. Notice of action is not, of course, restricted to cases in which the party claiming the right to it has acted legally, and so has a legal justification. In such cases, notice of action, which is intended to enable the person to whom it is given to tender amends, is of no use, inasmuch as there is a full justification, but it must be shown that the alleged wrongs were committed *bonâ fide* with the intention of acting in the character of an officer of the class for whose protection the statute law has required a notice to be given, and in the line of duty of such an officer. In these cases, entering on the lands and the seizures of the rods cannot be attributed to a *bonâ fide* intention on the part of the defendant to exercise the functions of a justice of the peace, even supposing him to have been legally invested with that office. The proper duties of a justice of the peace are magisterial and judicial, and these were in no sense judicial acts, but such as we must consider the appellant intended to perform in the execution of the functions of a fishery officer, an office which the defendant undoubtedly held, but one which does not entitle its holder to notice of action.

The objections to all the verdicts on the ground of excessive damages are, it seems to me, well founded. This court, under the 4th section of the Supreme Court

(1) Ed. 4, p. 198.

Amendment Act of 1880, is not now, as it formerly was, disabled from interfering with a verdict on this ground. I read that section as conferring jurisdiction in all cases where the ends of justice may require it, and not as confined to cases in which the verdict is objected to as being against the weight of evidence.

The damages here are entirely out of proportion to the wrong. No actual damage was done, except in the case of *Spurr*, by the seizure and taking away of the rod and the slight injury to the plaintiff's thumb in a struggle, which, according to the evidence of Mr. *Burbidge*, he engaged in as a practical joke. The whole proceeding seems to have been formal, and to have been so understood by all parties. Nothing like contumely or insult is complained of. The exhibition of a pistol, mentioned in the cases of *Hanson* v. *Venning* and *Steadman* v. *Venning*, was wrong, but even in these cases, too, the whole matter seems to have been preconcerted and understood between the parties.

In cases of personal injury like assaults, the damages must always be more or less arbitrary, as there is no means of measuring them, but I do not understand that the courts will never interfere in such cases. On the contrary, the present state of the law appears to be, as it is laid down in *Mayne* on Damages (1), where it is said.

> It is now, however, so well acknowledged, that whether in actions for malicious prosecution, words, or any other matter, if the damages are clearly too large, the court will send the inquiry to another jury.

The original verdicts of $3,000 in *Steadman's* case, $1,220 in *Spurr's* case, and $1,000 in *Hanson's* case are, in my opinion, enormous, considering the facts in evidence before the jury, and well warrant, in all three cases, the inference which the court below drew in *Steadman's* case—"that the jury were under the influence of undue motives;" and from the nature of the

(1) Ed. 3, p. 513.

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cases and the evidence presented to the jury, I do not think it an unreasonable presumption that the jury might have supposed that any damages which they might award would ultimately be paid by the Dominion Government, an error against which they might have been usefully warned by the court.

I have come to the conclusion that this appeal must be allowed, and that there should be a new trial in each case.

FOURNIER, J. :

L'Intimé est avec quelques autres personnes, acquéreur de la *New Brunswick and Nova Scotia Land Co.*, d'un certain terrain, situé sur le côté ouest de la rivière *Miramichi*, au dessus du flux et reflux de la marée. Ce terrain qui s'étend de chaque côté de la rivière appartenait à la susdite compagnie en vertu d'un titre légal. L'Intimé et ses associés sont convenus avec la dite compagnie de l'acheter, ont payé, partie du prix d'acquisition et ont été mis en possession par la compagnie en 1874 ; ils l'ont occupé chaque année depuis, comme poste de pêche et y ont fait divers autres actes de possession.

En 1881, lorsque l'Intimé et *Mr. Phair* étaient à pêcher, l'appelant alors inspecteur de pêche pour le *New Brunswick*, accompagné de plusieurs autres personnes se rendit sur le terrain et informa *Phair* qu'il allait saisir sa pêche de ligne. Sur le refus de ce dernier de le laisser faire, à moins d'y être contraint, l'appelant montra un pistolet en disant que dans ce cas il serait obligé de s'en servir. En présence de cette menace, *Phair* céda et l'appelant saisit alors sa ligne et autres appareils de pêche. Il en fit autant de ceux de l'intimé qui ne les céda que sous protêt. Il paraît que le pistolet n'était pas chargé—mais ni l'Intimé ni *Phair* ne connaissaient cette circonstance.

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La prétention de l'appelant est que l'intimé faisait la pêche en contravention à l'acte des pêcheries et à l'ordre en conseil du 11 juin 1879.

L'Intimé avant de se rendre sur sa propriété ayant rencontré l'appelant, l'informa de son intention d'y aller faire la pêche. Celui-ci déclara alors qu'il le suivrait pour l'en empêcher. A quoi l'Intimé lui répondit en le référant à la cause de *Steadman* v. *Robertson* (sa propre cause) comme établissant ses droits; qu'il serait injuste d'en agir ainsi. L'appelant invoquant l'ordre en conseil du 11 juin 1879, prétendait que personne ne pouvait pêcher sans avoir une licence du département de la marine et des pêcheries, l'Intimé lui répondit que cet ordre n'affectait pas ses droits et offrit, dans le but de faire régler la question à l'amiable, une admission du fait de pêche. L'appelant refusa d'accepter cette proposition, donnant pour raison qu'il avait des instructions du département et qu'il devait s'y conformer.

Un verdict a été rendu pour $3,000. Le jugement de la cour inférieure refusant un *non suit*, ordonna un nouveau procès pour le motif que les dommages sont excessifs, à moins que le verdict ne fut réduit à $1,500. Appel de ce jugement.

La principale question soulevée ici est encore de savoir si un propriétaire riverain peut, sans une licence du département des pêcheries, exercer le droit de pêcher dans les eaux non navigables ni flottables qui bordent où traversent sa propriété.

La section 91 de l'Acte de l'Amérique Britannique du Nord a bien donné au gouvernement fédéral le pouvoir de légiférer au sujet des pêcheries, mais sans lui en avoir attribué la propriété là où elle appartenait déjà aux particuliers en vertu de la loi. Les droits des propriétaires riverains n'ont été aucunement modifiés à cet égard. Ils sont maintenant ce qu'ils étaient avant la Confédération. Telle a été la décision de cette cour

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dans la cause de la *Reine* v. *Robertson* (1). Cependant l'appelant invoque encore comme il l'a déjà fait sans succès, dans la cause de *Venning* v. *Phair* (2) les pouvoirs étendus conférés par la 19me section de l'acte des pêcheries au Gouverneur en conseil de faire des règlements au sujet des pêcheries. Elle se lit comme suit (3) :

En vertu de cette section le règlement suivant a été passé le 11 juin 1879 :

Fishing for salmon in the Dominion of Canada, excepting under the authority of leases or licenses from the Department of Marine and Fisheries, is hereby prohibited.

Ce règlement doit-il être considéré comme devant avoir une application générale et obliger même un propriétaire riverain dans les rivières non navigables ni flottables qui veut exercer le droit de pêche chez lui, à se munir d'une licence ? Si tel était le cas le riverain n'aurait donc pas le droit exclusif de pêche que la loi lui a reconnu et que les tribunaux ont consacré par leurs décisions. Cependant, loin de le soumettre à cette nécessité, la 2me sec. de l'acte, en exempte les endroits où le droit exclusif de pêche existe. Cette exception n'est pas en contradiction avec la sec. 19 et le règlement du 11 juin 1879. Ces diverses dispositions peuvent facilement se concilier de manière à recevoir chacune leur effet. La loi n'a certainement pas voulu reconnaître d'un côté les droits du riverain par la 2me section, pour les lui retirer de l'autre par la section 19 et l'ordre en conseil du 11 juin 1879. En exceptant de leur opération les endroits où il existe un droit de pêche exclusif, il reste encore un champ assez considérable où le ministre de la marine et des pêcheries peut exercer le droit de licence. Les sec. 3 et 7 et ss. 6 de la sec. 7 en fournissent des exemples. C'est sans doute à ces cas que doivent s'appliquer la sec. 19 et l'ordre en conseil qui peuvent ainsi recevoir leur effet sans qu'il y ait conflit

(1) 6 Can. S. C. R. 52. (2) 22 N. B. Rep. 362.

(3) [For this reference see p.213.]

avec la 2me sec. La prohibition décrétée ne doit donc avoir lieu que dans les endroits où il n'existe pas un droit de pêche exclusif. En conséquence, les riverains dans les eaux non navigables ne sont pas compris dans cette prohibition et peuvent exercer leur droits de pêche sans être tenu de prendre une license.

L'Appelant a fait à l'Intimé l'objection qu'il n'avait pas fait preuve de son droit de pêche à l'endroit où il avait pêché, que le titre au rivage et au lit de la rivière appartenait à la *Nova Scotia and New Brunswick Land Co.* Il est vrai que son titre n'était pas encore parfait, mais il était alors légalement en possession du terrain en vertu d'une convention pour acheter des propriétaires, et cela lui donnait le droit à une action contre toute personne qui le troublerait sans droit dans l'exercice de son droit de pêche. L'Appelant, en intervenant comme il l'a fait, n'était qu'un *wrong doer*, parce qu'il n'avait aucune autorité quelconque, ni en vertu de l'acte des Pêcheries, ni en vertu de l'ordre en conseil du 11 juin 1879, pour justifier la saisie qu'il a faite. L'obligation de prendre des licences de pêche ne s'appliquant pas aux rivières non navigables, l'Appelant n'avait aucun droit à y exercer.

L'Appelant a fait encore deux autres objections: 1° qu'il était protégé contre toute poursuite par le ch. 89 des Statuts Consolidés, N.-B.; 2° que comme juge de paix, il avait droit à un avis d'action en vertu du ch. 90 des mêmes statuts.

A ces deux objections, je citerai comme réponse concluante l'opinion de l'honorable juge en chef *Allen* dans la cause déjà citée de *Phair* et *Venning*.

I think neither of these objections is tenable. We had occasion to consider ch. 89 in the case of *Wood vs. Reed* (*ante* p. 279.) I doubt if the defendant comes within the first section of that Act, the words of which are: 'All sheriffs and other officers of the law,' which, I think, mean policemen and constables, and would not include a fishery officer appointed by the Dominion Government. Neither

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would the third section apply to the defendant, because in taking the plaintiff's fishing-rod, he was not acting as a justice of the peace. But in addition to these objections, I think the defendant, in what he did, was not acting according to the directions of the Fisheries Act, nor within the jurisdiction thereby intended to be given him, because, in my opinion, the Act never intended to give a fishery officer power to seize fishing rods and in a place where an exclusive right of fishing existed, and which was consequently excluded from the operation of the Fisheries Act. With respect to the other objection, that the defendant was entitled to notice of action, it is sufficient to say he was not acting as a justice of the peace when he did the act complained of, but in another capacity, and therefore the provisions of ch. 90 do not apply."

Quant au montant des dommages, je le considère comme excessif. Il n'y a pas de doute que l'Intimé a été troublé avec menace de violence dans la jouissance de ses droits comme propriétaire riverain. Dans les circonstances c'était faire un outrage très grave à un citoyen honorable et paisible qui ne faisait qu'exercer des droits que les tribunaux du pays lui avaient reconnus et qui semblaient être devenus incontestables. Il n'y a pas de doute que des dommages assez élevés devaient être accordés pour marquer la réprobation de la conduite illégale de l'appelant, mais la juste mesure de ces dommages est assez difficile à établir. Cependant je crois que le montant accordé par le jury est trop élevé et pour cette raison je crois qu'un nouveau procès doit être accordé.

HENRY, J.:

In the case of the *Queen* v. *Robertson* (1) this court decided, I think, unanimously, that a riparian owner was not called upon to take out a lease to fish in the river in the exercise of his riparian rights. The authority of the Dominion Government and the Dominion Parliament is, as I take it, altogether under the Confederation Act, and there the power given to Parliament is to legislate

(1) 6 Can. S. C. R. 52.

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as to the regulation of the sea-coast and inland fisheries. There is no title conveyed to the Government there, either of the sea-coast or of the inland fisheries. Parliament takes its rights to legislate from this Act over inland fisheries, but there was no power given to the Dominion Parliament, in my opinion, to legislate away the private rights of individuals. We decided there was no such power existing; that it is the right of the riparian owner, bounding on unnavigable streams and rivers, to use half the width of the stream or river upon which his land so borders. It is a right appertaining to the property: it is one of the appurtenances to the property, as much as any other. It is a common law right that he has, and unless that right is, at all events, expressly taken away by statute, no legislation otherwise can affect it. The Dominion Government here passed an Act, 31 *Vic.*, ch. 60, authorizing the Governor in Council to make regulations for the better management and regulation of the sea coast and inland fisheries, to prevent and remedy the obstruction and pollution of streams, to regulate and prevent fishing, to prohibit the destruction of fish and forbid fishing, except under the authority of leases or licenses. The next point in the case is to consider what the leases referred must, I think, be intended. It is quite possible that the Dominion may be the riparian owner of large quantities of land in this Dominion through which flow streams where salmon and other fish run, and therefore the power to give leases of these was one that was necessary in order that a party might have an exclusive right of fishing. Under this Act they can grant leases where the land is owned by the Dominion, but, I think, it goes no further. When a party is said to be authorized to give a lease, it pre-supposes that he is the owner of the property to be leased. If the Dominion Government had the riparian rights by ownership, it was necessary that the Act

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should be passed to authorize the fishery officers to grant leases, and we have the right, therefore, to conclude that the word "lease" in the Act, or "regulation," meant a lease of property owned by the Dominion Government. But if it was intended to grant leases of property they did not own, then comes the question as to the power under the Order in Council or under the statute. That question was settled in the case before referred to. Now, what is the Order in Council as to licenses? It is to authorise the fishery commissioner to issue licenses to parties to fish where the exclusive right of fishing does not already exist. What does that mean? If there is an exclusive right already existing—and I maintain, under the common law principle, the riparian owner had the exclusive right—this provision for the issuing of licenses by the Department does not apply at all. It applies only to cases where the exclusive right did not exist. If this be so, what is the jurisdiction here of the defendant? He says:

> Under these statutes and regulations I went there to prevent the party who had the riparian right to fish from fishing on his own land, because he did not take a lease from the Government,

who had no power to give it to him, or a license where none was required. I have shown he did not require a license, because the law said, as plainly as words could make it, in my opinion, that a party who had an exclusive right did not require a license. Here, then, is one of the rights of property tacitly accorded by the terms of the regulation attempted to be attacked, and if the Government had the right to say, "You cannot fish on your own land without taking a license," they could demand a tax so heavy as to prevent the parties using their rights. It is possible that the extreme right to legislate to that extent does exist, but it could only be exercised where there was an extreme public necessity for it. It is possibly true that extreme course, for the

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purpose of revenue, might be resorted to by the Government, but then very great necessity must be shown before, I think, Parliament would have the right to say to a riparian owner "you shall not exercise your common law rights of property without paying a tax to the Government." It is quite possible that it might be done, and I do not say that in extreme cases it could not be done; but from what we know of the condition of the country, we have no right to conclude that any such necessity exists or existed.

As regards notice of action, I have come to the conclusion that the defendant was not acting as a magistrate. He was a magistrate by statute, but only so when he was acting in the capacity of magistrate, or justice of the peace. Here he shows, himself, that he was not acting as such—that he went there under the orders of the department as any agent authorized by the department would have done, and made a seizure. He made the seizure, then, as an officer by the command of the Government. It is true that he might have done what he did as a magistrate, and it is true that under the statute he could, on view, make a seizure of nets or other matters that were being used contrary to the terms of the Act, and he could also make an order to confiscate them, but he shows that he did not make the seizure in that way. If he had said that he went there as a magistrate, of his own motion, and, acting as a magistrate, he would be entitled to notice, but he says:

> I went before a magistrate afterwards to do what I might have done myself had I been acting as a magistrate in the first instance.

He was not, I take it, acting as a magistrate in anything he did, and he is therefore not entitled to claim the protection of the statute.

The only other question is the question of damages. I think the jury assessed the damages under an improper idea. I think that these damages were assessed under

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the idea that it was a case calling for vindictive damages. It is true, they had a right to assume that the Government might, in its discretion, indemnify the officer called upon to perform this particular duty, still I do not think they had a right to take that into consideration, when they were deciding the only question they ought to decide—what the party was entitled to get for the damage done. Taking that into consideration (and that is the only principle on which a jury is entitled to assess damages in a case like this) I think they exceeded it, and to a pretty large extent. If it had been even a good deal more than I would have thought right under the circumstances, I would not have interfered, but I think the difference here is too much when we get up to thousands of dollars in a case where a party is interfered with for a short time, and the damage done to him not of a very serious character. Under the circumstances, I think, if this court could agree upon an amount to which the damages should be reduced, and the parties were willing to take that reduced amount, we could give judgment to that extent, but that not having been done, and the damages being, in my opinion, excessive, the only course, I think, left open to this court, is to set aside the verdict on the ground of excessive damages. Under the peculiar circumstances of the case, I think the ends of justice would require the respondent should not be saddled with the costs in this court, and I quite agree with the decision the learned Chief Justice has arrived at with regard to costs. I think the verdict ought to be set aside on the ground of excessive damages, but on the terms the learned Chief Justice has already stated.

GWYNNE, J.:

These are actions brought by the respective plaintiffs against the defendant, who is Fishery Inspector for the

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Province of *New Brunswick*, appointed under the provisions of the Dominion statute, 31 *Vic.*, ch. 60. The declaration in each of the actions, at the suit of *Steadman* and *Hanson* respectively, contains counts in trespass and one in case for malicious prosecution, but, as at the trial, verdicts were rendered for the defendant upon the count in case, it is not necessary to refer to that count. The declaration in the action at the suit of *Spurr* contained but one count, and that in trespass.

The trespasses complained of were, that the defendant had entered upon the close of the respective plaintiffs, from and upon which they then respectively were fishing in the waters of the river *Miramichi*, in the Province of *New Brunswick*, and then and there wrongfully seized and deprived the plaintiffs respectively of the use and possession of a certain fishing rod, fishing line and reel with which the respective plaintiffs were then fishing in said waters, and then and there hindered and prevented the respective plaintiffs from fishing as aforesaid.

To these counts the defendant pleaded not guilty per statute, and specified the following statutes, namely, ch. 89, secs. 1 and 2, and ch. 90, sec. 8 of the Consolidated Statutes of *New Brunswick*, and the Dominion Parliament Statute, 31 *Vic.*, ch. 60, secs. 1, 16, 17, 18 and 19, known as the Fisheries Act of 1868.

At the trial, the acts relied upon by the plaintiffs respectively as the acts complained of being proved, the defendant insisted that in doing what he did he was acting in his capacity of Fishery Inspector, and in pursuance of instructions given to him from the Department of Marine and Fisheries for his guidance in acting as such Fishery Inspector, under the authority and provisions of the Fisheries Act of 1868. This was admitted on the part of the plaintiffs.

By order in Council of the 11th day of June, 1879,

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the following fishing regulation was made and adopted:

Fishing for salmon in the Dominion of Canada, excepting under the authority of leases or licenses from the Department of Marine and Fisheries, is hereby prohibited.

It was admitted that the plaintiffs were aware of the Order in Council, having seen it published in the *Official Gazette*, and it was also admitted that under this authority it was that the defendant was acting, but it was contended that (although, as was admitted, the respective plaintiffs were fishing for salmon) this Order in Council had not any application to them, as they were fishing up on their own lands, and where, in consequence, they had the exclusive right of fishing; and it was contended that the regulation by the Order in Council must be limited to the same extent as the 2nd section of the Fisheries Act is, which is limited to places where the exclusive right of fishing does not exist. On the other hand, it was contended that the regulation, as well as the 19th sec. of 31st *Vic.*, ch. 60, under which it was made, must be construed as having general application, and moreover, that whether they should or not be so construed, the defendant was protected in respect of the acts complained of under ch. 89 of the Consolidated Statutes of *New Brunswick*, or that at any rate he was entitled to a notice of action under the provisions of ch. 90 of the Consolidated Statutes of *New Brunswick*, and that no notice having been given, he was entitled to have a verdict in his favor, or judgment of non-suit entered. The learned judge refused to non-suit and submitted the cases to the jury as cases proper for them to award damages against the defendant, ruling that the defendant was not entitled to protection under either of the above statutes, and the jury rendered a verdict for $3,000, on the trespass counts in the action at the suit of *Steadman*, and for $1,000 on the trespass counts in the action of the suit of *Hanson*, and for $1,220 in the action at the suit

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of *Spurr*. Upon motions to set aside these verdicts and to enter a non-suit upon the grounds insisted upon at the time the court sustained the ruling of the learned judge who tried the cases, and upheld the verdicts rendered in all the cases, except in that at the suit of *Steadman*, in which, having said that they would grant a new trial unless the plaintiff should consent to have his verdict reduced to $1,500, and the plaintiff having consented, the verdict was reduced accordingly, and thereupon they discharged the rule *nisi* in that case also.

The defendant appeals from all of these rules.

The defendant, in my opinion, is entitled to prevail upon the point raised by him at the trial under the provisions of the 90th chapter of the Consolidated Statutes of *New Brunswick*, that is to say, the defendant was entitled to succeed upon the objection that he had not been served with notice of action. By the 1st sec. of the Dominion Statute for the regulation of fishing and the protection of fisheries, it is enacted that:

> The Governor may appoint fishery officers, whose power and duties shall be defined by this Act and the regulations made under it, and by instructions from the Department of Marine and Fisheries; and every officer so appointed under oath of office and instructed to exercise magisterial powers shall be ex-officio a justice of the peace for all the purposes of this Act and the regulations made under it, within the limits for which he is appointed to act as such fishery officer.

And by the 18th section it is enacted that—

> Any fishery officer or other magistrate may convict, upon his own view of any of the offences both as infractions and for non-compliance, punishable under the provisions of this Act: and shall remove or cause to be removed instantly, and detain any materials illegally in use.

[The learned Judge read also section 19.]

And by section 16 it is enacted that—

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Each and every offender against the provisions of the Act or the regulations under it, shall, for each offence, incur a fine of not more than twenty dollars, besides all costs.

The above Order in Council of the 11th June, 1879, containing the prohibition of salmon fishing, except under a lease or license, was proved by the production of the *Canada Gazette*, in which it was published. In the action at the suit of *Steadman*, the defendant gave evidence to the effect that he has been and acted as a fishery officer since 1868. His further examination upon this point was dispensed with by the admission of the fact by counsel for the plaintiff, and the statement inserted in the judge's notes, that no question was raised upon this ground. He further stated that he had received instructions what to do, and that he was to exercise magisterial powers under the Fisheries Act, and that in what he did do in the particular case, he did under instructions from the Department of Marine and Fisheries—that he seized the rods for the *Queen* and gave them up, on condition to be returned when called for. Mr. *Steadman* having himself been called, said that he knew the defendant was Fishery Inspector, and that he was acting as such. He knew of the Order in Council of 1879, having seen it in the *Gazette*: that he was satisfied that the defendant was only doing what he was ordered to do, and that the rods were given up immediately, on the understanding that when required they should be returned.

In the action at suit of *Hanson*, it was expressly admitted that the defendant at the time of the alleged trespass was Fishery Inspector for the Province of *New Brunswick*, duly appointed and sworn, and had been so for some years previously; that he had received instructions from the Department of Fisheries to exercise such power and authority, and to carry out the orders of the Department, and that in the acts complained

of he was acting under instructions of counsel for the Department, and under the advice of the agent of the Minister of Justice, and in the action at suit of *Spurr*, it was also proved that the defendant was Fishery Inspector for *New Brunswick*, and sworn in as such, and that he had received instructions from the Department to exercise magisterial powers within his district, which was the Province of *New Brunswick*, and that in doing what he did, he was acting under instructions from the Department, and in his capacity as fishery officer. The contention of the plaintiffs was, that the regulation contained in the Order in Council of the 11th June, 1879, must be construed to be limited to cases coming within the 2nd section of the Fisheries Act, namely, to places where the exclusive right of fishing does not already exist by law, and therefore that it does not apply to the plaintiffs, who were fishing upon their own lands. On the other hand, the contention urged by Mr. *Burbidge*, on behalf of the defendant, was that the prohibition contained in the Order in Council is not to be so limited, for that it is general in its terms and is made under the authority of the 19th section of the Act, which purports to authorize the Governor in Council to forbid fishing except under the authority of leases or licenses, and that the regulation containing such prohibition should have the same force and effect as if specially contained in the statute, notwithstanding that such regulation might extend, vary or alter any of the provisions of the Act, respecting the places or modes of fishing. This, no doubt, would raise a very important question, if the construction of the Act or its validity were now under consideration; but which of those views is correct, or what is the true construction of the Act, or whether it did or did not authorize the defendant to do the acts complained of and whether if open to the construction, that in terms it did, that

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part of the Act would or not be *ultra vires* of the Dominion Parliament, are questions upon which we are not called upon now to express, nor is it, in my opinion, proper that we should express, any opinion, as they have no bearing whatever, nor are they of any importance as regards the question which is now under consideration, namely, whether the defendant was entitled to notice of action or not.

That the defendant was acting in his capacity of a magistrate as Fishery Inspector of the Province of *New Brunswick*, and under the instructions of the Department of Marine and Fisheries, whose orders the statute directs him to obey, and that he was acting under the best legal advice, which, as an officer of the Department, he could get, namely, that of the Deputy Minister of Justice, are points which are not disputed, and these are the points upon which the question of right to notice of action depends. It is as Fishery Inspector and to enable him to discharge efficiently the duties of that office that he is made a magistrate; and all acts done by him in the character of Fishery Inspector and which might have been done by him in his character of a magistrate, acting upon view, as authorized by the statute, must be regarded as done by him in his character of a magistrate which, as being Fishery Inspector, and only as such, he is. The purpose for which notice of action is required to be given assumes that a statute, under the assumed authority of which an act is done, fails for some reason to afford complete protection to the defendant, for if it did afford such protection the statute would be a sufficient defence, but notice of action is required to be given for the purpose of giving to a defendant an opportunity to tender amends, which, of course, involves an assumption that the statute may not afford a justification of the acts complained of.

A party's right to notice of action must, of course, depend upon the wording of the particular statute requiring notice to be given to him, but as a general rule, it has been long established, that where the facts are such that a party may be considered as having fair color for supposing that he is warranted by the Act of Parliament in doing that which is made the subject of the action, he is entitled to notice,—that all persons who believe or suppose they are acting in pursuance of the Act of Parliament under which they profess to act are within the protection of a clause requiring notice to be given to them—even though they may have acted illegally. In accordance with these principles a magistrate has been held to be entitled to notice of action for an act done by him as a magistrate, although what he did was not within the scope of his authority, and so likewise, even though he may have acted maliciously; and it has been held that if a defendant was acting as a revenue officer, or even supposed he had legal authority so to act, he was entitled to notice without proving his appointment. *Bird* v. *Gunston* (1); *Prestidge* v. *Woodman* (2); *Daniel* v. *Wilson* (3); *Cook* v. *Leonard* (4); *Beachey* v. *Sides* (5); *Hughes* v. *Buckland* (6); *Kirby* v. *Simpson* (7); *Wadsworth* v. *Murphy* (8).

Now, the provision of the *New Brunswick* statute, ch. 90, is, that no action shall be commenced against a justice for any official act until one month at least after notice in writing of such action served upon him, &c., &c., &c., and every such action shall be brought within six months next after the cause thereof, and the venue shall be laid and the cause tried in the county where the act was committed, and the defendant may

(1) 4 Doug. 275.
(2) 1 B. & C. 12.
(3) 5 T. R. 1.
(4) 6 B. & C. 351.
(5) 9 B, & C. 809.
(6) 15 M. & W. 350.
(7) 23 L. J. M. C. 165.
(8) 1 U. C. Q. B. 190.

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plead the general issue and give the special matter in evidence; and if on the trial of any action the plaintiff should not prove the action brought—notice thereof given within the time limited in that behalf, the cause of action stated in the notice—and that it arose in the county where brought, he shall be non-suited, or the verdict may be entered for the defendant.

The word "justice" in the above Act is by the Interpretation Act, ch. 118, of the Consolidated Statutes of *New Brunswick*, declared to signify any justice of the peace for any city, county, or city and county.

That the defendant at the time of the committal by him of the alleged grievances which are the subject of these actions, was under the provisions of the Dominion Statute, 31 *Vic.*, ch. 60, sec. 1, a justice of the peace for the county within which he was acting as Fishery Inspector, has not been disputed.

By the 18th section of that Act he was authorized, as such Fishery Inspector and justice of the peace to convict, on his own view, for any infraction of any of the regulations made by the Governor in Council under the Act, which regulations were, by sec. 19, given the force and effect of a statutory enactment.

Neither can it, I think, be doubted that the defendant was acting in his official character of justice of the peace as well as of Fishery Inspector, in virtue of which office he became and was justice of the peace, and so that his acts were official acts within the provision of ch. 90 of the C. S. of *N. B.*, and that he was acting in the belief, and, indeed (as he was acting under express instructions from the Department and under the advice of the Deputy Minister of Justice) in the reasonable belief, however mistaken that belief may have been, that the acts complained of were authorized by the Act.

Under these circumstances, the defendant, as it appears to me, is entitled to the benefit and protection

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given by chap. 90 of the Consolidated Statutes of *New Brunswick*. I can see no reason why a person acting as a justice of the peace under an appointment as such under the authority of a Dominion Act of Parliament, is not entitled to the benefit of the provincial statute, equally as any other justice of the peace, however appointed; and being, as I think the defendant was, entitled to a notice of action, and not having received any, the plaintiffs should have been non-suited, or verdicts should have been rendered for the defendant.

The defendant was also, I think, entitled to the protection intended to be given by chap. 89 of the Consolidated Statutes of *New Brunswick*, by which it is enacted that:—

> In any action, suit or proceeding, either at law or in equity for, or by reason, or in consequence of any matter or thing done under and according to the provisions of any Act of the Legislature of this Province, or of the Parliament of *Canada*, passed or to be passed, that the same was done under and according to the provisions of said Act or Acts, shall be a good defence to any such action, suit or proceeding, either at law or in equity, and the subject matter of such defence may be given in evidence under the general issue or other plea; and any justice shall be deemed to have acted within his jurisdiction for the purposes of this chapter, who acts or has acted within a jurisdiction given, or intended to be given, by any Act of the Legislature of this Province, or of the Parliament of *Canada*, whether within or beyond the power of such Legislature or Parliament, as the case may be.

The words in this statute "under and according to the provisions of any Act," &c., &c., must receive the same construction as, in *Hughes* v. *Buckland* (1), was given to the words "for the protection of persons acting in the execution of this Act, be it enacted that all actions and prosecutions to be commenced against any person for anything done in pursuance of this Act, shall," &c.

In that case the rule was held to be that a person was protected who acted *bonâ fide*, and in the reasonable

(1) 15 M. & W. 350.

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belief that he was acting in pursuance of the Act of Parliament; that the protection was only required by him who acts illegally, but under the belief that he is right. That those words, "anything done in pursuance of this Act," do not mean acts done in strict pursuance of the Act. So, likewise, as it appears to me, the words "anything done under and according to the provisions of any Act," &c, &c., do not mean anything done in strict accordance with the provisions of such Act, but that in both cases the protection is extended to all who *bonâ fide* and reasonably believed that they were authorized to act in the character and manner in which they did act.

Here the defendant undoubtedly, in his character of Fishery Inspector, filled the character of a justice of the peace, persons filling which character were plainly intended to be protected by the Act, and that the defendant acted as such, and in the belief that he was authorized to act as such, cannot, I think, be doubted, and as he acted under the advice of the Deputy Minister of Justice, it could not, I think, be doubted, that he *bonâ fide* and reasonably believed that under of the provisions of the Dominion statute and in his character of justice of peace, which, as Fishery Inspector, he was, he was authorized to do what he did do. This does not appear to have been disputed at the trial; if there had been any doubt upon that point, the question of fact should have been submitted to the jury. Upon this ground, as well as on the other point, as to the defendant's right to have had a notice of action, the defendant was, I think, entitled to have had a non-suit or a verdict for him entered. The appeals, therefore, in my opinion, should be allowed with costs, and rules absolute for non-suit be ordered to be issued from the court below, with costs.

Appeals allowed without costs.

Solicitors for appellants: *L. H. Harrison.*

Solicitors for respondent: *J. Henry Phair.*

JOHN TAYLOR WOOD.....APPELLANT; 1883

*Oct. 31.

AND

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WILLIAM ESSON *et al*.....RESPONDENTS. *Mar. 8.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Obstruction in navigable waters, below low water mark—Nuisance—Trespass.

E. et al. brought an action of tort against *W.* for having pulled up piles in the harbor of *Halifax* below low water mark, driven in by them as supports to an extension of their wharf, built on certain land covered with water in said Harbour of *Halifax*, of which they had obtained a grant from the Provincial Government of *Nova Scotia* in August, 1861. *W.* pleaded, *inter alia*, that "he was possessed of a wharf and premises in said harbour, in virtue of which he and his predecessors in title had enjoyed for twenty years and upwards before the action, and had now, the right of having free and uninterrupted access from and to *Halifax* harbour to and from the south side of said wharf, with steamers, &c., and because certain piles and timbers, placed by the plaintiffs in said waters, interfered with his rights, he (defendant) removed the same." At the trial there was evidence that the erections which *E. et al* were making for the extension of their wharf did obstruct access by steamers and other vessels to *W's* wharf. A verdict was rendered against *W.*, which the full court refused to set aside. On appeal to the Supreme Court of *Canada* it was

Held—(reversing the judgment of the Supreme Court of *Nova Scotia*) that, as the Crown could not, without legislative sanction, grant to *E. et al*, the right to place in said harbour below low water mark any obstruction or impediment so as to prevent the free and full enjoyment of the right of navigation, and as *W.* had shown special injury, he was justified in removing the piles which were the trespass complained of.

APPEAL from a decision of the Supreme Court of *Nova Scotia*, discharging with costs a rule *nisi* obtained

*PRESENT.—Sir W. J. Ritchie, C.J., and Strong, Fournier, Henry and Gwynne, JJ.

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by the appellant to set aside the verdict or finding of Mr. Justice *Weatherbe* in favor of the respondents.

The appellant and respondents are the owners of two wharves and water lots in the city of *Halifax*, that of the appellant lying immediately to the north of a public dock, and that of the respondents immediately to the south of said dock.

The appellant, and those under whom he claims, have, for upwards of twenty years, been in the habit of bringing vessels to the south side of his wharf adjoining the public dock, and there landing and discharging cargo.

In August, 1881, the respondents, who had obtained in 1861 a grant from the Provincial Government of *Nova Scotia* of certain land covered with water, being a part of the harbour of *Halifax*, extended their wharf to the northward and thereby prevented vessels and steamers from getting to the south side of appellant's wharf, as they had always done up to that period, and the appellant pulled up the piles and removed the obstructions so that the steamers could get in.

For this alleged trespass an action in tort was brought by the respondents against the appellant and one *John F. Mitchell.*

The declaration consisted of three counts and the defendants pleaded *inter alia :*

11th. "That at the time of the alleged trespasses defendant was possessed of a wharf and premises adjoining and to the north of said property, the owners and occupants of which had for the period of twenty years and afterwards before this action enjoyed at all times, as of right and without interruption, the easement, right and privilege of having free and uninterrupted access from and to the *Halifax* harbour to and from the south side of said wharf with steamers and vessels, and of mooring and fastening the same there

while they took in and discharged cargoes and for other purposes; and because certain piles and timbers wrongfully obstructed and interfered with said rights and easements, defendant removed said obstructions, doing no unnecessary damage, which are the alleged trespasses."

Upon the trial it was admitted that the respondents possessed the title to this property which *John Esson* had in his lifetime.

The respondents also put in evidence a grant from the Crown, dated 16th July, 1861, which was contended on the part of respondents covered the *locus*.

Mr. Justice *Weatherbe*, before whom the cause was tried, found a verdict in favor of defendant *Mitchell*, there being no evidence to connect him with the trespass; and the respondents acquiesced in this finding. A verdict, however, was rendered against the appellant *Wood* in the following terms: "I find that the alleged trespasses were committed by the defendant *Wood* within the limits of the property described in the grant from the Crown to *John Esson et al.*, dated 16th July, 1861, against whom a verdict on all the issues will be entered for $175, at which I assess the damages."

A rule *nisi* to set aside that verdict and judgment was obtained by *Wood* and discharged by the Supreme Court of *Nova Scotia*, and thereupon *Wood* appealed to the Supreme Court of *Canada*.

Mr. *Sedgewick*, Q.C., and Mr. *Gormully* for appellant:

The obstruction complained of was in the harbour of *Halifax* and no grant could deprive the appellant of his right to approach by the navigable waters of the harbour a wharf of which he had a continuous user for over thirty years.

Mr. *Graham*, Q.C., for respondents:

The title of respondents to the property whereon the

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trespasses were committed was clearly proven upon the trial, and there is no evidence which can sustain the plea of user.

RITCHIE, C.J.:

The erection which the plaintiffs allege the defendant interfered with, and which is the alleged trespass for which they seek damages, consisted of piles driven with a view to the construction of a wharf below low water mark, in the navigable waters of the harbour of *Halifax*, and which obstructed and prevented the defendant's vessels and steamers from navigating in that part of the said harbour and from getting to the south side of his wharf, as he had been accustomed to do, and which piles or obstructions he pulled up and removed so that his steamers could get to his wharf. There can be no doubt that all Her Majesty's liege subjects have a right to use the navigable waters of the *Halifax* harbour, and no person has any legal right to place in said harbour, below low water mark, any obstruction or impediment so as to prevent the free and full enjoyment of such right of navigation, and defendant, having been deprived of that right by the obstruction so placed by plaintiffs and specially damnified thereby, had a legal right to remove the said obstruction to enable him to navigate the said waters with his vessels and steamers, and bring them to his wharf. On this short ground I think the appeal should be allowed.

It is not pretended that plaintiffs, in placing the piles in question, were doing so under any legislative authority, which alone could justify an interference with the navigable waters of the harbour.

STRONG, J.:

The 11th plea sufficiently sets up the defence upon which, in my opinion, the appellant is entitled to have this appeal allowed.

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The defendant was in possession of a wharf in *Halifax* harbour, to which a line of steamers and other vessels were used to come.

The plaintiffs, in 1861, obtained a grant from the Provincial Government of *Nova Scotia* of certain land covered with water, being part of the harbour, and in August, 1881, they built upon this land an extension of a wharf, of which they were the proprietors, in such a way as to cause an obstruction to the passage of the vessels which had been used to resort to the defendant's wharf. The defendant pulled up the piles which had been driven as supports for this extension, so as to enable the steamers and other vessels to get in to his wharf. The court below have upheld a verdict found against him on this state of facts.

The defendant's possession of this wharf is *primâ facie* evidence of seisin in fee, and was sufficient to enable him to justify any acts which an owner seized in fee could justify.

The grant to the plaintiffs by the Provincial Government, in 1861, was valid and operative to pass the title to the soil of the harbour included in the grant, but, although the grant was effectual for this purpose, and the plaintiffs had a valid title under it, that did not justify any erection upon the land granted having the effect of obstructing the navigation of the harbour.

The title to the soil did not authorize the plaintiffs to, extend their wharf so as to be a public nuisance, which upon the evidence, such an obstruction of the harbour amounted to, for the Crown cannot grant the right so to obstruct navigable waters; nothing short of legislative sanction can take from anything which hinders navigation the character of a nuisance (1). That these piles did actually interfere with the approach to the defendant's wharf is proved, and this is sufficient to

(1) *Atty. Gen.* v. *Terry*, L. R. 9 Ch. App. 23.

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bring it within the case of *Dimes* v. *Petley* (1), where Lord *Campbell* holds that a person is not justified in abating a public nuisance of this kind, unless he can show that he is actually injured by it. Here the defendant does show special injury and, therefore, he was justified in removing the piles, which are the trespasses complained of, and the verdict should have been found for him.

The judgment must be reversed with costs, and the rule for a new trial made absolute with costs.

FOURNIER, J. :

Les parties en cette cause sont propriétaires de quais et de terrains couverts par l'eau, situés de chaque côté d'un dock public dans la cité et le port d'*Halifax*. Le quai de l'appelant est au nord et celui de l'intimé au sud du dock qui les sépare

Depuis au-delà de vingt ans l'appelant était dans l'habitude d'amener des vaisseaux au côté sud de son quai, adjoignant le dock public, pour les y charger et décharger.

Dans le mois d'août 1881, les intimés firent commencer la construction d'une addition à leur quai, du côté nord donnant sur le dock déjà mentionné. Cette construction ayant l'effet d'empêcher les steamers et autres vaisseaux d'arriver au côté sud du quai de l'appelant, celui-ci fit enlever la partie de ces travaux qui obstruaient l'accès à son quai. Telle est la cause de la présente poursuite pour voie de faits (*trespass*).—Un nommé *J. F. Mitchell* avait été compris dans la poursuite.

L'honorable juge qui a présidé au procès sans le concours d'un jury, a déclaré par son verdict que la voie de faits avait été commise par l'appelant dans les limites d'une concession (*grant*) faite par la Couronne à l'intimé en 1861. *Mitchell* fut mis hors de cause.

(1) 15 Q. B. 276.

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Fournier, J.

L'appelant a pris une règle *nisi* pour faire mettre le verdict de côté pour les raisons suivantes : 1o Parce que la ligne nord de la concession (*grant*) faite aux intimés n'était pas prouvée, et parce qu'il n'y avait pas de preuve que l'endroit où la voie de fait avait été commise était dans les limites de la concession.

2o Parce que l'appelant avait droit à un verdict fondé sur le 11e plaidoyer par lequel il réclame un droit d'usage (*easement*) ou servitude depuis au-delà de vingt ans pour arriver à son quai.

3o Enfin, le rejet d'un plan original de record dans le bureau des terres de la Couronne.

Cette règle fut renvoyée et c'est de ce jugement qu'il y a maintenant appel.

Les questions qui se présentent maintenant à la considération de cette cour, sont :

1o Les intimés ont-ils prouvé, par le titre qu'ils ont produit en date du 16 juillet 1861, un droit exclusif de propriété de l'endroit où la voie de fait a été commise ? Ce terrain est décrit comme suit :

"A water lot or lot of land covered with water, situate, lying and being in the County of *Halifax*, bounded as follows: *Beginning on the southern line of the public dock, at the eastern end of Slater street, and at the north-eastern angle of the wharf* property of the said *Esson, Boak & Co.*, at *Halifax* aforesaid; now running easterly by the course of *said line* two hundred and ten feet into the harbor, &c., &c."

Par la description contenue dans le titre aussi bien que par la preuve testimoniale, il est établi que le lot en question est entièrement couvert par l'eau, et se trouve situé même au-dessous de la ligne de la basse marée, dans le port d'*Halifax*.

L'honorable juge qui a présidé au procès a bien déclaré que la partie des travaux d'extension commencée par les Intimés et démolie par l'Appelant se trouvait dans les limites de leur concession, mais la question de savoir si le titre des Intimés leur conférait le droit

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d'élever de pareilles constructions au détriment du public dans un endroit du port d'*Halifax*, toujours couvert par l'eau et servant à la navigation ne paraît pas avoir été soulevée devant lui. Le dossier ne contenant qu'un extrait du titre, il n'est guère possible de dire quels sont à part du droit au sol les privilèges conférés aux Intimés. Sont-ils autorisés à y faire des constructions qui puissent avoir l'effet d'obstruer la navigation ? La concession leur est-elle faite, au contraire, avec la réserve des droits du public dans les eaux navigables ? On doit présumer que le titre n'en fait aucune mention, car autrement les Intimés n'eussent pas manqué d'alléguer des conditions qui auraient justifié leur droit de faire les constructions commencées. Il faut donc en conclure que ce titre ne leur a été accordé que sujet au droit de navigation du public, la Couronne n'ayant pas le pouvoir de les aliéner dans les eaux navigables. En admettant même, ce qui me paraît assez douteux en point de fait, que les Intimés n'ont pas dépassé la ligne sud du dock public et qu'ils se soient strictement tenus dans les limites de leur concession, leur titre leur conférait-il le droit d'intervenir en aucune manière avec les droits de navigation ? Il est certain que non. De plus, ce titre ne pouvait conférer implicitement aux Intimés des droits que la Couronne ne peut aliéner. Lors même que le titre des Intimés leur eût conféré d'une manière spéciale le droit de faire les constructions qu'ils ont entrepris de faire, ce titre eut été absolument nul, la Couronne n'ayant pas, à moins d'une législation spéciale, le pouvoir d'aliéner les droits de navigation du public. On ne saurait mettre en doute ce principe trop bien établi par les autorités.

The right of the Crown to the soil in arms of the sea and public navigable rivers is subject to the public right of passage, and any

grantee of the Crown must take subject to such right. *Mayor, &c., of Colchester* v. *Brooke* (1).

The public right in this respect includes all such rights as with relation to the circumstances of each river, are necessary for the convenient passage of vessels along the channel. Ib. 26.

The bed of all navigable rivers where the tide flows and reflows, and of all estuaries or arms of the sea, is vested in the Crown, but subject to the right of navigation, which belongs, by law, to the subjects of the Realm, and of which the right to anchor forms a part; and every grant made by the Crown of the bed or soil of an estuary or a navigable river must be subject to such right of navigation (2).

The right of the public to navigate a public river is paramount to any right of property in the Crown, which never had power to grant a weir, so as to obstruct public navigation; and if a weir which was legally granted in such a river, caused obstruction at any subsequent time, it becoming a nuisance (3).

And in *Angell* on Tidal Waters (4):

The right of property in tide waters, and in the soil and shores thereof, is *primâ facie* vested in the King, to a great extent, at least, as the representative of the public. To such an extent, that to the rights of navigation and fishery, he has no other claim than such he has, as protector, guardian or trustee of the common and public rights. Hence, the King has no authority, and since *Magna Charta*, has never had, to obstruct navigation, or to grant an exclusive right of fishing in an arm of the sea.

The important doctrine, that public rights, and such things as are materially dependent upon them, cannot be alienated by the Crown, seems to have been established at a very early period. The rule, as laid down by *Bracton*, is, that these things which relate particularly to the public good cannot be given, sold or transferred, by the King, or separated from the Crown.

Hence, the people of *England* are not only, *primâ facie*, entitled to the use of the sea, &c., for the purposes hereafter to be considered, but their right in this respect cannot be restrained or counteracted by any royal grant, on the ground that the King is the legal and sole proprietor. In favor of this view of the subject, we have the treatise of Lord *Hale*, and also the opinion of one of the modern judges of the King's Bench (*Mr. J. Bailey*), who says, 'many of the King's rights are, to a certain extent, for the benefit of his subjects,

(1) 7 Q. B. 339.
(2) *Gann* v. *Free Fishers* of *Whitstable* Co., 11 H. L. Cas. 192.
(3) *Williams vs. Wilcox*, 8 A. & E., 314.
(4) P. 23.

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and that is the case as to the sea, in which all his subjects have the right of navigation and of fishing, and the King can make no modern grants in abrogation of those rights.' It is unquestionably true, as regards the authority of the Crown, as was asserted by one of the learned judges in *Browne vs. Kennedy*, in *Maryland*, that the subject has, *de commune jure*, an interest in a navigable stream, such as a right of fishery and navigation, which cannot always be restrained by any charter or grant of the soil, or fishery since *Magna Charta*, at least. The King may doubtless grant the *soil* covered by tide water to an individual, but the right of the grantee is always subservient to the public rights above mentioned. 'The soil, says *Mr. G. Best*, can only be transferred, subject to this public trust, and general usage shows, that the public right has been excepted out of the grant of the soil.'

D'après ces autorités, il est évident que la Couronne n'avait pas le pouvoir de conférer aux Intimés le droit d'ériger dans le port d'*Halifax* des constructions qui pouvaient intervenir avec la navigation. La construction commencée par les Intimés, doit donc être considérée comme une nuisance publique, si elle n'a pas été autorisée par la loi. Il n'en a été cité aucune à cet effet. En conséquence, les Intimés n'avaient aucun droit de porter leur présente action. Ils doivent succomber à cause de l'insuffisance de leur titre.

L'Appelant par son 11me plaidoyer a invoqué un droit de servitude (easement) exercé depuis plus de vingt ans sur l'endroit où la voie de fait a été commise, ainsi que dans le dock avoisinant son quai. La preuve qu'il a faite de l'examen de ce droit n'a pas été considérée comme suffisante pour le lui faire acquérir par prescription ; mais il n'est pas nécessaire d'entrer dans l'examen de cette question ; car l'endroit où il exerçait ce droit de servitude étant un dock public, soumis au droit de navigation du public, l'Appelant n'y pouvait pas acquérir par prescription un droit particulier, mais il avait en commun avec le public le droit d'en faire usage pour les fins de la navigation.

Dans le but de s'assurer davantage le droit qu'il

exerçait de faire usage de ce dock pour l'exploitation de son quai, l'Appelant en obtint, le 20 novembre 1879, une concession du gouvernement de la *Nouvelle-Ecosse* avec la condition de n'y faire aucune construction, et avec de plus la réserve du droit de passage en faveur des sujets de Sa Majesté. Ce dock étant une partie du port d'*Halifax*, il n'appartenait qu'au gouvernement fédéral et non au gouvernement local d'en disposer. C'est ce que cette Cour a déjà décidé dans la cause de *Holman* et *Green* (1). Ainsi cette concession est nulle ; et l'Appelant n'a dans ce dock que des droits qu'il partage en commun avec le public, au lieu de la servitude qu'il a invoquée. Toutefois cette position est suffisante pour lui donner le droit d'exiger que l'entrée du dock, et le dock lui-même, qui avoisine son quai soit libre de toute obstruction.

La preuve a établi que la construction commencée par les Intimés et dont une partie a été enlevée par l'Appelant avait diminué la largeur du dock et de son entrée. L'appelant, dans son témoignage, dit : que des poteaux avaient été posés à une distance seulement de 15 à 16 pieds vis-à-vis de son quai. L'espace entre les deux quais à la ligne de basse marée était de 22 pieds 8 pouces. Au haut des quais la distance était plus considérable, mais elle avait été tellement réduite par les nouveaux ouvrages que l'Appelant ne pouvait plus faire arriver ses bâtiments à son quai. *Phalen*, le locataire du quai des Intimés dont le témoignage ne saurait être suspect, dit :

Steamers that had been in the habit of coming into that dock were prevented by *Mosher's* work.

Mosher était le contracteur des travaux qui avaient l'effet d'obstruer l'entrée du dock et d'en diminuer la largeur. Ces témoignages ne laissent pas de doute sur le fait de l'existence d'une obstruction à la navigation et à l'usage

(1) 6 Can. S. C. R. 707.

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du dock, causant une nuisance publique. L'Appelant ayant droit de faire usage de ce dock pour arriver à son quai, n'avait-il pas le droit de faire disparaître cette nuisance ? C'est ce qu'il a fait dans le seul but d'exercer ses droits de navigation et en faisant le moins de dommage possible aux ouvrages des Intimés. En cela, il n'a fait qu'exercer le droit que lui conférait la loi de faire disparaître une nuisance qui faisait obstacle au passage des vaisseaux allant à son quai. Ce principe est bien établi par toutes les autorités. Il suffit d'en citer quelques-unes :

A fourth remedy by the mere act of the party injured, is the *abatement*, or removal, of nuisances. * * * * And the reason why the law allows this private and summary method of doing one's self justice, is because injuries of this kind, which obstruct or annoy such things as are of daily convenience and use, require an immediate remedy; and cannot wait for the slow progress of the ordinary forms of justice (1).

Les constructions de l'Intimé étaient à n'en pas douter une nuisance :

All obstructions to navigation, whether by bridges, or in any other manner, without direct authority from the Legislature, are public nuisances. Lord *Hale*, in his treatise *de Portibus Maris*, notices the several nuisances which may be committed in ports as follows: Building new wharves or enhancing old; the straightening of the port by building too far into the water, &c. * * * *

All obstructions to navigation which are not occasioned by misfortune or inevitable accident, and without any fault on the part of the owner, and which are not authorized by the Legislature, are, of course, public nuisances, and as such, subject the authors of them to indictment. It is very well known to be settled law also, that all public nuisances are likewise liable to be *abated;* and the remedy by abatement is in all respects concurrent with that by indictment (2).

Tomlins' Law Dictionary :

It is said, both of a common and private nuisance, that they may be abated, or by those who are prejudiced by them, and they need not stay to prosecute for their removal; *Wood's* Inst.,

(1) Blackstone,3 vol., p. 5.

(2) Angell on Tide Waters, pp. 111 and 115.

443; but no man can justify the doing more damage than is necessary, or removing the materials further than requisite, 1 *Hawk.* P. C., c. 75-76; Tha., 680 (1).

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En résumé, l'action des Intimés ne peut pas être maintenue, 1o parce que leur titre même en supposant qu'il couvre l'endroit de la voie de fait (*tresspass*) ne leur a conféré aucun droit de faire des constructions qui puissent intervenir avec l'exercice du droit de navigation du public, et qu'une telle concession si elle leur eût été faite, serait illégale. Le terrain en question étant au-dessous de la basse marée, la Couronne n'a point dans ce cas, à moins d'autorité législative, le pouvoir d'aliéner les droits de navigation du public. 2o Parce que la preuve a établi que les travaux en question étaient une obstruction qui empêchait les steamers d'arriver au quai de l'Appelant; que cette obstruction constituait une nuisance publique que dans dans les circonstances de cette cause l'Appelant avait le droit de faire disparaître. Ces deux questions étant résolues en faveur de l'Appelant, il devient tout à fait inutile de s'occuper du rejet du plan dont il se plaint dans la règle *nisi*. En conséquence de ce qui précède je suis d'avis que l'appel doit être accordé avec dépens.

HENRY, J.:

The appellant is shown to have been, by himself and others, through whom he claims title, for over twenty years previous to the action in this case, in possession of a wharf property in the city of *Halifax, Nova Scotia*, which extends into the navigable waters of the harbour to which vessels, large and small, resorted to load and unload cargoes. The respondent is also shown to have title to another wharf property, situated to the south of that of the appellant and distant therefrom a sufficient distance to permit the vessels using both wharves to

(1) Voir Fisher's Digest—"Nuisance, Abatement of."

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enter the dock between them, and lie as well on the south side of the appellant's wharf as on the north side of the respondent's.

Previous to the confederation of the British North American Provinces by the operation of the Imperial Act passed to effect that object, the respondent obtained a grant from the Local Government of a portion of the dock to the northward of his wharf, by which the fee simple in the land covered by the water of the dock was conveyed to him, and since the going into operation of that Act, the appellant obtained a grant of a part of the dock south of his wharf, but on condition that he should not erect any wharf or in any way interfere, by any erection on the granted land, with navigation. Disputes as to the true lines of the grants, and legal questions as to the construction of the descriptions in them existed and were considered on the trial, but it is not, in my opinion, necessary here to refer to them. The respondent, believing he was legally authorized to do so, commenced to build an extension of his wharf by causing piles to be driven in the dock on or within the northern line, as claimed by him, of the land granted to him. By the driving of the piles, and whilst they remained as driven, the dock, south of the appellant's wharf, became so narrowed and straitened that vessels could no longer enter it, or get to the south side of the appellant's wharf, as they had before done, and he caused the removal of the piles. For that act the present action was brought Was the appellent justified in removing the piles in question as he did? He had, without doubt, the right of easement over the navigable waters of the harbour, for the ingress or egress of vessels to and from his wharf. He had no more. He could not exclude the public from the proper use of the dock for navigable purposes. From the fact that his wharf adjoined the dock, he had, how-

ever, special rights of easement, different from those of the general public, in the same way as a man residing in his house adjoining a highway, has the right of ingress and egress from and to the highway. If another should interfere with that right by an erection which deprived him of it, he would sustain special damages while others would only suffer as part of the general public, and would have to depend for redress on a prosecution against the offending party as for a public nuisance; unless, indeed, the nuisance was such as to create an impediment to the use of the highway by any one requiring such use. If a highway be fenced across and a party using it requires to go beyond the fence, he could legally remove it so as to pass through it. So with the occupier of the dwelling house—he would be justified in removing the obstruction to his common law right of using the highway; and so, I think, with regard to the obstruction to the wharf of the appellant, created by the piles driven and placed by the defendant, unless, indeed, he derived title to the land in which they were driven through the grant under which he claims such title.

The law in *England* as to navigable tidal waters has been long settled; and it is not now disputed that a grant of navigable waters, particularly those used in navigation, unless authorized by an Act of Parliament, is void and conveys no right or title. A patent from the Crown, say of a navigable part of the *Thames*, would in *England*, be adjudged void. The same doctrine and principles have always been applicable to this country and are founded upon a proper appreciation of, I may say, public common law rights, which are not to be affected, except by the consent of the public, by means of parliamentary action. I am not insensible to the injury that may result from this decision of the matter before us, to many who hold valuable properties in *Halifax* and elsewhere,

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solely by the title given them by grants similar to that of the respondent, but sincerely regretting such results, I feel bound to declare the law as I consider it. Courts are only to administer the law as they find it in each case, without regard to expediency or consequences. Parliaments and Legislatures alone can change it.

For the reasons given, I am of opinion that the verdict and judgment below, as between the appellant and respondent, should be set aside and reversed, and a new trial granted, with the costs of the appeal to this court to the appellant.

GWYNNE, J.:

This action is one in tort brought against the above appellant and one *Mitchell*. At the trial whichtook place before a judge without a jury, a verdict was rendered in favor of the defendant *Mitchell* and against the defendant *Wood;* a rule *nisi* to set aside that verdict and judgment against the defendant *Wood* having been obtained by him and discharged by the Supreme Court of *Nova Scotia*, this appeal is from the rule and judgment of that court discharging the rule *nisi*.

One of the grounds stated in the rule *nisi* as entitling him to have the said verdict against him set aside and a new trial granted, was that he was entitled to a verdict under his eleventh plea, on the evidence given at the trial. *Wood* had pleaded to the action separately from the defendant *Mitchell*. The declaration consists of three counts.

In my opinion, the case may be disposed of wholly upon the defendant *Wood's* eleventh plea, which is pleaded to all the counts of the declaration, as well to the first, which is framed in trover, as to the other two counts, which are quite inappropriate, as it seems to me, to the facts appearing in the case. The short material substance of the eleventh plea, which, as I have said, is

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pleaded to all the counts of the declaration, is that the defendant *Wood* was possessed of a wharf and premises situate in the harbour of *Halifax*, in virtue of which he and his predecessors in title had enjoyed for 20 years and upwards before this action, and had the right of having free and uninterrupted access from and to *Halifax* harbour, to and from the south side of said wharf with steamers and vessels, and of mooring and fastening the same while they took in and discharged cargoes, and for other purposes; and because certain piles and timbers placed by the plaintiffs in the waters of the harbor wrongfully obstructed and interfered with said rights, the defendant removed said obstructions, doing no unnecessary damage in that behalf, which are the alleged trespasses. Issue having been joined on this plea as the only answer offered thereto, the only question which arises thereunder was one of fact, namely, was it proved; for if it was, then the plea showed a justification in law of the alleged wrongs complained of by the plaintiffs.

That it was proved appears very clear, and it is not disputed that the defendant *Wood*, the now appellant, was possessed of a wharf as the plea alleges, which wharf is situate in the harbour of *Halifax*, adjoining a wharf of which the plaintiffs were possessed, and that the plaintiffs, by certain erections which they were causing to be erected for the extension of their wharf out further into the harbour in the navigable waters thereof, over which steamers and vessels navigating the harbor to and from the defendant's wharf were accustomed to pass, did in a very material manner obstruct access to the defendant's wharf, by driving down piles in the navigable waters of the harbour, in such a manner as to do special damage and injury to the defendant, by interfering with and preventing the access to his wharf, over the navigable waters of the

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harbour, which he was entitled to have and enjoy. That under these circumstances the defendant had a right to do the acts relied upon in his 11th plea as justification of the acts complained of by the plaintiffs in their declaration, cannot, I think, admit of a doubt. This appeal, therefore, in my opinion, must be allowed with costs, and it is not necessary to express any opinion upon the other matters which were discussed, and a rule absolute for a new trial, with costs, to be paid to the defendant *Wood*, should be ordered to issue in the court below, such new trial to be between the plaintiffs and *Wood* alone; the verdict in favor of the defendant *Mitchell* not being interfered with thereby.

Appeal allowed with costs.

Solicitor for appellant: *L. H. Harrison.*

Solicitor for respondents: *J. Henry Phair.*

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*Oct. 27.
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*Jan. 12.

THE PROVIDENCE WASHINGTON INSURANCE COMPANY..... } APPELLANTS;

AND

FREDERICK D. CORBETT, Assignee, &c..... } RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Marine Insurance—Total or constructive total loss, what constitutes—Notice of abandonment not accepted by underwriters—Right to abandon—Sale by master.

C., as assignee of *W.*, was insured upon the schooner *Janie R.*, to the amount of $2,000 by a voyage policy.

On the 14th February, 1879, the *Janie R.*, which had been in the harbor of *Shelburne* since the 7th of February, left with a cargo

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*PRESENT.—Sir W. J. Ritchie, Knt., C.J., and Strong, Fournier, Henry and Gwynne, JJ.

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of potatoes to pursue the voyage described in the policy, but was forced by stress of weather to put back to *Shelburne*, and on the morning of the 15th she went ashore, when the tide was about at its height. On the 17th notice of abandonment was given to the defendants (appellants) and not accepted, and on the 18th the master, after survey, sold her. The next day the purchaser, without much difficulty, with the assistance of an American vessel that was in the harbor, and by the use of casks for floating her (appliances which the master did not avail himself of), got her off. There was no evidence whatever of the vessel having been so wrecked as to have been worthless to repair, or to have been so much damaged that she would not have been worth, after having been repaired, more than the money expended for that purpose. The vessel afterwards made several voyages, and was sold by the purchasers for $1,560. In an action brought on the policy against the defendant company, tried before a judge without a jury, a verdict was given in favor of plaintiff for $1,913, which verdict was sustained by the Supreme Court of *Nova Scotia*. On appeal to the Supreme Court of *Canada*—

Held (reversing the judgment of the courts below), 1. That the sale by the master was not justified in the absence of all evidence to show any "stringent necessity" for the sale after the failure of all available means to rescue the vessel.

2. That the undisputed facts disclosed no evidence whatever of an actual total loss and did not constitute what in law could be pronounced either an absolute or a constructive total loss.

Per *Strong*, J., That the right to abandon must be tested by the condition of the vessel at the time of action brought, and not by that which existed when notice of abandonment was given.

APPEAL from a judgment of the Supreme Court of *Nova Scotia* discharging a rule *nisi* to set aside a verdict in favor of the respondent.

This was an action brought on a policy of insurance issued by defendants for $2,000 upon the hull and materials of the schooner *Janie R.*, to the plaintiff, a mortgagee of the vessel.

The action was tried before *McDonald*, J., without a jury, and a verdict was given by him in favor of the plaintiff for eighteen hundred and forty dollars, together

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with seventy-three dollars and sixty cents damages in the nature of interest.

A rule *nisi* obtained by the defendants to set aside this verdict, was, after argument before the Supreme Court, by the judgment of the court delivered by *Weatherbe*, J., discharged with costs.

The declaration contained two counts upon a policy of insurance for $2,000 issued by defendants under seal to the plaintiff, upon the schooner *Janie R.* on a voyage at and from *Liverpool* to *Boston* returning either to *Liverpool* or *Halifax*, and claimed for a total loss.

The defences pleaded were:

1st. That defendants did not subscribe said policy, or undertake and promise as alleged.

2nd. A denial of the allegation averring interest in plaintiff's assignors, *Rhynard* and *Lohnes*. or some or one of them.

3rd. That the vessel was not lost by the perils insured against or any of them.

4th. That after the commencement of the risk and before said loss, said vessel, without sufficient cause or excuse, did not proceed on said voyage, and deviated therefrom.

It appeared in evidence at the trial that the *Janie R.* sailed from *Liverpool*, on the voyage described in the policy on the 5th of February, 1879, with a cargo of potatoes, and owing to bad weather put into *Shelburne* harbour on the night of the 7th, where she was compelled by adverse winds and bad weather to remain until the 14th, when she left to pursue her voyage. During the night of the 14th she was forced by stress of weather to put back to *Shelburne*. When approaching that harbour on the morning of Saturday the 15th, part of her steering gear was carried away, she was so iced her anchor would not drop, and she drove ashore with considerable force, the wind being high, at about

high water, and was driven up some distance and lay between two rocks The place where she struck was open and exposed to the ocean, and the shore under and around her was rocky and dangerous. Part of her cargo was taken out, and some unsuccessful attempts were made to get her off.

Some portion of the cargo was carried ashore in bags by men employed by the master. No attempt was made to float the vessel, either with casks, which were eventually used for that purpose by the purchaser with success, nor were other appliances, spoken of by the witnesses, and which could have been procured at *Shelburne* where there are ship yards, used or even procured. Nothing having been done towards saving the vessel, except hauling on the anchor with the windlass at high tide, the master on Tuesday the 18th sold the vessel as she lay, for something over $100, and she was got off by the purchaser the next day without much difficulty with the assistance of an American vessel and by the use of casks for floating her. It appears from the evidence of *McAlpin*, a witness for plaintiff, that a vessel was in the harbour, in open water, on Saturday, the day the *Janie R.* went ashore; whether this was the American vessel which afterwards hauled her off does not appear, but no attempt by the master to obtain the assistance of this vessel spoken of by *McAlpin* is proved. The vessel was valued in the policy at $5,000.

Notice of abandonment was given by the plaintiff, with whom the master had communicated by telegraph to the agent of the underwriters in *Halifax*, on the afternoon or evening of the 17th.

Upon the trial the policy was admitted without objection, and the interest was proven as averred.

The only question raised upon the argument here and in the court below was whether or not the respondent, under the facts in proof, could recover for a total loss.

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Mr. *Graham*, Q.C., for appellants, and Mr. *Lash*, Q.C., and Mr. *Gormully* for respondent.

The arguments and cases cited appear in the judgments.

RITCHIE, C.J.:—

This is an action on a marine policy on the *Janie R.*, which sailed from *Liverpool* on February 5, 1879, with a cargo of potatoes bound for *Boston*. On the morning of the 15th she got ashore at the entrance of *Shelburne* harbour, having been in the harbour since 7th February. Monday, the 17th, notice of abandonment was given to the defendants and not accepted, and on the 18th the master sold her, her owner being present in *Shelburne*.

This question is as much as possible like that involved in the case of *Taylor* v. *Gallagher* (1), which we decided in this court, and in which case we held that the evidence did not establish that urgent necessity for the sale which alone can justify a sale by the master, so as to subject the insurers to liability as for a total loss. In this case I think there is nothing whatever to justify a sale by the master under the circumstances detailed in evidence.

The captain says that on the morning of the 15th they went ashore. Then, without apparently making the slightest effort to get the vessel off, or any investigation as to her exact position or condition on the shore, or any enquiries, or seeking any assistance in the neighbourhood, he leaves the vessel at daylight, and says he got to *Shelburne* town, about eight miles, in the morning. When there, he does not appear to have made any enquiries as to the possibility of getting assistance to get the vessel off, but his sole enquiries appear to have been as to getting a survey, and in this view, and this alone, he seems to

(1) 5 Can. S. C. R. 368.

have visited *Shelburne* town. This is all the account he gives of this mission, "Left at daylight and returned with two surveyors about noon. Captain *Purvey* and Mr. *McAlpin* were the two." The other surveyor, he says, was Captain *Dall*, who resided near the vessel, and they surveyed her. Having accomplished this he appears for the first time to have turned his attention to getting the vessel off, and this is his account:

After we got back, we put out an anchor astern and tried to heave the vessel off. We carried the anchor out about fifty fathoms. The tide was about half high when we put it out, and we hove on by the windlass when the tide was high. Eight or ten hands hove-on but they did not affect her.

He says he communicated with the owners in *Liverpool* and the plaintiff by telegram before he sold. But he thought the first thing to be done was to get surveyors. Another witness—Mr. *McAlpin*, one of the surveyors—says:

The weather was then comparatively smooth. The wind W.N.W., and we had hopes of getting her off. On the next day we returned about 3 p.m. The tide well up. I think it was rising. I remained there a short time. Saw no efforts made.

Now, it appears that this vessel was condemned on Monday and sold on Tuesday, and a day or two after, she was got off and repaired, and became a seaworthy vessel sailing as she had done before. She was got off by means of a vessel attached to her, and hauled her off. This witness says he saw a vessel there but did not know her. There was a vessel there which could have taken her off on Saturday, but the captain does not appear to have made the least effort to obtain its assistance. He has to admit that on Saturday it might have been prudent to get the potatoes out first before going to *Shelburne*. Then he shows what would have been the most natural thing to do—the vessel being on shore, to lighten her. "If, he says, she had been my vessel, and not insured, I think

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that would have been my course." We have the evidence of this man, who acted as a surveyor, testifying that the course the captain adopted was not the course he should have adopted. "I am not prepared to say she could not be repaired, at low water, enough to pump out the water," and yet he was prepared to condemn her. Common sense points out that unless there was a determination to condemn the vessel, that was the proper course to be adopted, viz:—to examine the vessel, to see whether there were any leaks, and to what extent, to lighten her to repair her, and to use every exertion to get her off. Then he adds:

> I think she could have been repaired for $500, perhaps for $300. I am not prepared to say what I would have done on Sunday, but on Monday we made our report.

This is, to my mind, conclusive that the surveyors came to a conclusion before any proper examination was made.

John Purvey, in his evidence, says: "She was not not making water then." As it appears that, after this party went there, she was not making water, how important was it that the cargo should have been got out at the earliest possible period, and this witness will not say she could not have been got off. The witness goes on to say: "There was an American schooner inside of the point" This is another important point, because the vessel was got off by this American vessel. So that at the very time the vessel was sold, there were means at hands to get her off, had the captain chosen to avail himself of them.

Was it ever heard that under such circumstances, a captain was justified in selling a vessel on shore without making any effort whatever to get her off? I think this is as strong a case as *Taylor* v. *Gallagher*, decided in this court (1). I think the sale

(1) 5 Can. S. C. R. 368.

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was not justified. Under the circumstances, a prudent owner uninsured would have done exactly what the owner under the sale did, viz., would have resorted to the ship yards and got his appliances there, would have put them to the vessel and accomplished what was accomplished, and in one hour she would have been taken off and saved. Under these circumstances, I think there was nothing to justify the sale. After the sale she was repaired, and she became a vessel that went on her way, pursuing her course as an insurable vessel, made several voyages and was finally sold. The utmost extent of the cost of repairing her was $500, the extreme extent of the loss was $300, which deducted from the $1,600 for which she was sold, left $800 of value in the vessel. Besides that, she was much older when she was sold. There must be a most stringent necessity to justify a captain in selling a vessel, and I think that it should not be tolerated that a sale should be made hastily without examination or without the captain having previously made every exertion in his power to get off his vessel.

Under these circumstances I think the appeal must be allowed.

STRONG, J.:

The first question which arises is, was there a constructive total loss—such a loss as justified an abandonment to the underwriters? For two reasons it appears that this must be answered in the negative. First, it is clear that there is no right in a case of stranding to abandon to the underwriters until all reasonable means within his power have been used by the master for the recovery of the vessel. In *Parsons* on Insurance (1), the rule in this respect is thus stated:

It is quite certain, however, that neither stranding nor submerging,

(1) Vol. 2, p. 181.

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nor any loss that leaves the probability of recovery, gives of itself at once and necessarily the right to abandon, for it is the duty of the master to examine sedulously and use to the best of his skill and power all means for recovery; and there is no right to abandon until these means are used, or until it is obvious, from the nature of the loss or the circumstances attending it, that there is but little, if any, hope of success.

Can it be said that the master, in the present case complied with these essential requirements before the notice of abandonment was given? I am of opinion that it cannot. The evidence of *Harlon*, one of the plaintiff's witnesses, and of Captain *McLean*, a witness for the defendant, and the undisputed facts, show very conclusively that the course which ought obviously to have been adopted was not followed. In the first place, the master seems to have been more intent on saving the cargo than the vessel. Instead of landing the cargo by the slow process of carrying it ashore in bags, he ought, having regard to the comparative value of the vessel and the cargo, to have lightened the vessel by throwing overboard such portion of the cargo as he could not expeditiously save. Then he ought to have had recourse to the use of the devices mentioned in the evidence, and which were afterwards successfully used, of floating the vessel with casks, and if this, too, failed, he might have used the "Sampson Posts" spoken of by the witnesses. All these appliances could have been got either on the spot or at *Shelburne*, and were therefore within his reach. Had all this been done, as with reasonable and proper energy it might have been, on the Saturday, there could have been at least four opportunities of endeavouring to float the vessel, by hauling her off with the anchor and cable at high tide, between Saturday and the sale on Tuesday Then, too, it does not appear that the assistance of the American vessel, which afterwards hauled the schooner off, was asked and that if it had been

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asked it could not have been procured. In the face of these undisputed facts it is impossible to say that all the conditions which are essential to a right to abandon the vessel to the underwriters were complied with. It is out of the question to say, in the face of the evidence of *Harlon*, the purchaser, and one of the plaintiff's own witnesses, that the vessel as she lay on the rocks was such a wreck as not to be worth repairing if she was got off. At all events, it was for the plaintiff to prove this, if he could establish it, but there is no evidence whatever of the vessel having been so wrecked as to have been worthless to repair, or to have been so much damaged that she would not have been worth, after being repaired, more than the money expended for that purpose. It would be sufficient to say that it was for the plaintiff to prove this, and that he has not done so, but, from the evidence of *Harlon*, the contrary is a fair inference, though he does not give the total cost of repair, for, he says, the purchasers sold her, after repairing and coppering her, for $1,560—the coppering having cost $250 ; the cost of the repairs, he does not give, but he says this price was obtained after the purchasers had made use of her in several voyages, one a fishing trip, and then a voyage to the *West Indies*. Then *McAlpine*, one of the persons who held a survey of the vessel, and a witness for the plaintiff, who is a ship-builder, says he will not swear she could not be repaired for $300. It is therefore, in my opinion, fully established that the underwriters are not liable as for a constructive total loss.

Next, another and independent ground for coming to the same conclusion, is invoked in the appellant's factum, and was also urged in the argument at the bar. It is said that the rule of English law, differing in this respect from that which prevails in the American courts, and is established by the Codes of

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Continental Europe, is that the right to abandon must be tested by the condition of the vessel at the time of action brought, and not by that which existed when notice of abandonment was given. This contention seems to be well founded.

Lord *Blackburn*, in his opinion in the case of *Shepherd* v. *Henderson* (1), states this rule very decisively. He says:

> There is considerable difference between the law of *England* and the law of some foreign countries, *France* in particular. In the law of *England*, where notice of abandonment is given and the circumstances are such that the man may reasonably give it, but the underwriter refuses to take it and afterwards an action commences, if in the interim that which the man who gave the notice of abandonment reasonably and properly believed to be a total loss turns out to be not a total loss, it cannot be held that it is. For instance, if a ship has actually been captured and is apparently going off into the enemy's hands, and thereupon notice of abandonment is given; it is perfectly good as matters then stand. But an English frigate meets the ship and re-captures her and brings her back before action is brought, then you must take it that it is not a case of constructive total loss in law at the time when the action is brought; and, as Lord *Mansfield* said long before, in *Hamilton* v. *Mendes* (2), it is a rule of the law of insurance in *England* that where a thing is safe in fact, no artificial reasoning should be permitted to say that it is not.

The same judge in *Rankin* v. *Potter* (3), lays down the same rule in even clearer terms, thus:

> Even in the case when the loss is at the time of the notice of abandonment total, though capable of being reduced by a change of circumstances to a partial loss, the assured (unless in the very uncommon case of the notice being accepted) cannot recover as for a total loss, if that change of circumstances does occur before the trial.

In *Arnold* on Insurance (4) the law is stated to the same effect, as follows:

> In this country an abandonment is not indefeasible until action brought. Till that event, therefore, the loss though at one time

(1) 7 App. Cases 70.
(2) 2 Burr. 1198.
(3) L. R. 6 H. L. 127.
(4) Vol. 2, p. 930, 5 Ed.

total is liable to be reduced to a partial loss, by the restitution of the property under such circumstances, in this country, that the assured may, if he pleases, have possession and may reasonably be expected to take it.

Mr. *Parsons* in his work (1) recognises the existence of this rule in English law, but points out that the American courts hold that the abandonment, if good at the time notice is given, is indefeasible.

The same principle of insurance law was also recognized by the Supreme Court of *Nova Scotia* in the case of *Kenny* v. *Halifax Marine Insurance Co* (2), but I confess I cannot understand its applicability to the facts in that case, since the notice of abandonment was there accepted by the underwriters, which, of course, operated as an immediate cession of the property to them, and as Lord *Blackburn* says, in the quotation already given, made the abandonment at once indefeasible.

If it be said that this rule only applies when the assured can get the vessel back, and that here he could not, as his right to do so was intercepted by the sale, the answer is plainly that there was no valid sale, and the plaintiff's rights as mortgagee have never been divested unless he has lost them by his acquiescence in the sale. That the sale was an unauthorized one is plain when we apply the law to the state of facts disclosed by the evidence already remarked upon in connection with the point regarding the right to abandon. The master has no authority to sell so as to bind the absent owner, (and of course an absent mortgagee must stand in precisely the same position as a *quasi* owner,) unless compelled to do so by "stringent necessity." That this is the law, the recent cases of *Cobequid Marine Ins. Co.* v. *Barteaux* (3); *Hall* v. *Jupe* (4); and *Taylor* v. *Gallagher* (5), establish beyond doubt or

(1) Vol. 2, p. 181.
(2) 1 Thomson, 141.
(3) L. R. 6 P. C. 319.
(4) 43 L. T. N. S. 411.
(5) 5 Can. S. C. R. 385.

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question. It is not sufficient to show that the sale was made in good faith, and that the master acted as a prudent owner would have done. The law is now conclusively settled, that nothing but the most urgent necessity, after the failure of all available means to rescue the vessel, will justify him in so acting; if he sells under any other condition, the sale is unauthorized, and nothing passes by it. In the present case, it is true, the owner, the mortgagor, seems to have been on the spot, but, even if he concurred in the sale, which is not proved, but which may, perhaps, be inferred, that can make no difference, for he certainly had no authority to bind either the plaintiff, as mortgagee, or the underwriters. Again, it would seem that the master had no authority to sell so as to bind either the plaintiff or the underwriters without first communicating with them. He must have known that the plaintiff was interested in the vessel, as he communicated with him by telegraph, and the owner was at hand to inform both as to the interest of the plaintiff, and also of the fact of the insurance, and who the underwriters were, and how they could be communicated with. In such cases it seems that the master has no more power to sell, so as to affect the rights of absent parties, than he has to sell in the absence of the owner without first communicating with him, if the means of communication are at hand, as they were here by the telegraph (1).

It is apparent, therefore, that there was no valid sale, and consequently the rights of the plaintiff as mortgagee were entirely unaffected by the unauthorised disposition of the vessel which the master assumed to make, and he was as free to enforce his rights as mortgagee against the vessel after she was taken off the rocks as he was before the stranding occurred. There was nothing, therefore, to prevent the operation of the rule,

(1) Parsons on Insurance, Vol. 2, p. 146.

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that the restoration of the vessel before action brought does away with the effect of the notice of abandonment and makes a recovery for a total loss impossible. There are doubtless numerous cases, from among which *Cambridge* v. *Anderton* (1) may be selected as an example in which the insured has recovered for a total loss, although the vessel has been sold and afterwards got off and repaired. But such are all cases in which the sale was a valid one within the rule which requires a case of "stringent necessity" to authorise the master to take such a step.

A sale by itself is not a loss covered by a policy of marine insurance, it is not a peril insured against; what constitutes the loss in such a case is the state of things which can alone authorise the master to sell. In *Gardner* v. *Salvador* (2), Mr. Justice *Bayley* says:

> There is no such head in insurance as loss by sale.

In *Rankin* v. *Potter* (3) the law is there laid down by Mr. Justice *Blackburn:*

> As has been often observed, a sale by the master is not one of the underwriter's perils, and is only material as shewing that there is no longer anything to be done to save the thing sold for whom it may concern.

To these authorities may be added Lord *Campbell* to the same effect in the following passage from his judgment in *Knight* v. *Faith* (4):

> There is no such loss in insurance law as a sale by the master, unless it be barratrous, and a *bonâ fide* sale by the master can only affect the insurers when it becomes necessary by prior damage arising from a peril for which they were answerable.

The question of the validity of a sale by the master will be found to have arisen in actions against underwriters in connection with the important question, upon which the opinions of courts and judges have so

(1) 2 B. & C. 691.
(2) 3 Bing. N. C. 766.
(3) L. R. 6 H. L. 127.
(4) 15 Q. B. 649.

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much differed, whether a sale relieves the insured from the obligation of giving notice of abandonment and entitles him to claim for an actual total loss—a question which seemed to have been set at rest by the decision in *Rankin* v. *Potter* (1), which, following *Roux* v. *Salvador* (2), and *Farnworth* v. *Hyde* (3), determined against the opinion of Lord *Campbell*, that the assured was not bound to give notice when there had been a "right sale," and consequently nothing left to be abandoned to the underwriters.

Both counts in the declaration are in form for a total loss, but under a declaration so framed there may be a recovery for a partial loss (4), and this it appears the plaintiff is entitled to proceed for in the present case.

The judgment of the court below discharging the rule for a new trial must be reversed, and the rule for a new trial made absolute with costs to the appellant in both courts.

FOURNIER, J., concurred.

HENRY, J.:

The plaintiff must recover either for an actual total, or a constructive total, loss. There is no evidence whatever of an actual total loss, so we must look at the law and the facts, and see if he has made out a case for a constructive total loss. Mere notice of abandonment amounts to very little, unless the circumstances existing at the time and afterwards, affirm the right of the party to make the abandonment. A mere sale does not convey the property unless the party had a right to make it. The captain is the agent of all parties where the owner is absent, but in this case he was present, and we may dismiss from our minds the law or facts of the

(1) L. R. 6 H. L. 127.
(2) 3 Bing. N. C. 266.
(3) 18 C. B. N. S. 835.
(4) Arnold Ins. 1127, *Gardner* v. *Croasdale*, 3 Burr. 904; *King* v. *Walker*, 2 H. & C. 384, 3 H. & C. 209.

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sale by the captain as agent, and speak of the sale as having been made by the owner. Can the owner of an insured ship, by giving notice of abandonment, part with the property to another, and then afterwards say: I cannot abandon to you, because I have sold. That would be no excuse in law. He could not first do the act and then plead that act as an impediment in his way to do something else. If there is any difficulty in the position of the owner, he created it himself by the sale. The law is very clear on the question of a constructive total loss. The English authorities lay down the rule that a party cannot recover for a constructive total loss after an abandonment, unless he shows the repairs would cost as much or more than the ship was worth. That is a necessity at the beginning of his right to recover. In this case, then, the plaintiff was bound to show that this was the fact. The evidence, on the contrary, shows that it was not the fact. In order to prove that case, he should have given evidence what the value of the repairs would have been, and, to do so, he should have had a proper survey. As the vessel was got off and repaired, it was competent for him to prove, if the circumstances would justify his doing so, that the vessel would not be worth the amount of the cost of the repairs. This vessel was repaired on the spot, in the harbour. She was in the harbor when she was sold. There is no evidence of sufficient justification to the captain to sell on the ground that the vessel was likely to go to pieces. She was in the harbor, and, although it was possible she might have been more injured by a storm, there is nothing to show she would have been totally destroyed if she had remained there all the winter. But the plaintiff ought to have given evidence of what the cost of the repairs would be, and of the value of the vessel after she was repaired, and, if the one amounted to as much as the other, he would have

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been entitled to demand for a constructive total loss. That he has not done. At the time this action was brought, that vessel was floating as seaworthy, and it could not be said there was a constructive total loss unless the amount expended was as much as she was afterwards worth. Under these circumstances, without going into other matters, I think the parties have totally failed to establish a constructive total loss, and have therefore not made out the case which the law requires them to make out. I think, therefore, the judgment below should be reversed, and a new trial ordered.

GWYNNE, J.:

The question presented by this case does not appear to me to differ in substance from that which came before us in *Gallagher* v. *Taylor*; namely, had the master done everything that it was his duty to do before selling, and was there that urgent necessity to sell which alone could make a sale justifiable; for although notice of abandonment was given in this case the evening before the sale, whereas no such notice was given in *Gallagher* v. *Taylor*, still notice of abandonment will not of itself justify a sale or entitle the insured to recover as for a total loss, unless those events have occurred which justify the notice being given; that is to say, which entitle the assured in point of law to abandon to the insurer the thing insured, and to subrogate the insurer in the place of the assured as to all the latter's rights of property in the thing insured. The question here then is, did those events occur? The plaintiff, who was insured upon a schooner to the amount of $2,000 by a voyage policy, claims to recover as for a total loss. The vessel ran ashore upon the morning of Saturday, the 15th February, 1879, when the tide was about at its height

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within the harbour of *Shelburne*, on the coast of *Nova Scotia*, within eight miles of a town of the same name, which is a shipbuilding place. Notice of abandonment was given to the insurers on the evening of Monday, the 17th February, and the vessel was sold by the master at noon of the following day, the insurers having in the interim declined to accept abandonment.

The learned judge before whom the case was tried, without a jury, rendered a verdict for the plaintiff for $1,840, being the full amount of the policy less $160, apparently allowed for salvage money arising from the sale of the vessel, to which he added $73.60 for interest from the commencement of the action, making in all $1,913.60. What was the opinion of the learned judge upon the law or the evidence, we have no means of knowing otherwise than by inference from the fact that he has rendered a verdict for the plaintiff for the full amount of the policy. Looking at the evidence as given on both sides there is a conflict upon some points; but looking only at that portion as to which there does not seem to be any conflict, I do not see how we can avoid sending the case back for a new trial with a declaration that the undisputed facts disclosed do not constitute what in law can be pronounced to be either an absolute or a constructive total loss.

An absolute total loss entitles the assured to claim the whole amount. A constructive total loss gives him the like right upon condition only of his giving such notice. Absolute total loss occurs only when in the progress of the voyage, the vessel becomes totally destroyed or annihilated, or placed, by reason of the perils against which the underwriter insures, in such a position, that it is wholly out of the power of the assured, or of the underwriter, to extricate her from her peril, or that she was in such imminent danger of destruction that a sale appeared to afford the only reasonable hope

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of saving any part of her value. *Roux* v. *Salvador* (1), *Farnworth* v. *Hyde* (2). Constructive total loss occurs when, by some of the perils insured against, the vessel has become of so little value, that a prudent owner uninsured, would decline any further expense in putting the vessel in a state of repair to pursue her voyage; and if the expense of repairing her, so as to pursue her voyage, be greater than the value of the vessel when repaired, he is justified in declining to incur that expense, and he is allowed to abandon her and to treat the loss as total (3).

Now, that the vessel in this case was not an absolute total loss, in the sense of having been annihilated, or placed in such a position that it was wholly out of the power of the assured, or of the underwriter, to extricate her from her peril, so as to undergo such necessary repairs as might enable her to pursue her voyage, appears from the fact that when means calculated to get her off were applied by the purchasers she was apparently easily extricated from her peril, and was repaired. It remains, therefore, to consider whether she was in such imminent danger of destruction that a sale appeared to afford the only reasonable hope of saving any part of her value; or, whether the expense of repairing her was such (compared with her value when repaired), as to have justified a prudent owner, uninsured, to decline to incur any further expense upon her. As to the former of these questions the same point arises as arose in *Galagher* v. *Taylor*, namely, was there that urgent necessity for a sale, after the fruitless application by the master of every possible means at his disposal for extricating her, which alone would justify him in selling her? Upon the undisputed evidence the facts may be stated to be, that the vessel having run ashore

(1) 3 Bing. N. C. 286.
(2) 18 C. B. N. S. 854.
(3) 2 *Wm. Saund*, 202—*Roux* v. *Salvador*. 3 Bing. N. C. 86.

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about full tide upon the morning of Saturday, the 15th February, 1879, the master did not then make any efforts whatever to get the vessel off with the tide; that although there was at the time an Italian bark close by in the harbor of *Shelburne*, where the vessel was ashore, he made no application to her for assistance, but, without giving any orders to lighten the vessel, or to attempt to get her off, in his absence, he went straightway to the town of *Shelburne*, a ship-building place only eight miles off, not for the purpose of getting any assistance or appliances to get the vessel off, but to get surveyors to come down with the apparent intention of having her condemned. During Saturday, Sunday and Monday, the only efforts made to get the vessel off consisted in hauling upon one anchor thrown out some distance astern, although the master must have known that as the vessel went ashore at high tide, she could not have been so hauled off without lightening her. Instead of lightening her at once by throwing overboard her cargo, which consisted of potatoes loose in the hold, Saturday, Sunday and Monday were employed in saving the cargo by putting the potatoes into bags, carrying them ashore and safely housing them, and on Tuesday, before the sale, the balance of the potatoes remaining in the hold was sold to one *Goodrich*, who was allowed twelve hours to remove them, and the purchasers of the vessel afterwards were obliged to pay *Goodrich* for the privilege of throwing the potatoes overboard in order to lighten the vessel so as to haul her off. Although there was an American vessel on Saturday in the harbour in open water as well as the Italian barque, neither the one or the other was applied to for any assistance to get the vessel off. The surveyors, who were brought down on Saturday, condemned the vessel upon Monday by a report which was not produced, but on Sunday, as one of them swore, they concluded to order a sale,

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although, as that same witness said, they made no examination of the vessel on the Sunday, and could not see the extent of the damage, and that he was not prepared to say that she could not have been repaired at low water enough to pump out the water. The master's efforts, therefore, appear to have been directed rather to saving the cargo, than by throwing it out—as might have been done, overboard at once—to lighten the vessel and save her.

The vessel was sold on Tuesday, and one of the surveyors who had condemned her was himself either one of the purchasers, or was employed by the purchasers to get her off, and did succeed in so doing.

On Tuesday, as appears by the evidence of Mr. *Purvey*, one of the surveyors, the purchasers got an American schooner to go down, but she put back without doing anything that day. *Hart*, another witness called by the plaintiff, says that on Wednesday the purchasers had the American vessel there, and that it was no more stormy on Tuesday than it was on Wednesday, when the American schooner got into position.

Mr. *Harlon*, one of the purchasers, says that they got her off with the aid of the American vessel and water casks the next night after they bought her. They lost, he says, the first tide after they bought her; it was during the evening tide of the day after they bought her that they got her off. There was no evidence whatever offered to shew why the cargo was not thrown overboard and the vessel lightened on the Saturday, nor why the master did not apply to one or other of the vessels in the harbor for assistance; nor was there any reason to suppose that if the vessel had been lightened at once upon the Saturday she might not have been gotten off as readily on the Saturday, or the Sunday or the Monday before the surveyors signed their report, if the same means had been used as were subsequently

used by the purchasers, and by one of the surveyors who condemned the vessel, or that the master could not have made use of the like means. If, therefore, this case depended upon the validity of the sale in the absence of a notice of abandonment, it must needs be governed by *Gallagher* v. *Taylor*, and the sale must be held to have been invalid by reason of the absence of all evidence to shew any urgent necessity for the sale, or that the master had exhausted, as was his duty all the means within his power of extricating the vessel and so that there was no absolute total loss. Can then the giving notice of abandonment in this case make any difference? Clearly not for—1st. There was no evidence whatever offered as to what was the extent of the damage done, or what the cost of such repairs as would have enabled the vessel to pursue her voyage, or what the value of the vessel when so repaired as compared with the cost of such repairs, so that there cannot be said to have been offered any evidence to establish a constructive total loss; and 2nd. Upon the vessel running ashore it was the duty of the master to use all the means in his power to extricate her from her peril, whether an actual or constructive total loss was relied upon, and if he fails to do so, as the notice of abandoment is of no avail unless the events happen which entitle an assured to abandon, he must fail upon a claim for constructive, equally as upon one for absolute total loss. The case then is resolved into this:

1st. Here the evidence shews there was no absolute total loss.

2nd. It shews also that the master did not make use of all the means within his power to extricate the vessel from her peril, and so that he neglected a duty incumbent upon him to discharge before the assured could abandon and subrogate the insurers into his place.

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3rd. There was no evidence offered of any constructive total loss.

4th. The plaintiff therefore was not entitled to recover, except for a partial loss, as to which he made no claim, and if he had, he failed to offer the necessary evidence in support of it.

It is said, however, that the plaintiff's right to recover depends on questions of fact, and that the verdict of the learned judge who tried the case without a jury, being in favor of the plaintiff must be taken as having found all the necessary facts in his favor equally as if a jury had rendered the verdict. If the case had been tried by a jury, it must have been left to them with such a direction that it should appear whether they should intend, by their verdict, if in favor of the plaintiff, to find as upon an absolute or constructive total loss, or for partial loss only. If they had found as for an absolute total loss, their verdict must have been set aside as wholly contrary to law and evidence, for the undisputed evidence sufficiently shows that there was no such loss. If they had found as upon a constructive total loss, their verdict must equally have been set aside for the reasons I have already above given.

The verdict of the learned judge must be set aside for the like reasons, whether he proceeded as upon an absolute or a constructive total loss.

Appeal allowed with costs.

Solicitor for appellants: *Hugh McD. Henry.*

Solicitor for respondent: *John M. Chisholm.*

LOUIS ISRAEL COTE *alias* FRECHETTE..... APPELLANT;

AND

J. F. GOULET *et al*..... RESPONDENTS.

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*Mar. 15, 16.
*April 1st.

ON APPEAL FROM PLAMONDON, J., SITTING FOR THE TRIAL OF THE MEGANTIC CONTROVERTED ELECTION CASE.

At the trial of the petition, the returning officer, who was also the registrar of the county of *Megantic*, and secretary of the municipality of *Inverness*, was called as a witness, and produced in court in his official capacity the original list of electors for the township of *Inverness*, and provedthat the name *L. McM.*, one of the petitioners whom he personally knew, was on the list. The original document was retained by the witness, and, as neither of the parties requested that the list should be filed, the judge made no order to that effect. The status of the other petitioners was proved in the same way.

Held, that there was sufficient evidence that the petitioners were persons who had a right to vote at the election to which the petition related under 37 *Vic.*, ch. 10, sec. 7 (D).

The shorthand notes of the shorthand writer employed by the court to take down the evidence were not extended in his handwriting, but were signed by him.

Held, that the notes of evidence could not be objected to.

Before setting out on a canvassing tour, the appellant, the sitting member, placed in the hands of one *B.*, who was not his financial agent, $100 to be used for the purposes of the election. While visiting a part of the county with which the appellant was not much acquainted, but with which *B.* was well acquainted, they paid an electioneering visit to one *K.*, a leading man in that locality, who indicated to *B.* his dissatisfaction with the candidate of his party, and stated that, although he would vote for the liberal party, he would not exert himself as much as in the former elections. The appellant then went outside, and *B.* asked his host, "Do you want any money for your church?" And having received a negative reply, added, "Do you want any

*PRESENT.—Sir Wm. J. Ritchie, C.J., and Strong, Fournier, Henry and Gwynne, JJ.

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money for anything?" *K.* then answered, "If you have any money to spare there is plenty of things we want it for. We are building a town hall, and we are scarce of money." *B.* then said, "Will $25 do?" *K.* answered, "Whatever you like, it is nothing to me." The money was left on the table. Then, when bidding the appellant *B.* good-bye, *K.* said, "Gentlemen, remember that this money has no influence as far as I am concerned with regard to the election." The appellant did not at the time, nor at any subsequent time, repudiate the act of *B.* This amount of $25 was not included in any account rendered by the appellant or his financial agent, and large sums were admittedly corruptly expended in the election by the agent of the appellant.

Held, affirming the judgment of the court below, that the giving of the $25 by *B.* to *K.* was not an act of liberality or charity, but a gift out of the appellant's money, with a view to influence a voter favourably to the appellant's candidature, and that, although the money was not given in the appellant's presence, yet it was given with his knowledge, and therefore that the appellant had been personally guilty of a corrupt practice.

APPEAL from the judgment of *Plamondon*, J., in the Controverted Election for the county of *Megantic*.

The petition of the said respondents contained the usual charges of bribery, corrupt practices, &c., by the appellant personally, and by his agents.

By the judgment of *Plamondon*, J., the appellant was found guilty on both sets of charges.

On the present appeal, the Supreme Court of *Canada* affirmed the judgment of the court below on the charge of personal corruption, known as the *James Kinnear* case.

The facts of this case, and the evidence relied on, appear in the judgments hereinafter given.

Mr. *Crepeau*, Q. C., and Mr. *Gormully*, for appellant.

Mr. *Irvine*, Q. C., for respondent.

RITCHIE, C. J.

The first objection is that petitioners were not candi-

dates and have not legally proved that they were electors having the right to vote at the election to which the petition herein relates, nor have they proved that those persons are electors, whom the defendant and his pretended agents were accused of having bribed. The Controverted Elections Act (37 *Vic.*, cap. 10, sec. 7) prescribed that the election of a member may be contested by "a person who had a right to vote at the "election to which the petition relates."

Of this and other objections not touching the merits of the case, the learned Judge thus disposes in his judgment:—

M. *William H. Lambly*, régistrateur du comté de *Mégantic* et secrétaire de la municipalité d'*Inverness*, et qui avait agi comme officier-rapporteur à la dite élection, a comparu en ces dites qualités. Il a prouvé le bref d'élection en vertu duquel il a agi, aussi la nomination de candidats et le rapport par lui de l'élection du défendeur.

Il a exhibé en ses susdites qualités officielles, 1° la liste électorale originale pour le canton d'*Inverness* et il a prouvé que le nom de *Laughlan McCurdy* était sur cette liste, en ouvrant la dite liste et montrant que ce nom y était inséré avec ses qualifications comme électeur. Il a déclaré, de plus, connaître personnellement *McCurdy*, l'un des requérants, depuis vingt ans. Ces listes sont faites en duplicata; les deux sont également des originaux; c'est sur le duplicata original du secrétaire qu'il a donné sa déposition relativement à *McCurdy*. Il hésitait à produire cette liste au dossier, mais il est prêt à le faire si la cour l'ordonne. Nie l'un ni l'autre des parties ne l'ayant exigé, la cour n'a pas été appelée à donner et n'a pas donné cet ordre. M. *Lambly* a exhibé en deuxième lieu la liste électorale de *Somerset-Nord*. C'est un original, dit-il, et on l'appelle un double duplicata. Au moyen de cette liste, ainsi exhibée en cour, il prouve les qualifications d'électeur des deux autres requérants *Jacques Goulet*, ferblantier et locataire, 8e lot, 8e rang, et *Louis Richard*, charron et locataire, 8e lot, 6e rang. Il connaît personnellement *Louis Richard*.

Les deux listes qu'il vient d'exhiber sont celles-là mêmes qui ont servi lors de l'élection dont il s'agit. Elles sont soumises à l'inspection de la cour et des parties. Le témoin est prêt à placer au dossier la deuxième s'il en reçoit ordre de la cour.

Pour la même raison que ci-dessus, cet ordre n'a pas été donné.

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Les objections faites par le défendeur à cette preuve à l'enquête, et réservées pour adjudication au mérite, ne sont pas fondées et elles sont renvoyées.

La preuve de la qualité des requérants est complétée par le témoignage du docteur *Larose*.

Les requérants ont prouvé légalement, de même, la qualité d'électeurs des personnes qu'ils ont prouvé avoir été corrompues à la dite élection. La motion du défendeur présentée le 5 septembre dernier, à l'effet de faire rejeter du dossier toute la preuve ci-dessus, n'est pas fondée et elle est renvoyée.

La cour rejette également une autre motion des défendeurs, présentée à l'audition, demandant le rejet de l'enquête des requérants, prise avant le 22 janvier 1883, alors que le dossier était hors de cour. La cour a déjà affirmé, par un jugement interlocutoire, la légalité de cette enquête.

Le défendeur a présenté à l'audition une troisième motion, demandant le rejet de toute l'enquête des requérants, parce que les sténographes n'auraient pas, eux-mêmes, copié les dépositions prises par eux, et parce que ces dépositions fourmillent de faussetés.

La cour rejette cette motion, 1° parce qu'il n'y a pas de preuve à l'appui, 2° parce que ces dépositions sont certifiées par qui de droit et dans la forme ordinaire et voulue.

I think the learned Judge was entirely right in the manner he thus treated these objections.

It is freely and fully admitted that the Judge was right in deciding that the election must be avoided for corrupt practices by the agents of the defendants, and the only questions submitted for our consideration are the corrupt acts attributed to the defendant personally, and which the learned Judge found the evidence established against the appellant.

The first case is that of the alleged bribery of one *James Kinnear*. The learned Judge thus states his view of this case :—

"1er Cas personnel de corruption.—Pendant le cours de la cabale électorale, un jour ou deux avant le jour de la nomination, le défendeur est parti en voiture, de *Somerset*, avec *Jean Charles Beaudette*, pour aller travailler ensemble à l'election. Ce monsieur *Beaudette* est l'ami intime, le partisan zélé du défendeur, et il est difficile à prétendre qu'il n'était pas autorisé par le défendeur à agir pour lui.

Avant le départ de *Somerset* le défendeur mit entre les mains de *Beaudette* une somme de $100.00, pour les besoins de l'election. Ils se rendaient à *Saint-Pierre* de *Broughton*. L'objet de leur voyage était d'aller voir les personnes influentes sur leur route, pour les intéresser en faveur de la candidature du défendeur.

Chemin faisant ils s'arrêtent à *Leeds*, chez un homme très influent de la localité, M. *James Kinnear*; M. *Kinnear* est un libéral. Le défendeur ne l'avait jamais ni vu ni connu; mais *Beaudette* avait eu quelquefois l'occasion de le visiter en qualité de commis voyageur. Une fois entrés, tout naturellement il est question de l'élection. *Kinnear* dit au défendeur: 'Je n'aime pas le Docteur *Olivier*; si vous étiez libéral je voterais pour vous au lieu d'*Olivier*; mais s'il n'en vient pas d'autres je voterai pour *Olivier*.'"

Le défendeur admet, dans son témoignage, qu'il est entré chez *Kinnear* parce qu'il savait que ce dernier n'aimait pas le Docteur *Olivier*.

On prend des rafraichissements poliment offerts par *Kinnear* et tout en causant le défendeur s'informe de l'état de l'opinion relativement à l'élection. *Kinnear* lui répond que les gens là sont en presque totalité des libéraux, mais que le Dr *Olivier* n'est pas aimé dans *Leeds* et que, quant à lui, il est disposé à ne pas faire grand'chose pour lui, qu'il voterait pour son parti mais qu'il ne travaillerait pas beaucoup.

La dessus le défendeur sort, sous le prétexte d'aller voir à son cheval. Resté seul avec *Kinnear*, *Beaudette* lui dit. "Avez-vous besoin de quelqu'argent pour votre église?" "Non, répond *Kinnear*, Dieu merci, notre chapelle n'est pas en dette, et je n'ai pas besoin d'argent pour elle."

Refusé mais non rebuté, *Beaudette* revient à la charge. "Mais, dit-il, vous devez avoir tout de même besoin d'argent pour une chose ou pour une autre." *Kinnear* lui répond: "Si vous avez de l'argent de trop, nous pouvons l'appliquer à bien des choses ici, par exemple, nous voulons bâtir un *town-hall* et nous sommes à court d'argent pour le faire."

Beaudette répond: "Vingt-cinq piastres ça fera-t-il?" *Kinnear* dit: "N'importe ce que vous voudrez, c'est pareil pour moi."

Là-dessus Beaudette dépose $25.00 sur la table du salon. Le défendeur, sur cette entrefaite, rentre au salon; l'on se dit bonjour et l'on part.

Dans son examen, le défendeur prétend que *Beaudette* ne lui a fait part de ce don d'argent que deux ou trois jours après, et qu'il n'en a pas entendu parler auparavant. Mais, outre l'invraisemblance de cette prétention, comment la concilier avec le fait qu'avant leur

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départ et pendant qu'on échangeait des bonjours, *Kinnear* leur dit à tous deux: "Gentlemen, remember that this money has no influence as far as I am concerned, with regard to the election. I vote for Dr. *Olivier*, he has got my support, but I am not going to exert myself canvassing among people, as I formerly did."

Le défendeur savait donc alors et là qu'une somme d'argent avait été déposée par *Beaudette*, et cet argent était celui du défendeur. Il n'a ni alors ni subséquemment répudié cet acte; au contraire, il a continué, avec *Beaudette*, sa tournée électorale, et *Beaudette* a à sa connaissance travaillé pour lui jusqu'à la fin de la lutte. Il a donc sanctionné l'acte de corruption de *Beaudette*.

Ce cas si clairement prouvé de corruption et tentative de corruption serait suffisant à lui seul pour faire annuler l'élection et pour faire déclarer que le défendeur s'est personnellement rendu coupable de manœuvres frauduleuses au cours de sa dite élection.

Before setting out on this Election expedition without the instrumentality of a financial agent, the appellant places in the hands of *Beaudet* $100 to be used for the purposes of the election; of this there can be no doubt, *Côté's* evidence is clear and conclusive on this point, notwithstanding what *Beaudet* says:—*Côté's* language is as follows:—

Q. Je vous demande si à part de vos dépenses personnelles vous avez dépensé d'autre argent?—J'ai payé de l'argent à *Beaudet* et à *Jean Charles Beaudet*.

Q. *Beaudet* était-il un de vos agents?—Non.

Q. Combien d'argent avez-vous donné à *Jean Charles Beaudet*?—R. A peu près cent soixante-quinze ($175.90) à deux cent vingt-cinq ($225) piastres pendant la lutte.

Q. Vous lui avez donné cela pour les fins de l'élection?—R. En différents temps; je ne me rappelle pas exactement le montant, c'est peut-être moins et peut-être plus,

Q. Etiez-vous avec *Beaudet* cette fois-là?—R. Oui, la première fois que je suis monté, j'y ai été rien qu'une fois.

Q. Vous étiez avec *Beaudet*?—R. Oui.

Q. Le même M. *Beaudet* auquel vous avez donné deux cent vingt-cinq piastres ($225.00)?—R. Deux cent vingt-cinq ($225.00), ou cent soixante et quinze ($175.00) je ne me rappelle pas bien.

Beaudet was perfectly familiar with the part of the country they visited on this occasion, but with which appellant was not much acquainted; *Beaudet* was also

well acquainted with *Kinnear* while *Frechette* was a perfect stranger to him at the time of the visit.

As to *Frechette's* pretence that he called on *Kinnear* simply because he was a trader and not because of the election, he is expressly contradicted by himself and by *Beaudet*. He says:—

Q. Vous êtés entré la parceque vous saviez qu'il n'aimait pas le docteur *Olivier?* R. Oui je voulais le voir. Quand on fait le tour du comté ou va voir les principales gens de la place. C'etait la première fois que j'allais à *Leeds*. * * * * *

Beaudet says:

Quand je suis arrivé chez M. *Kinnear* j'ai introduit M. *Fréchette* à M. *Kinnear*, et M. *Fréchette* a dit à M. *Kinnear* vu qu'il se présentait comme candidat que c'était son devoir d'aller le voir comme citoyen.

Can any one doubt that this was an an electioneering and not a merely friendly social visit which *Frechette*, though unacquainted with *Kinnear*, being a trader himself, considered he was owing *Kinnear*, he being also a trader. Had it been such a visit is it consistent with common sense within the ordinary experience of life, I may even say, with human nature, that on such a visit to an utter stranger as *Frechette* was to *Kinnear*, that his companion, Mr. *Beaudet*, a commercial traveller, who, as such, it would seem, often called at *Kinnear's* place, should wholly apart from the election, or any influence it was to have on the election, exhibit such reckless anxiety to get rid of, not his own, but *Frechette's* money, dispensing it without the consent and approval of *Frechette* and contrary to the purpose for which the money was given him, and without the slightest solicitation for, or even intimation, direct or indirect, that there was any object whatever then present to his mind for which his liberality was needed or would be appreciated. Was it ever heard of that a business man, such as *Beaudet*, in a place with which he was unconnected, except to get money by the sale

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of goods, not to dispense it gratuitously, on a social visit, nothing in the conversation tending to such a question, should abruptly ask his host, "Do you want any money for your church?" and having received the reply, "No, thank God, our church is free from debt, I "don't want any money for it," and not content with this rebuff should again ask "Do you not want any "money for anything?" This, on the idea of its having innocently occurred on a social visit, would be incomprehensible. But viewed in the light of the candidature of his companion *Frechette*, and of his having $100 of *Frechette's* money in his pocket to be used for election purposes, and of the conversation with *Kinnear* immediately preceding the offer in which *Kinnear* indicated so clearly his dissatisfaction with the candidature of Mr. *Olivier* and the fact that though he would vote for the Liberal party he would not exert himself as much as in former elections, it is entirely intelligible. Can any one doubt that knowing the state *Kinnear's* mind had been in, in reference to Mr. *Olivier*, *Frechette* and *Beaudet* called, and that, finding him still in the same state of mind, which *Kinnear* in no way disguised, these $25 were left on *Kinnear's* table to influence, favorably to *Frechette*, *Kinnear's* conduct in regard to the election, and can it be doubted that *Kinnear* felt and knew that *Beaudet* intended it to have that effect? otherwise why should he, when bidding *Frechette* and *Beaudet* good-bye say, "Gentlemen, remember that this money has no influence as far as I am "concerned with regard to the election." Of this extraordinary transaction *Beaudet*, though examined as a witness in the case, gives no explanation, in fact says not one word as to the giving; all he does say is indirectly at variance with the testimony of *Kinnear*.

I am wholly unable to look on this as an act of liberality or charity, but a gift with a view to influence

Kinnear pure and simple, and I am equally unable to bring my mind to the conclusion that *Frechette* was not a party to the transaction, or that he was not aware that the money he supplied *Beaudet* was thus applied. While we must not act on mere suspicions, however strong they may be, but must be satisfied that the corrupt practice has been affirmatively established beyond reasonable doubt, we cannot expect to find in a vast majority of cases direct evidence of the fact; in this instance it would be unreasonable to suppose that *Frechette* would openly and before *Beaudet* take out this money and offer it to *Kinnear* as a bribe pure and simple; equally unreasonable would it be to expect that *Beaudet*, having received money from *Frechette* to be used for election purposes, would in his presence in like manner offer the bribe to this man, or that he would offer it to him as a bribe; but *Frechette* and he having set out with a common object, viz: to forward the election interests of *Frechette*, in which it is clear money was to be used by *Beaudet*, (otherwise it would not have been furnished him at the outset by *Frechette*,) and having found *Kinnear* an influential man of opposite politics in a dissatisfied state of mind as to the candidate of his party, where could be found a more desirable subject to operate on? and, if to be operated on by *Beaudet*, the holder of the money, what more natural and significant than that *Frechette* should step out on pretence of looking after his horse and *Beaudet* thus be furnished with an opportunity? And can there be a doubt that of the opportunity thus afforded, *Beaudet* availed himself, feeling no doubt that though *Kinnear's* vote might not be changed, such liberality so freely and generously bestowed could not fail to have its good effect? In considering cases of this kind we must bring our common sense to bear, we must not ignore our knowledge of human nature, nor must we

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cast aside the experience of life, and while we must not presume guilt, we must from the facts and circumstances presented for our consideration arrive at the conclusions which our common sense, our knowledge of human nature and our experience of life naturally and without reasonable doubt fairly lead us. It is only necessary to read the evidence in this case to establish that the learned Judge could have come to no other conclusion than he did.

Côté's account of the interview with *Kinnear* is as follows:—

Q. Vous avez été, comme vous avez dit, avec M. *Beaudet* en voiture, et vous avez visité plusieurs des électeurs en cabalant avec lui? R. Oui.

Q. Êtes-vous allé à *Leeds* avec lui?—R. Oui.

Q. Êtes-vous allé au moulin de *Kinnear?*—R. Oui.

Q. Êtes-vous entré chez *Kinnear* avec lui?—R. Oui.

Q. Avez-vous resté tout le temps dans la chambre avec lui quand il a parlé à *Kinnear?*—R. J'ai sorti *pour voir à mon cheval*, j'ai laissé M. *Kinnear* et *Beaudet* dans la salle.

Q. A-t-il été question avec *Kinnear* de vous supporter dans l'élection, quand vous avez parlé avec lui?—R. Non.

Q. Lui avez-vous parlé d'élection?—R. *J'ai parlé par rapport à la lettre qu'il avait envoyée à M. Piteau. M. Kinnear* m'a dit: Je n'aime pas le docteur *Olivier*, si vous étiez libéral je voterais pour vous au lieu d'*Olivier*; mais s'il n'en vient pas d'autre je voterai pour *Olivier*.

Q. Votre entrevue avec lui n'a pas été favorable?—R. Je savais bien que *Kinnear* est libéral; j'allais le voir comme confrère de magasin.

Q. Vous êtes entré là parce que vous saviez qu'il n'aimait pas le docteur *Olivier*?—R. *Oui. Je voulais le voir.* Quand on fait le tour du comté on va voir les principales gens de la place. C'était la première fois que j'allais à *Leeds*.

Q. A-t-il été question en votre présence de bâtir une halle, une salle publique dans la paroisse?—Non.

Q. Après que votre cheval a été prêt *Beaudet* vous a rejoint?—R. Je suis rentré chez *Kinnear*, il était après parler avec *Beaudet*.

Q. Et *Beaudet* est resté avec vous?—R. Oui.

Q. *Beaudet* vous a-t-il dit quelque chose par rapport à certaines vingt-cinq piastres ($25.00)?—R. Il m'a dit cela quelques jours après.

Q. Quand ?—R. Je crois que c'est trois ou quatre jours après.

Q. Qu'est-ce qu'il vous a dit ?—R. Il m'a dit qu'il avait donné vingt-cinq piastres ($25.00) à M. *Kinnear* pour lui aider à bâtir un townhall.

Q. A part des deux cent cinquante piastres que vous avez données au comité de *Somerset*, et des deux cent vingt-cinq piastres à *Beaudet*, cent soixante-quinze piastres à deux cent vingt-cinq piastres à *Beaudet* et à part de vos dépenses personnelles avez-vous donné d'autres sommes d'argent pendant l'élection et pour l'élection ?—R. Pas que je me rappelle. Oui, j'ai donné cinquante piastres ($50.00) au comité de *Sainte-Julie* que j'ai envoyées pour les dépenses légales, les orateurs, etc.

Q. A part vos dépenses personnelles et de l'argent que vous avez donné à *Beaudet*, avez-vous donné d'autre argent pendant l'élection, ou depuis, pour l'élection ?—R. A part de ce que j'ai donné à *Beaudet*, j'en ai donné au comité de *Somerset*.

Q. Combien ?—R. Deux cent cinquante piastres ($250.00) à peu près, je ne puis pas dire au juste, c'est pour payer les dépenses du comité, j'ai donné environ deux cent cinquante piastres, deux cents à deux cent cinquante piastres, j'ai donné en différents temps.

Q. Qu'avez-vous dit ? - R. Peut-être ce n'est pas bien. Il dit, j'ai donné ça, ce n'est pas du tout pour l'élection, c'est pour bâtir un townhall.

Q. Et vous étiez satisfait ?—R. Je n'étais pas pour les retirer. Ce n'est pas moi qui ai donné l'argent.

Q. C'était votre argent ?—R. Je ne sais pas.

Q. Vous avez donné quelle somme d'argent à *Beaudet* ?—R. J'ai donné neuf cents piastres ($900.00) en partant de *Somerset* et la balance en différents temps jusqu'au montant de cent soixante-quinze piastres ($175.00) à deux cent vingt-cinq piastres ($225.00).

Q. A-t-il rendu compte de cela ?—R. Non.

Q. Vous ne lui avez pas demandé non plus ?—Non.

Beaudet's account of what took place at *Kinnear's* is as follows :—

Q. Vous êtes, si je ne me trompe pas, commis voyageur, c'est-à-dire que vous vendez à commission pour des marchands de gros de *Montréal*, et cela depuis de nombreuses années ?—R. Oui, depuis dix-sept (17) ans.

Q. Et durant ce temps-là avez-vous eu occasion de faire connaissance avec M. *James Kinnear* ?—R. Oui, je le connais depuis nombre d'années, et je suis allé le voir.

Q. Durant la dernière élection vous êtes entré chez lui avec le défendeur M. *Fréchette* ?—R. Oui.

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Q. Et vous dites que dans ce temps-là il y avait bien des années que vous faisiez des affaires comme commis voyageur et que vous en aviez fait beaucoup avec lui ?—R. Oui, beaucoup avec lui et avec son fils aussi.

Q. Vous étiez sur un pied d'intimité, je présume, avec M. *Kinnear* ? —R. Oui.

Q. Avant d'entrer là, M. *Beaudette*, a-t-il été question entre vous et M. *Fréchette* de quelque chose au sujet de votre visite à M. *Kinnear* ?—R. Pas du tout. M. *Fréchette* m'a demandé d'aller avec lui, il m'a dit : " tu connais bien des gens." Je lui ai dit : " c'est bien," et nous sommes partis tous les deux, et nous avons été à plusieurs places. Quand je suis arrivé chez M. *Kinnear*, j'ai introduit M. *Fréchette* à M. *Kinnear*, et M. *Fréchette* a dit à M. *Kinnear*, vu qu'il se présentait comme candidat que c'était son devoir d'aller le voir comme citoyen.

Q. Si je vous comprends bien, avant d'aller voir M. *Kinnear*, vous n'aviez fait aucun complot entre vous et lui pour tendre des embûches à M. *Kinnear* ?—Non.

Q. Si je ne trompe pas, il s'est passé quelque chose entre vous et M. *Kinnear* au sujet d'une souscription pour un *Town Hall* ?—R. Oui.

Q. Voulez-vous dire si le défendeur *Fréchette* était présent et a eu connaissance de cette conversation entre vous et M. *Kinnear* à propos de cette souscription ?—R. Non, M. *Fréchette*, n'était pas dans la maison quand j'ai parlé avec M. *Kinnear*.

Q. Lorsque vous êtes embarqué avec M. *Fréchette*, M. *Kinnear* a-t-il dit quelque chose pouvant donner à comprendre à M. *Fréchette* qu'il avait reçu quelques libéralités pour lui ou sa municipalité ?—R. Non ; quand je suis sorti avec M. *Fréchette*, la voiture était attachée à peu près à une cinquantaine de pieds de la porte ; comme on revirait avec la voiture, M. *Kinnear* a sorti sur le perron et a dit : " Ne passez pas chez mon fils *James* sans arrêter le voir." C'est ce que nous avons fait.

Q. Pendant que cette affaire de souscription s'est passée, M. *Fréchette* était dans le jardin ?—R. Il était en dehors ; j'ai remarqué qu'il avait un jeu de croquet où il y avait des dames et M. *Fréchette* était avec elles à s'amuser ; c'était à côté de la maison, on les voyait par le châssis, mais ils ne pouvaient pas entendre la conversation.

Q. Quand M. *Fréchette* est venu vous rejoindre pour embarquer, M. *Kinnear*, tout ce qu'il vous a dit est ceci : N'oubliez pas d'aller chez mon fils *James* ?—R. C'est tout ce qu'il a dit.

And then we have the evidence of *Kinnear* :—

Q. Do you remember the member elect, Mr. *Fréchette*, in com-

pany with *Beaudet*, going to your house while the canvass for the election was going on?—A. Yes, they both came.

Q. Was that before or after the nomination day?—It was before.

Q. It was a day or two before?—A. I could not say exactly; it was a short time before. It was before the nomination.

Q. Would you relate, as nearly as you can remember, the conversation which took place with *Fréchette* in the first instance at your house?—A. *Fréchette* and *Beaudet* called upon me and said that he was in the neighborhood. I was well acquainted with *Beaudet*, being a commercial traveller, and calling at our place. They came in and sat down, and Mrs. *Kinnear* brought some little refreshments and chatted away, and asked *Fréchette* how he was getting along, if he was intending to run. He said yes, that he had great encouragement and intended to go through. After we talked. After this he went outside, and Mr. *Beaudet* was sitting on the sofa. I should say that before this occurred they asked me how the parties felt at the mill, regarding this election. I said that they felt rather cold, a good many of them in the main were so, that they did not like the member that was setting up to run, that the late Dr. *Olivier* was not very popular in *Leeds*, and I said if they—I said for my part I was not going to interfere a great deal in this election. I was cold about the thing, but at the same time that I would vote for my party, that I was always Liberal, and that I would vote for the Liberal party, but not exert myself as much as in former elections. Then *Fréchette* went out, and Mr. *Beaudet* asked me "Do you want any money for your church?" I said "No, thank goodness, our church is free from debt, I did not want any money for it." We then continued talking, and he asked me again "Do you not want any money for anything?" And I said "If you have any money to spare there is plenty of things we want it for." We were thinking about putting up a public hall here and we were scarce of money. Then *Beaudette* said, I think, "Will twenty-five dollars do?" I said "Whatever you like, it is nothing to me." I think he took twenty-five dollars and left it on the parlor table. And after this happened Mr. *Frechette* then came in, and when I was bidding them good-bye, I said "Gentlemen, remember that this money has no influence, as far as I am concerned, with regard to the election." I said "I vote for *Olivier*, he has got my support, but I am not going to exert myself canvassing among people as I formerly did."

Q. These last remarks you made in the presence of Mr. *Fréchette*?—A. Yes, they were both going away, and I was bidding them good-bye, and I said "Now, remember this has no influence with regard

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to my vote, alluding to the money. I think that is about all that happened."

Q. Did you inform the people that this .....had been given for the purpose of the *Town Hall* ?—A. No, it still remains there, and I made an offer of it back again to Mr. *Beaudet*; the money will go for that purpose unless it goes back to those who gave it to me. It was left there, and I often felt sorry about having anything to do with it, and after that, I met *Beaudet*, shortly after the council here, he did not care about talking about it or anything. I said I think I had better pay you back this twenty-five dollars. It appears something as calling in conscience, I would rather not have it, but he walked on and went away, but it had no influence when the day of the election came. I felt just as anxious to get votes for the Liberal side as before.

Q. Is it not a fact, Mr. *Kinnear*, that when Mr. *Fréchette* called at your place that he said because being himself a trader that he considered he was owing you a visit, yourself being a trader ?—A. I explained that, he said he was in the neighbourhood, and called upon me to see me.

Q. I want to know if there was any mention of your being traders and you older that he thought it was due he should call on you ?—A. I believe it was a sort of a..... call, an electioneering call, it must have been, because I had no acquaintance with Mr. *Fréchette*, I had not known him before.

Q. I mean, you say that you were an old trader, and he Mr. *Fréchette* is also a trader, and being in your neighbourghood, and you being an old resident and trader, that he thought it was his duty, as an able man to call and see you ?—A. Well, I do not know about ——perhaps that might be his idea for that.

Q. Have you any doubt that if Mr. *Fréchette* had been in your village that he would not have called, if it had not been election time ? Do you mean to say that if it had not been during the election time that *Fréchette* being in your village would not have called ?—A. I could not say for that, the only thing is I have no acquaintance with *Fréchette*, but having acquaintance with *Beaudet* they might have called. *Beaudet* has often called.

Q. Do you undertake to swear, Mr. *Kinnear*, that when they left, and when you made the remark that you would not be influenced by that, as you said, do you undertake to swear that any mention in reference was made in the presence of *Fréchette* of the twenty-five dollars that had been left by *Beaudet* ?—A. No mention whatever, after what mention I made of it.

Re-examined.

Q. When *Fréchette* came back to the room, and you accompanied

them out of their vehicle, they were going away, you then made, if I understand you rightly, in the presence of *Fréchette*, a reference to the money that had been left, and said the money would not influence you?—A. I do not think I mentioned money, but I mentioned it would have no influence as far as..... I referred to it, I do not know whether they understood it.

Q. Could Mr. *Fréchette* have helped understanding that you were making reference to something which had been done, or offered you with the view to influence your vote at the election?—A. I have stated all that occurred.

Q. Mr. *Kinnear*, as a matter of fact, have you any doubt at all but that Mr. *Fréchette* called to see you because there was an election going on, have you any doubt in your mind about that at all?—A. They said that they called for another purpose, that it was merely to see me as they were in the neighborhood, but of course as he was running for the county, my impression was that he called to see me with reference to that.

Q. Is it not a fact that you are the most prominent and most influential person in the neighborhood of *Kinnear's Mills*?—A. I have got a certain amount of influence there, and there is some there that always vote whatever side I vote for, no matter whether it is Liberal or Conservative.

Thus we have it clearly established by *Frechette* that $100 was given by him to *Beaudet* for the purposes of the election directly, and not through the instrumentality of a financial agent. In opposition, the subterfuge of *Beaudet* that the money was not given for the purposes of the election, but on account of an indebtedness of *Frechette* to him, *Beaudet*, and that the money was therefore his and not *Frechette's*; and *Fréchette* and *Beaudet* having, in the course of the avowed election expedition, come to the house of *Kinnear*, we have the flimsy pretence of *Frechette* that, because he was a fellow-trader, he thought he ought to call on him, and that that was the object of the visit, clearly overturned.

Then we have the introduction into the conversation of the subject of the election, very clearly showing the cause and object of the visit, for in answer to a question to *Coté*: "Lui avez-vous parlé d'election?" R. "J'ai parlé par rapport à la lettre qu'il avoit envoyée à M.

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Piteau," clearly inferring thereby that he was acquainted with *Kinnear's* feelings.

Then, so soon as *Kinnear* had made apparent his dislike, as still existing, to the candidateship of *Olivier*, and his unwillingness to work for him, or to take as active a part in the election as he usually did in elections, we have the disappearance of *Frechette* from the room and leaving *Beaudet* there with *Kinnear* alone, under the flimsy pretence of *Frechette* that he went to look after his horse, which, the evidence shows, was tied only about fifty feet from the door, and does not appear to have needed any looking after; and the equally flimsy, but different, reason assigned by *Beaudet* that *Frechette* left the room to see some ladies playing croquet.

Then *Beaudet's* question to *Kinnear*, immediately on *Frechette's* leaving, to know if he did not want money for his church, and on receiving a negative answer, *Beaudet's* extraordinary reply to *Kinnear* that he, *Kinnear*, should have need of money for one thing or another totally indifferent to *Beaudet*, so that he got *Kinnear* to take *Fréchette's* money, and then his leaving it on *Kinnear's* table.

Then we have the knowledge of the money having been given by *Beaudet* to *Kinnear* brought home to *Fréchette* on the spot by *Kinnear* as they were leaving, and *Kinnear's* evident intimation to *Beaudet* and *Frechette* that he thought they would expect it would influence him in the election, and his statement to them that it would have no influence, as far as he was concerned in the election. Then there is the absence of any repudiation of the act of *Beaudet* at this time or at any subsequent time, though *Frechette* admits that *Beaudet* informed him of the particulars of the transaction a day or two after: "Q. Et vous etiez satisfait. R. Je n'étais pas

pour les retirer; ce n'est pas moi qui ai donné l'argent," where he inferentially adopts the act. The attempt of *Beaudet* to make it appear that the money was not given him by *Frechette* for election purposes, but that it was his and not *Frechette's* money in all which he was directly contradicted by *Frechette.* The clearly established fact, notwithstanding what *Beaudet* says, that the $100 was given by *Frechette* to him for the purposes of the election, that this $25 was part of that sum, which it would have been a fraud on *Frechette* if *Beaudet*, instead of spending it for the purpose for which it was entrusted to him, viz., that of the election, had distributed it behind *Frechette's* back in acts of unsolicited liberality or charity having no bearing on the election; the absence of any explanation by *Beaudet* though examined respecting the transaction; the contradictions of *Beaudet* and *Frechette.* Then we have *Coté's* expenditures. He admits that the election cost him $1,500. He thinks there are accounts still to come in. At pages 38 and 39 he says:—

Q. N'avez-vous pas dit à M. *D'Auteuil*, le curé d'*Ireland*, que votre élection vous coûtait quinze cents piastres ($1,500.00)?—R. Je ne me rappelle pas de cela. J'ai dit que l'élection d'*Olivier* devait coûter à peu près quinze cents piastres ($1,500.00). Je ne me rappelle pas d'avoir dit que la mienne coûtait quinze cents piastres ($1,500.00). Je sais bien que j'ai parlé de $1,500.00 (quinze cents piastres).

Q. Jurez-vous positivement que vous n'avez pas dit à M. *D'Auteuil* que votre élection vous coûtait à peu près cela?—R. Je ne puis pas jurer cela. Je puis avoir dit que ça avait coûté à peu près quinze cents piastres ($1,500.00). Je puis peut-être avoir dit cela, que ç'avait coûté à peu près cela.

Q. N'est-il pas à votre connaissance qu'il y a une foule de comptes d'élection qui ne sont pas venus encore et qu'on attend que ce procès-ci soit fini pour régler?—Je ne sais pas.

Q. Pouvez-vous jurer que ce n'est pas à votre connaissance personnelle qu'il y a de ces comptes-là?—R. D'après moi je crois qu'il y a quelque compte à venir, je ne sais pas.

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Q. Pourriez-vous m'en nommer?—R. Je ne sais pas quelle sorte de comptes.

Q. Pourriez-vous m'en nommer quelques-uns?—R. Les comptes de *Saint-Pierre* et de *Prince*, je ne les ai pas eus. Les comptes, je ne puis point les nommer.

The account of *Fréchette's* Election Agent is as follows:

Etat des dépenses légales d'élection de *Louis Israël Côté alias Louis Israël Fréchette*, candidat élu à l'élection, le 20 juin 1882, pour la Chambre des Communes, dans le district de *Mégantic*. Pour argent déboursé et payé comme suit :—

Pièce No 1—	Compte de	*B. Tippens*, orateur.....	$75 00
" " 2—	"	*J. A. McDonald*, orateur...	33 00
" " 3—	"	*Moffatt*, orateur.....	10 00
" " 4—	"	*J. B. Rousseau*.....	10 58
" " 5—	"	*J. Chassé*, orateur.....	75 00
" " 6—	"	*J. G. Prince*, orateur. .. .	45 00
" " 7—	"	*P. C. Bourke*.....	15 00
" " 8—	"	*S. Larochelle*.....	31 55
" " 9—	"	*Edouard Fluet*	3 50
" " 10—	"	*L. J. Piteau*, orateur.....	100 00
" " 11—	Dépenses personnelles de *L. I. Fréchette*.....		95 00
" " 12—	Compte de	*V. A. Bérubé*	1 10
			$494 73

Daté à *Maple Grove*, ce 18 août 1882.

(Signé) SIMEON LAROCHELLE,
Agent.

The absence of any account being rendered by *Frechette* or his financial agent of the payment of this and other monies to *Beaudet*, or of any account rendered by *Beaudet* to *Frechette*, or of any request by *Frechette* to *Beaudet* of an account of its expenditure; the large sums distributed by *Frechette* to his committee and agents without the instrumentality or knowledge of his financial agent, the dispositions of which were entirely unaccounted for, either by *Frechette* to his financial agent or by the parties to whom the expenditure was entrusted, to *Frechette* himself; the absence of any inquiry by *Frechette* as to such expenditure, and

the large sums admittedly corruptly expended in the election by the agents of *Frechette*, all show the entire reckless disregard of the law in the manner of conducting the election all prevent a favorable view being taken of *Frechette's* conduct in reference to this transaction, and so far from my being able to say that the learned Judge was clearly wrong in the decision at which he arrived, I am constrained to say that had the case come before me in the first instance I should have been compelled to come to the same conclusion.

STRONG, J. :—

For the reasons assigned by Mr. Justice *Plamondon*, I am of opinion that the judgment of the court below must be affirmed and this appeal dismissed with costs.

FOURNIER, J. :

I also am of opinion that the judgment of the court below should be affirmed.

HENRY, J. :

I concur in the decision arrived at by my learned colleagues.

GWYNNE, J. :

The objection urged upon behalf of the appellant to the evidence of the quality of the petitioners to file the election petition in this case as duly qualified electors cannot be entertained. The voters' list prepared under the provisions of the *Quebec* statute, 38 *Vic.*, ch. 7, when finally completed and filed of record as directed by that statute, is, in my opinion, the sole evidence required to be produced for the purpose of establishing the right of a person inserted thereon as a qualified voter to vote at an election held thereunder, and to file an election petition as such qualified voter. Ample oppor-

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tunity is given to every one by the provisions of the statute to make objection to all persons inserted on the list as voters while it is in course of preparation, and the utmost precautions are provided to insure its accuracy, so that when it is finally completed and filed of record, as required by the statute, it becomes the title of record of every person inserted thereon to be an elector, entitled to vote at an election held under it, and as such entitled to maintain a petition calling in question the validity of the election. Neither is there anything in the other purely technical objections urged by the learned counsel for the appellant. The appeal must therefore be disposed of upon its merits.

The learned judge, before whom the election petition was tried, has avoided the election upon the grounds of bribery and corruption which he had found to have been committed by the appellant personally, and also by others, his duly authorized agents. The learned counsel for the appellant has, upon this appeal, submitted to the correctness of the judgment of the learned judge, in so far as it proceeds upon the acts of the agents of the appellant committed without his knowledge and consent, and has disputed the judgment only in so far as it finds that any bribery or corrupt practice was committed by the appellant personally, or by any agent of his, with his knowledge or consent, the object of the appeal being to get relief from the disqualification of the appellant incident upon the judgment of the learned judge.

The charges affecting the appellant personally upon which the judgment of the learned judge proceeds, are five in number.

The first is comprised in items No. 1 and 19, inserted in the bill of particulars annexed to the record, which are as follows:

1st. That the appellant gave from two hundred and fifty to three

hundred dollars to one *Jean Charles Beaudette*, with which to commit bribery during the election, and

19th. That *Jean Charles Beaudette*, with the knowledge and consent of the appellant, who had furnished him with money for such purposes, gave to one *James Kinnear* the sum of twenty-five dollars for the purpose of corruptly influencing the vote of the said *James Kinnear*.

The learned judge, after a careful review of the evidence bearing upon this charge, came to the conclusion that it was clearly proved, and that in itself was not only sufficient to avoid the election, but to subject the appellant to be found guilty personally of corruption. The appellant and his agent, *Beaudette*, had the fullest opportunity of explaining their version of this transaction; indeed, they and *Kinnear* are the sole witnesses upon the charge. It is apparent, however, that the learned judge was very unfavorably impressed with the manner in which the appellant gave his evidence upon all the charges which were under investigation before him, for he premises his judgment with a passage which I transcribe in his own language:

Une observation trouve ici nécessairement sa place. C'est que le defendeur a étonnement varié dans les diverses dépositions et déclarations qu'il a données. La cour déclare sans hésitation qu'elle croit de son devoir d'attacher plus de poids aux admissions, affirmations et explications contenues dans les réponses du défendeur à l'interrogatoire en chef plutôt que dans ses depositions subséquentes faites *exparte* et qui décélent le besoin et le desir d'amoindrir sinon d'anéantir complètement la preuve de faits compromettants, preuve, résultant d'un témoignage long et minutieux donné à plusieurs reprises, en pleine connaîsance de cause, en toute liberté sans la moindre pression de précipitation, et sans le moindre prétexte de défaut de connaissance de cause, le defendeur bénéficie déja suffisamment d'un défaut de mémoire bien remarquable dans son premier interrogatoire.

Now that *Beaudette* gave to *Kinnear* the $25, and that the money so given was part of the $100 which the appellant had that same morning placed in *Beaudette's* hands, there can be no doubt. That the money placed

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by the appellant in *Beaudette's* hands was so placed for purposes of corruption, and to be expended in a manner similar to the manner in which it was so soon after, and almost in the presence of the defendant applied, and that *Beaudette's* motive in giving the $25, although expressed to be given towards the erection of a public hall at the place where *Kinnear* lives was, in fact, in order to induce *Kinnear* either to vote for the appellant or at least not to vote or work against him, and that the appellant had at the time knowledge of the manner in which the sum of $25 was expended, of the source from which it came, and of *Beaudette's* motive in so expending it are all inferences which the evidence warranted, and it is sufficient for me to say, especially in view of the above extract from the judgment of the learned judge, that the learned counsel has failed to convince my mind that the finding of the learned judge is erroneous. On the contrary, I am of opinion that the above inferences flow very naturally from the facts detailed in the evidence, and however serious are the consequences to the appellant, I can see nothing to justify us in reversing the judgment of the learned judge upon this charge.

Another of the charges contained in the bill of particulars is that the appellant gave from $30 to $50 to one *Porter* to commit corrupt acts therewith, and that the money was employed by him for that purpose. The learned judge has found that the appellant enclosed in an envelope addressed to *Porter* the sum of $20, a day or two before the polling day, and he was of opinion that the sending of this $20 served to purchase the influence and services of *Porter*, who was to act as an agent of the appellant at one of the polling places.

On the back of a piece of paper covering the money were written the words: "for expenses at your poll." There was no signature to this, nor was there any writing save the name and address of *Porter*, which

were on the envelope. *Porter* could give no satisfactory account of his application of this money, and he professed to have been ignorant when he received it of the person from whom it came. Now that this money was sent with a corrupt intent was a very natural inference for the learned judge to draw from the facts in evidence, for there was no legal expenses to be incurred by *Porter* at the poll for which he would require any money; and if sent to him with an honest motive, there was no occasion for such a statement of the purpose for which the money was sent, nor for suppressing the name of the person sending it, nor for omitting to have the amount entered in the account of the appellant's expenses at the election. It was contended, however, by the learned counsel for the appellant, that the finding of the learned judge as to the purpose for which the money was sent was a different purpose from that alleged in the charge, the latter being "*pour faire de la corruption*," and the finding of the learned judge being, that the payment of a sum of $10 for a service which was worth only $3 or $4 "*et l'envoie de* $20 *ont servi à acheter l'influence et les services de Porter.*"

I confess that it appears to me that in these charges of personal corruption, the same preciseness should be required as in an indictment. In this case the evidence, to my mind, rather proves the motive of the appellant in sending the money to have been the corrupt one charged than to influence the vote of *Porter*, which, as I understood the learned counsel for the appellant, is the construction put by him upon the language of the learned judge; but it may be that the words "*ont servi à acheter l'influence et les services de Porter*" are open to the construction that the money was given to purchase the good offices and services of *Porter* in freely treating the voters on the polling day at the poll where *Porter* was to represent the appellant, a practice which ap-

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pears to have been largely indulged in at some of the polling places by persons acting in the interest of the appellant, in which case the charge "*pour faire de la corruption*" would be established. However, as the first charge is sufficient to support the learned judge's judgment, it is unnecessary to dwell upon this one, or upon the others, which are charges of corrupt treating, as to which latter I think it not inopportune to observe that these charges of corrupt treating appear to me to afford a good illustration of the importance of our being very careful not to set aside the finding of the judge of first instance upon matters of fact, unless thoroughly convinced that the finding is erroneous. As to the mere fact of treating, there may not be, and frequently is not, any question raised—the criminality lies in the intent of the party in treating; and judging from the observations above quoted from the learned judge's judgment, I cannot but think that the very unsatisfactory character of the evidence given by the appellant, and his demeanor under examination mainly contributed to induce the learned judge to draw the inference that the intent in the cases adjudicated upon by him was corrupt, and as upon appeal we have not that evidence before us, as the learned judge had, we are not in a position that would justify us in pronouncing his judgment to be erroneous.

Appeal dismissed with costs.

Solicitor for appellant: *Eugène Crépeau.*

Solicitor for respondents: *Joseph Lavergne.*

RICHARD A. GUILDFORD.....APPELLANT; 1882

AND *Oct. 29.

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THE ANGLO-FRENCH STEAMSHIP COMPANY.....RESPONDENT. *Mar. 28.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Master and owner—Contract, Breach of—Damages, Measure of.

The action was brought by *G.* against *A.-F. S. S. Co.* to recover damages for an alleged breach of contract. The plaintiff was master of the ss. *George Shattuck*, trading between *Halifax* and *St. Pierre* and other ports in the Dominion. She was owned by defendant company, the plaintiff being one of the largest shareholders of the company. Plaintiff's contract was that he was to supply the ship with men and provisions for the passengers and crew, and sail her as commander for $900 a month, afterwards increased to $950. The ship had been originally accustomed to remain at *St. Pierre* 48 hours, but the time was afterwards lengthened to 60 hours by the company, yet the plaintiff insisted on remaining only 48 hours, against the express directions of the company's agents at *St. Pierre*, and was otherwise disobedient to the agents, in consequence of which he was, on the 22nd May, without prior notice, dismissed from the service of the company.

The case was tried before Sir *William Young*, C.J., without a jury, who, considering that the plaintiff was not a master in the ordinary sense, held that he had been wrongfully dismissed and found a verdict in his favor for $2,000. A rule *nisi* was made absolute by the full court for a new trial. On appeal to the Supreme Court of *Canada* it was

Held,—1st. That even if the dismissal had been wrongful, the damages were excessive, and the case should go back for a new trial on this ground.

2nd. *Per Ritchie*, C.J., and *Fournier* and *Gwynne*, JJ., That the fact of the master being a shareholder in the corporation owning the vessel had no bearing on the case, and that it was proper to grant a new trial to have the question as to whether the plaintiff so acted as to justify his dismissal by the owners submitted to a jury, or a judge, if case be tried without a jury.

*PRESENT.—Sir W. J. Ritchie, Kt., C.J., and Strong, Fournier, Henry and Gwynne, JJ.

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APPEAL from a judgment of the Supreme Court of *Nova Scotia*, making absolute a rule *nisi* to set aside a verdict of $2,000 in favor of the appellant. The action was brought by appellant against respondents to recover damages for an alleged breach of contract.

The plaintiff was master of the steamship *George Shattuck*, trading between *Halifax* and *St. Pierre* and other ports in the Dominion. She was owned by defendant company; the plaintiff being the largest shareholder of the company. He was dismissed before the expiration of the term of his agreement.

The 1st count of the declaration was based on an agreement to hire the plaintiff at $1,200 a year while the vessel should be engaged on such voyages, and alleged a wrongful dismissal on 22nd May, 1878. The 2nd count declared on an agreement for six months, at $950 per month (to include supplies for the ship and wages for the crew), and wrongful dismissal during that period, and while performing the voyages prescribed. The 3rd count alleged a hiring for six months, from 14th March, 1878, and a dismissal on 22nd May, 1878. The 4th count alleged an agreement to hire plaintiff, as long as the steamer should be employed by defendant company at $1,200 a year and dismissal while she was so employed. The 5th count alleged that, by way of inducing plaintiff to take $4,000 in shares, the defendant company promised that he should have command of the steamer while she belonged to defendant company, at $1,200, a year, and wrongful dismissal during that time. The 6th count alleged an agreement that, in consideration of plaintiff paying $4,000 into the company as a sharesman, the company would give him command of any steamer which they might put in the trade; that he paid the money and became master of the *George Shattuck*, and also undertook to provide wages and provisions at their request,

while they should employ the steamer, at $950 per month, and a wrongful dismissal before the expiration of the term. The common counts were added.

The 1st plea denied all the agreements. The 2nd denied all the grievances. The 3rd denied the employment. The 4th denied that plaintiff performed his duties. The 5th alleged negligence, carelessness and disobedient conduct on the part of plaintff. The 6th alleged disobedience and insubordination and refusal to obey the lawful commands of defendants and their agents, and insults to agents and improper and outrageous conduct. The 7th alleged that while the ship was in plaintiff's possession, defendants replevied her and dispossessed him, and that the replevin suit is still pending. To the common counts were pleaded never indebted and payment.

On May 26th, 1880, Sir *William Young*, who tried he cause without a jury, gave a verdict for plaintiff for 2,000. A rule *nisi* was taken for a new trial, and this vas made absolute on 10th July, 1881. From this decion the present appeal was taken.

Mr. *Thompson*, Q.C., for appellant, relied on the follow-ig reasons in support of the appeal :

1st. The conduct imputed to the plaintiff did not wrrant the respondent company in dismissing the plintiff before the termination, of his contract, while employed under such an agreement as that which had be made.

2d. The statements of misconduct were denied, and the verdict found this issue in favor of the plaintiff.

3d. The contract by which plaintiff became, for a defite term, master, and entitled to find the ship in wage and provisions, was not one which could be termiated for the reasons which the respondents assign

4th. The plaintiff's management of the ship having

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been faithful and satisfactory, and he being one of her owners and having a contract for a definite term, he was not removable for such reasons as have been assigned.

5th. The reasons assigned by the plaintiff, and which have not been controverted, were such as to excuse the language and conduct attributed to him—or, at any rate, to save him from the consequences of dismissal,

6th. The respondents condoned the alleged misconduct.

7th. The reasons which the respondents now assign for his removal are either offences which were condoned, or of which it does not appear that they had knowledge at the time of dismissal.

Mr. *Rigby*, Q C, for respondents, contended—

1st. That the respondents were justified in dismissing him, and that the appellant, not being a part owner of the respondents' steamer, the latter had a right at any time to dismiss without cause and without notice.

2nd. That the finding of the judge who tried the case as a matter of fact that the justification pleaded in the 5th and 6th pleas was not proved, is against all the evidence, or at least the weight of evidence.

But it must be observed that the finding of the judge was not an absolute finding, but was made with certain reservations, and in his judgment he characterizes appellant's language as indefensible. Besides the learned judge considered the appellant to be a part owner in the steamer, and that the right of the owners to dismiss him was qualified by that fact, and also because he and his son had become stockholders in the enterprise, and the former had embarked all his capital in it.

3rd. That the damages were excessive.

If the justification was not proved the utmost

damages recoverable would be an equivalent for such a period of service as would cover a reasonable notice of such dismissal, which would be far below the sum awarded.

Besides, in estimating the damages, the judge was influenced by circumstances which ought not properly to have been considered in relation to that question, such as the transactions between one *Frecker* and appellant at the original inception of the enterprise, the alleged interest of appellant in the ship, that he was not a master in the ordinary sense, and that he had embarked all his capital, a considerable sum to him, in the purchase and ownership of the vessel. These circumstances are urged in the judgment originally given by his Lordship after the trial, and more strongly insisted upon in his subsequent dissenting opinion.

RITCHIE, C. J.: —

I think this appeal must be dismissed. It is abundantly clear that neither the fact of plaintiff being a shareholder, nor what he may have done with a view to redeeming the concern and saving it from ruin, which seems to have so much influenced the mind of the learned Chief Justice who tried this case without a jury, should have, in my opinion, any bearing whatever on this case. This is simply an action by the plaintiff for an alleged breach of contract in wrongfully dismissing him from his situation as master of a steam vessel belonging to defendants. The contract appears to have been that defendants agreed to employ plaintiff as master of the ship, and that he should receive $950 a month for commanding and sailing the ship and finding the crew and passengers.

The simple questions involved are, first, did plaintiff so conduct himself while in command of the ship as master, as to justify the defendants, the owners, in dismissing him? And this is a question for the jury and

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should have been determined by the judge who tried this case without a jury. If so, there is an end of the action. But secondly, if his dismissal was not justifiable, then what damages is he entitled to recover? The learned Chief Justice did not pass on the first question pure and simple, but treating plaintiff "not as a master in the ordinary sense," but under all the circumstances thought him entitled to a verdict, and that the sum of $2,000 was not unreasonable damages. The circumstances which influenced the Chief Justice appear to have been the fact that the vessel was owned by a corporation, and the master was a shareholder, for he adds to what I have just quoted:

> As it was understood, however, that the case would be remitted to the court in *banco*, the amount of damages, as well as the questions of law as to the right of dismissal, and the distinction between the ownership of a ship by a body of individuals, the master being one of them, and by a corporation under an Act, would come up for adjudication after argument and full enquiry.

This question as to the ownership of the vessel, the captain being a shareholder, had, as I have said, in my opinion, nothing whatever to do with the case, as everything must turn on the contract entered into with the company, with which plaintiff's interest in the ship as a shareholder had nothing whatever to do.

But, secondly, if the judge had found the dismissal unwarranted, there is nothing whatever to justify the amount of damages awarded. The true measure of damages in cases of wrongful dismissal are very plain and very simple, and in no circumstances, under the evidence in this cause, could plaintiff, on a monthly salary, under a contract by which he was not only to act as captain but was to find the crew and passengers for $950 a month, his wages as master being previously to his agreement $100 a month, be entitled to recover $2,000.

The court below were therefore quite right in granting a new trial, when the case can be submitted to a

jury, or to a judge, if tried without a jury, as to whether the plaintiff so acted as to justify his dismissal, a question of fact for the jury. Secondly, as to the amount of damages, as to the measure of which the jury should be instructed as in the ordinary case of employer and employee.

STRONG, J.:

The question of wrongful dismissal would have been one entirely for the jury, if a jury had tried this case; as it was, the question was one for the consideration of the learned Chief Justice, Sir *W. Young*, as a question of fact, and of the proper inferences to be drawn from facts; and upon the finding that the plaintiff was wrongfully dismissed, I should not be disposed to disturb his verdict. Making all allowance for the habits and manner of men of the plaintiff's calling, and taking into account his good service to the company and his undeniably good seamanship and management of his vessel, I think he was very harshly dealt with.

The damages, however, are unwarrantedly large; vindictive damages cannot be given in actions for breach of contract. The damages ought therefore to have been measured in the present case by the amount of the loss which the breach of contract occasioned the plaintiff, and as the hiring was a monthly one, a month's wages or $950 was the utmost which could properly have been allowed. I should be prepared to let a verdict for the plaintiff stand reducing the damages to this amount, but as the other members of the court think there ought to be a new trial, I do not dissent.

FOURNIER, J., concurred with Ritchie, C.J.

HENRY, J.:

I agree with the views of brother *Strong* in regard to this question. I think it is a proper question for a jury. If the Chief Justice, who was sitting as a jury,

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had found for the plaintiff damages such as we could justify, I would have felt inclined to sustain the verdict, but I must say that under the circumstances I think, with the means we have of ascertaining what the damages ought to be, they are too high. Therefore, I consent that the verdict should be set aside.

GWYNNE, J.:

This case was, as it appears to me, eminently a proper one to justify the court below in ordering a new trial. Whether the plaintiff was or not entitled to notice before being dismissed, depended upon his contract and the nature of his employment. This raised a mixed question of law and fact, which does not appear to have been tried. If entitled to notice, it could not, as appears, have been more than one month's notice, and then would have arisen the question whether the causes of dismissal relied upon and the evidence given thereof were sufficient to justify dismissal without notice. That was a point proper to be determined by a jury or a court of first instance acting as a jury, and does not appear to me to have been sufficiently considered. It is not a point proper for this court sitting as a Court of Appeal to adjudicate upon, as if it was a court of first instance. Then as to damages, the sole measure of damages applicable to the case appears to have been ignored. The only proper course to be pursued, as it appears to me, was to remit the case to be tried anew, as the ground upon which the learned Chief Justice proceeded in rendering a verdict for the plaintiff cannot, in my opinion, be supported. The plaintiff's appeal, therefore, against the rule absolute, ordering a new trial, must be dismissed with costs.

Appeal dismissed with costs.

Solicitors for appellant: *Thompson & Graham.*

Solicitor for respondents: *Samuel G. Rigby.*

THE GRAND TRUNK RAILWAY CO. OF CANADA (DEFENDANTS)..... } APPELLANTS;

AND

MARY ROSETTA ROSENBERGER, *et al.*, (PLAINTIFFS)..... } RESPONDENTS.

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*Jan. 22.

*March 8.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Railway—Failure to sound whistle—Accident from horse taking fright—C. S. C. cap. 66, sec. 104—Finding of Jury—Evidence.

Held,—Affirming the judgment of the Court of Appeal for *Ontario*, that Consolidated Statutes of *Canada*, ch. 66, s. 104, must be construed as enuring to the benefit of all persons who, using the highway which is crossed by a railway on the level, receive damage in their person or their property from the neglect of the railway company's servants in charge of a train to ring a bell or sound a whistle, as they are directed to do by said statute, whether such damage arises from actual collision, or as in this case by a horse being brought over near the crossing and taking fright at the appearance or noise of the train.

The jury in answer to the question, "If the plaintiffs had known that the train was coming would they have stopped their horse further from the railway than they did?" said "Yes."

Held,—Though this question was indefinite, the answers to the question as a whole, viewed in connection with the judges charge and the evidence, warranted the verdict.

APPEAL from the Court of Appeal for *Ontario* (1), affirming the decision of the Common Pleas Division of the High Court of Justice (2) discharging an order *nisi* to set aside the judgment entered for the plaintiffs, and the finding of the jury upon which said judgment was based, and to enter a judgment for the defendants, or for a new trial.

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*PRESENT.—Sir W. J. Ritchie, Knight, C.J., and Strong, Fournier, Henry and Gwynne, JJ.

(1) 8 Ont. App. R. 482.

(2) 32 U. C. C. P. 349.

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The action was commenced by the respondents against the appellants on the 16th September, 1881, for injuries which they had severally sustained by being thrown out of a buggy on a highway in *Berlin*, near a crossing of the appellants' railway on the previous 9th of June.

The cause was first tried before Mr. Justice *Galt* and a jury, when, on answers to questions submitted to the jury, the judge entered a verdict and judgment for the respondents against the appellants.

This verdict was set aside by the Common Pleas Division, and a new trial was ordered, and leave was given to the respondents to amend their statement of claim, the court being of opinion that the original statement of claim did not shew a good cause of action.

The statement of claim was then amended, so as to state the facts upon which the respondents relied to maintain their action, in the words following—

"Paragraph 2. On the evening of the 9th day of June, 1881, the plaintiffs were lawfully proceeding from the said town of *Berlin* to the town of *Waterloo*, in a carriage drawn by one horse, and upon and by the way of the highway leading from the said town of *Berlin* to the said town of *Waterloo*.

"Paragraph 3. In order to reach the said town of *Waterloo* it was necessary for the plaintiffs to cross the defendants' railway, in the said town of *Berlin*, where the said railway crosses the said highway on a level with the said highway.

"Paragraph 4. The plaintiffs proceeded upon the said highway to within a very short distance of the said railway, where it crosses the said highway, when a train upon the said railway in charge of the defendants' servants came along the said railway and proceeded to cross the said highway without giving the warning or signal of the approach of the said train, as required by the statute in that behalf, and when the said train had

gone partly across the said highway the whistle upon the engine attached to the said train was then for the first time sounded, and the horse which the plaintiffs were driving took fright at the very close, unexpected and sudden appearance of the said train, became unmanageable, and upset the said carriage, and the plaintiffs were violently thrown to the ground, and the said carriage was broken, and the said horse ran away, although during all the time aforesaid the plaintiffs drove the said horse with reasonable care and skill.

"Paragraph 4*a*. While the plaintiffs were proceeding upon said highway in the said carriage as aforesaid, and before the said carriage was upset as aforesaid, the said train (preceded by a locomotive engine attached thereto and forming part thereof) was being rapidly driven along and over the said railway in charge of the said defendant's servants, and thereupon it became and was the duty of the defendants to ring the bell, or to sound the whistle, which were upon the said engine, at least eighty rods from the place where the said railway crosses the said highway, and to keep the said bell ringing, or the said whistle sounding, at short intervals until the said engine had crossed the said highway, to warn persons travelling along the said highway of the approach of the said train, but the said servants of the defendants did not, nor did any other person, ring the the said bell or sound the said whistle when approaching the said crossing, either at, or within, the said distance of eighty rods from the said point of intersection or crossing, but wholly neglected so to do, by reason whereof the plaintiffs were not warned of the said approach of the said train.

"Paragraph 5. No warning or signal of the approach of the said train towards the said highway on the occasion aforesaid was given as required by law. No bell

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was rung, nor whistle sounded upon the said engine until the same was partly across the said highway, when the said horse immediately took fright and became unmanageable, through no fault of the plaintiffs, and entirely in consequence of the said negligence and carelessness of the said servants of the defendants.

"Paragraph 5*a*. Because no warning of the said train was given by whistling or ringing the bell as hereinbefore mentioned, the plaintiffs had reason to suppose that no train was then approaching the said railway crossing, and therefore being ignorant of their danger, and being unable to see or hear any approaching train, and believing that no train was coming, the plaintiffs drove with due care as aforesaid much nearer and closer to the said railway crossing than the plaintiffs would have gone on the occasion aforesaid if they had been warned by whistle or bell of the approach of the said train as required by law, and immediately thereupon, when the plaintiffs had proceeded to within a very short distance of the said railway, as mentioned in the fourth paragraph hereof, the said train came suddenly upon the said highway, and the said horse took fright at the said train, so that the said horse became unmanageable and upset the said carriage, and the plaintiffs then received the injuries hereinafter mentioned, and it was by reason of such neglect to ring the said bell or sound the said whistle as aforesaid that the plaintiffs sustained the damages hereinafter mentioned.

The appellants pleaded not guilty by statute.

The cause was tried a second time before Mr. Justice *Patterson* and a jury.

The learned Judge after reading s. 104 of the Consolidated Statutes of *Canada*, ch. 66, put the following questions to the jury:

First, has it been proved to your satisfaction that that

duty was not performed? to which the jury answered yes.

Second—If you find the signal was given, but not so far as eighty rods from the highway, would it have been heard by the plaintiffs if they had been careful and listened so they could have avoided the accident? To which the jury answered yes, but said that they do not mean that the bell was rung.

Third—Was it a prudent thing for the plaintiffs to have driven the horse they did where the railway was to be crossed? To which the jury answered yes.

Fourth—Did the plaintiffs use such care as a reasonably cautious person would under the circumstances have used on approaching the railway? To which the jury answered yes.

The fifth question was not answered and is not material.

Sixth—If the plaintiffs had known the train was coming would they have stopped the horse further from the railway? To which the jury answered yes.

The jury then assessed the damages of the respondents—*Mary Rosetta*, at $600, and of *Lydia Ann*, $500.

Upon these answers the learned judge entered a verdict for the respondents.

On the 18th May, 1882, the Common Pleas Division granted an order *nisi* to show cause why the judgment rendered for the plaintiffs, and the findings or verdict of jury upon which the said judgment was based, should not be set aside, and a judgment entered for the defendants, on the ground that the plaintiffs could not maintain an action, as the defendants did not owe any duty to sound the bell or blow the whistle, so far as the plaintiffs were concerned, and on the ground that it was not established that the injury to the plaintiffs complained of was caused by the omission of the defendants to give the signal referred to, and on the ground

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that the omission to give the signal was not the proximate cause of the injury, or why the said findings should not be set aside and a new trial had between the parties, on the ground that the findings were against law and evidence, and the weight of evidence.

After arguments the order *nisi* was discharged, Justices *Galt and Osler* being of opinion that the action was maintainable, and that they could and ought to supply a finding of a matter of fact which the jury had not found. The Chief Justice dissented, holding that the action was not maintainable. The appellants then appealed to the Court of Appeal, and a majority of the judges of that Court affirmed the judgment of the Common Pleas Division. Mr. Justice *Burton* dissented, agreeing with the opinion of Chief Justice *Wilson*.

The present appeal was from the judgment of the Court of Appeal.

The evidence at the trial, besides the statements of the two respondents, consisted of persons in the neighborhood of the crossing, who stated that they did not hear the signals given, and some of them that if they had been given they would have heard them, while others gave evidence to show that either one or both signals were given. The two respondents, who were driving a buggy, said that they did not hear the signals or hear even the noise of the approaching train till they saw it.

Mr. *James Bethune*, Q. C., for appellants:

The appellants submit that except for the statement of claim numbered 5*a*. the appellants could have demurred. See observation of *Osler*, J. (1).

If the action will lie at all it certainly was necessary for the respondents to prove to the satisfaction of the jury, and to get them to find, that the injury to the

(1) 32 U. C. C. P. 364 & 365.

respondents happened by reason of the appellants' neglect to give the signals in question.

The majority of the judges of both the courts below have in effect tried that part of the case as jurors, and have supplied a finding which the real jury did not find, and might not have found if the matter had been submitted to them.

The respondents rely on marginal rule 321 of the Judicature Act, as enabling the Court to try that issue.

I submit that this could not in such a case as this be done, or even if the court possessed the power it ought not to have been so exercised in this instance.

The respondents required to have the issues of fact tried by a jury. Then attention was called to the importance of the issue as to whether the injury happened by reason of the defendants' neglect to give the signals. See observation of *Osler*, J. (1), in the report already referred to. The respondents chose to rest their case on the findings of the jury in answer to the questions submitted, and declined to ask the judge to submit a question as to the causation of the injury, and ought not now to be allowed to raise any question of the kind, but certainly if it is to be raised it must be tried by the tribunal of the respondents' own choice.

The appellants submit that marginal rule 321, already referred to, does not apply to a case of this kind, but if it does, the appellants contend that the divisional court had not, and this court has not, all the materials before it necessary to enable it finally to determine the question of whether the injury was caused by reason of the neglect to give the signals in question.

In cases of this kind no court who has not seen the witnesses can determine a question of this kind now under consideration.

That the accident happened because the signals were

(1) P. 364.

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not given is not the necessary result of the findings of the jury.

The 6th question is the important one in connection with the matter now being discussed. That question is "if the plaintiffs had known the train was coming would they have stopped the horse further from the railway?" The appellants ask how much further? and do not see where the evidence is upon which the exact place can be fixed. It is not a finding that they would have stopped a quarter of a mile away. The finding is so vague as to be quite useless to enable the the court to determine anything.

Then I also submit that an action will not lie for a breach of the statute, even if everything else assumed in favor of the respondents, because the damages are too remote.

Moreover the respondents were guilty of such contributory negligence in attempting to drive the horse across the railway track as should disentitle them to recover, and the appellants did not owe the respondents, in the circumstances which happened, any duty to give the signals. [The learned counsel also relied on the judgments of the Chief Justice of the Common Pleas (1) and the cases therein cited, and the judgment of Mr. Justice *Burton* in the Court of Appeal (2).]

Mr. *Bowlby*, Q. C., for respondents:

The finding of the jury in answer to the 6th question sufficiently shows that the respondents' damages were sustained by reason of the appellants' neglect to give the requisite statutory signals by whistle or bell, when that finding is read in connection with the evidence and the Judge's charge, which must always be done with the findings of Juries given in answer to questions.

It is enacted by "The Ontario Judicature Act, 1881,"

(1) 32 U. C. C. P. 349. (2) 8 Ont. App. R. 482.

rule 321, statutes of *Ontario*, 1881, p. 108, that "upon a "motion for judgment, or for a new trial, the court may "if satisfied that it has before it all the materials neces- "sary for finally determining the questions in dispute "or any of them, give judgment accordingly." As the appellants' motion in the court below was for a new trial, under this rule 321 the whole question of the liability of the appellants was open for the court to determine on the pleadings and evidence upon hearing such motion for new trial. This case having already been twice tried by jury, another new trial should not be granted for the mere purpose of asking the jury one additional question, the answer to which the court can foresee to a certainty upon the evidence now before the court and upon which the court itself has full power to find and give judgment by the above mentioned O. J. Act, rule 321, and upon which the evidence is conclusive in favour of the respondents. *Hamilton* v. *Johnson* (1).

The *United States* courts have decided railway companies are liable in cases like the present, although there was no actual collision with the train and it is well known that no practical inconvenience or injustice has resulted to the railway companies in that country, where the statute law, in nearly every state, is identical with our own.

It cannot be fairly contended that the signals were only required by the statute to prevent persons travelling on the highway from coming into actual collision with the train, because, if the only purpose the legislature had in view in requiring the signals, were to prevent cases of actual collision, signals twenty feet from the crossing would have answered quite as well as signals eighty rods away.

It is of the greatest importance to the people of this

(1) 5 Q. B. D. 263.

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country, travelling upon the public highways, that the signals required by the statute, to give warning of the approach of trains towards level crossings, should be in all cases strictly observed. See *Redfield* on Railways (1).

In the case of *Slattery* v. *The Dublin and Wicklow Railway Co.* (2), it is stated, at pages 1172 and 1175 of the report of that case, that the particular signal for warning people on the highway, which is required by statute, and no other, is what the traveller on the highway is entitled to depend upon.

There was no evidence of any contributory negligence, and the jury found there was none.

The learned counsel also cited and commented on the following authorities:

Stewart et al v. *Rounds* (3); *Hill* v. *Portland and Rochester Railroad Co.* (4); *The People* v. *The New York Central R. R. Co.* (5); *Hill* v. *Louisville & Nashville R. R. Co.* (6); *Dyer* v. *Erie Railway Co.* (7); *Whitney* v. *Maine Central Railroad Co.* (8); *Kelly* v. *St. Paul, Minn. & Man. R. Co.* (9); *Renwick* v. *New York Central R. R. Co.* (10); *Plummer* v. *Eastern R. R. Co.* (11); *Daun* v. *Simmins* (12); *Rosenberger* v. *Grand Trunk Rwy. Co.* (13).

Mr. *James Bethune*, Q. C. in reply.

The judgment of the court was delivered by

GWYNNE, J.:—

We are all of opinion that this appeal should be dismissed. We entirely concur in the opinion of the learned judges of the Common Pleas division of the

(1) Vol. I., p. 566.
(2) L. R. 3 App. 1155.
(3) 7 Ont. App. R. 515.
(4) 55 Maine 438.
(5) 25 Barb. N. Y. Sup. C. Rep. 199.
(6) 19 Ladd's Am. Ry. Rep. 400.
(7) 71 N. Y. 228.
(8) 69 Me. 208.
(9) 29 Minn. 1.
(10) 36 N. Y. 132.
(11) 73 Me. 591.
(12) 48, L. J. of 1879, C. L. 343.
(13) 8 Ont. App. Rep. 482.

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High Court of justice, and of the Court of Appeal of the Province of *Ontario*, namely, that the benefit of the 104th section, chap. 66 of the Consolidated Statutes of *Canada*, is not confined to the case of persons injured in person or property by actual collision with an engine or train crossing a highway. In the neighboring States, where a precisely similar enactment is inserted in railway companies Acts, the courts of law recognize no such limitation, and neither in the language of the clause, nor in reason, is there, in our opinion, anything which would justify such a limitation of the application of the clause. It clearly, as we think, applies to, and must be construed as inuring to, the benefit of all persons who, using the highway which is crossed by a railway on the level, receive damage, either in their persons or in their property, from the neglect of the railway company's servants in charge of a train to ring a bell or sound a whistle, as they are directed to do by the statute, whether such damage arises from collision or is occasioned in any other manner by the neglect referred to.

The learned judge, before whom the case was tried, submitted certain questions to the jury, accompanied by a most careful charge, of which the defendants have no just reason to complain, explaining the reason why each of such questions was put to them, so as to exclude all possibility of the jury failing to understand their object. He told them that the action was founded upon negligence in the defendants:

It is alleged, [he told them], that the railway company had a certain duty to perform, and that they neglected that duty, and that it was by reason of that neglect that the accident happened, and [he told them] to bear in mind these two or three principles, because all these things have to be established to entitle the plaintiffs to recover. They must satisfy you, [he said], not merely that the defendants neglected their duty, but that the neglect caused the injury. It is not sufficient for them to show that the railway company neglected to

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do something which by the statute they were bound to do; they must go further, and satisfy you that the injuries were in no degree caused by their neglecting something which they themselves should have done. I want you, [he said], to understand as clearly as I can explain it, the grounds upon which the plaintiffs, if entitled to recover, must establish their claim. They must show, before they are entitled to recover, that what has happened was brought about by no fault of their own—not by neglect of anything which they should have done, or which persons who were reasonably cautious and careful would have done under the same circumstances. It must appear that what happened to them was occasioned altogether by the fault of the company—I mean, of the persons who were running the train and who represent the company for this purpose. The company, [he said] is bound to ring the bell or to sound the whistle, and that signal or one of those signals, it does not matter which, has to be repeated at short intervals, not kept continuously going, until the train crosses the highway, the signal to commence at the distance of eighty rods. The company are liable to a penalty if they neglect that duty, whether any person is hurt or not. It does not, however, follow, that if this duty is neglected that necessarily the person who suffers has a right of action. If a person neglects proper caution upon his part, if he has the means of seeing that the train is coming and if his own carelessness has something to do with bringing about the accident which occurs, he cannot excuse himself and claim damages against the railway company because they neglected to give the signals. If he could, by keeping his eyes and ears open, have protected himself, he cannot hold the company responsible. The case is not made out unless the jury are satisfied that the accident was caused altogether by the negligence of the company.

With these preliminary observations and further observations to the like effect, he submitted to the jury the following questions. It was the duty, he said, of the persons in charge of the locomotive to sound the whistle or ring the bell at the distance of at least 80 rods from where the rails cross the highway, and to keep the bell ringing or the whistle sounding at short intervals, until the train had crossed the highway, and he put this question:

1st. Has it been proved to your satisfaction that that duty was not performed?

The learned judge further explained to the jury that he put the question in that shape because he was of opinion that the onus lay upon the plaintiffs to prove, not merely that the train frightened their horse, and so caused the damage, but that the whistle was not sounded nor the bell rung, and he added:

If you are satisfied, upon the evidence, that the whistle was not sounded nor the bell rung, either one or the other of them during this space of 80 rods, you will answer "yes." If you are satisfied that the bell was rung or the whistle sounded during that distance, or if it is left doubtful, you should answer "no," because the question is, are you satisfied that it was so?

2nd Question.—If you find the signal was given, but not so far as 80 rods from the highway, would it have been heard by the plaintiffs if they had been careful and listening, so that they could have avoided the accident? Was there such signal as those people should have heard if they had listened?

The learned judge then drew the attention of the jury to the whole of the evidence bearing upon these two questions, in a very careful manner, and concluded that it was for the jury to weigh the probabilities and to decide upon the evidence as they should think proper. The evidence was certainly contradictory, but it was for the jury to say which side they believed, and there cannot be, nor is there, any complaint as to the manner in which it was left to them by the learned judge. The jury answered the first question in the affirmative, thereby establishing that they were satisfied that the bell had not been rung, nor the whistle sounded, as required by the clause of the statute. The second question they all answered in the affirmative, adding that by this answer they did not mean that the bell was rung. Conveying their meaning to be that if the signal required by the statute, which, by their answer to the 1st question, had not been given, had been given, it would have been heard by the plaintiffs, so as to have enabled them to avoid the accident.

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3rd Question.—Was it a prudent thing for the plaintiffs to have driven the horses they did where the railway had to be crossed ?

And he asked this question in view of the evidence given by witnesses who spoke as to seeing the plaintiffs when they started out.

4th Question.—Did the plaintiff use such care as a reasonably cautious person would, under the circumstances, have used in approaching the railway ?

This question he accompanied with these further observtions :

People, he said, are bound to use reasonable care. You are not to have in your mind's eye a timid woman or a rash man, but a person of reasonable caution, able to manage the horse and to drive. Did they act as such ? Did they do anything they should not have done, or did they omit to do anything they should have done ? Should they have stopped to listen? Did they omit to do anything that a reasonable person, under the same circumstances, would have done ?

The jury answer these 3rd and 4th questions in the affirmative, thereby conveying their opinion to be, as I think, in view of the charge of the learned judge accompanying the question, we must understand them, that the plaintiffs were not guilty of any contributory negligence.

5th Question.—What ought they have done which they did not do ?

To this question the jury gave no answer, from which circumstance the natural and fair inference is, that they could not say that the plaintiffs could have done anything to avoid the accident which they did not do. The learned judge, then, premising that there was still another question which he would put to them, and which touched the right of the plaintiff, to recover, and that was, did they stop their horse as soon as they knew that there was danger, put this 6th question :

If the plaintiffs had known the train was coming, would they have stopped the horse further from the railway ?

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which question the jury answered in the affirmative. To the 7th question, which was as to the amount of damages the plaintiffs should receive, the jury answered that one should receive $600 and the other $500.

Now, that these answers given to questions accompanied by such clear explanation from the learned judge of what, in his opinion, the jury should be satisfied before the plaintiffs could recover, were intended by the jury to be taken as a verdict for the plaintiffs, and that the entry of a verdict upon them for the plaintiffs by the learned judge was a proper entry, cannot, we think, admit of a doubt. It is, however, now objected by the learned counsel for the defendants that the 6th question is too vague to warrant the conclusion being drawn, from the affirmative answer of the jury, to it that the accident would not have happened, even if the signals required by the statute had been given, but admitting that this question might have been put more clearly we cannot, in view of all the questions and of the whole charge of the learned judge accompanying them, doubt that the intention of the jury by their answers to all the questions, taken as the whole, was to convey their opinion to be that the neglect of the defendants' servants to give the signals required by the statute to be given, was the sole cause of the accident; and that the plaintiffs were not guilty of any contributory negligence, and we think that the answers so given did warrant a verdict and judgment to be entered for the plaintiffs. When questions are submitted to a jury, as they were in this case, if counsel for the defendants should be of opinion that they are not framed so as to elicit answers which would enable the court thereupon to enter a verdict for the plaintiff or defendant, they should object at the time when, if necessary, the question or questions objected to or omitted could be amended or supplied,

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and if he fails to do so, he should not, after running the chance of the jury answering the questions put in a sense favorable to his client, and failing in that expectation, be heard to make the objection, unless at least the defect in the questions is so apparent that the ends of justice seem to demand their rectification. In the present case we do not think there is any such defect, or any such ambiguity as to how judgment should be entered upon the answers of the jury, as would require us to send this case to another jury. Upon the only objection which was taken by the learned counsel for the defendants, when the questions were submitted to the jury, namely, that the learned judge should have told the jury that the proximate cause of the accident being the appearance of the train, there is no cause of action, we are of opinion, that for the reasons given by the majority of the learned judges in the court below, this objection cannot prevail. As to the point taken, that the findings of the jury are against the weight of evidence, we cannot say that this is so. The evidence was contradictory, no doubt, as in cases of this kind it always is, but two courts below have concurred in the opinion that the findings of the jury are not against the weight of evidence. To justify us in arriving at a contrary conclusion, the onus lies upon the defendants to establish their contention beyond all reasonable doubt, and this, it is sufficient to say, they have failed to do.

Appeal dismissed with costs.

Solicitor for appellants: *John Bell.*

Solicitors for respondents: *Bowlby & Clement.*

JAMES WORTHINGTON (DEFENDANT)... APPELLANT; 1883

*Mar. 19.

AND

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ANGUS PETER MACDONALD (PLAINTIFF) AND RANDOLPH MACDONALD (DEFENDANT).. ..... } RESPONDENTS. *Jan. 16.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Articles of partnership, construction of—Partners, rights of.

The respondents having on hand large contracts to fulfil entered into partnership with the appellant under the style of *J. W. & Co.* The respondent *A. P. M.* subsequently filed a bill in Chancery against *W.* (the appellant) and his two sons co-partners, asking for a decree declaring him and his two sons entitled to receive credit to the amount of $40,000, the estimated value of certain plant, etc., used in the construction of the works done by the partnership. The article in the deed of partnership executed before a notary public in the Province of *Quebec*, under which the respondent claimed to be entitled to credit of $40,000, is as follows :—

"The stock of the said partnership consists of the whole of the plant, tools, horses and appliances now used for the construction of said works by the said parties of the first part *A. P. M. & Sons;* also all quarries, steam tugs, scows; and also all the rights in said quarries that are held by the said parties of the first part, or any of them, the whole of which is valued at the sum of $40,000, and is contained in an inventory thereof hereunto annexed for reference after having been signed for identification by the said parties and notary; but whereas the said plant, tools, horses, appliances, steam tugs, scows, quarries and other items had been heretofore sold by the said party of the first part to the firm of *M. & W.*, of the city of *Montreal*, hardware merchants, to secure them certain claims which they had against the said *A. P. M. & Co.*, for moneys used in the construction of the works referred to, to the extent and sum of about $24,000 and interest; and whereas the said *J. W.* has paid said amount of

* PRESENT—Sir W. J. Ritchie, C. J.; and Strong, Fournier, Henry and Gwynne, JJ.

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$24,000 and redeemed said plant, tools, horses and appliances and quarries, steam tugs and scows, &c., and now stands the proprietor of the same under a deed of conveyance; it is hereby well agreed and understood that the said plant, tools, horses and appliances that are or may be put on the said work shall be and continue to be the entire property of the said *J. W.* until such time as he shall have realized and received out of the business and profits of the present partnership a sum sufficient to reimburse him of the said sum of $24,000 and interest so advanced by him as aforesaid, as also any other sum or advances and interests which shall or may be paid or advanced to the present firm or partnership, after which time and event the whole of the said stock shall become the property of the said firm of *J. W. & Co.*, that is to say: That one-half thereof shall revert to and belong to the parties of the first part, and the other half to the said party of the second part, as the said *J. W.* has a full half-interest in this contract and all its profits, losses and liabilities, and the said *A. P. M.*, *W. E. M.* and *R. M.*, parties of the first part, jointly and severally, the other half-interest in the same."

There was evidence that the plant had cost originally $57,000, and that it was valued in the inventory at $40,000 at the request of the appellant; it was also shown and admitted that the profits of the business were sufficient to reimburse the appellant the sum of $24,000 and other moneys advanced, and that there was still a large balance to the credit of the partnership.

Held,—(*Henry* and *Gwynne*, JJ., dissenting,) that the plant, &c., furnished by the respondents having been inventoried and valued in the articles of partnership at $40,000, the respondents had thereby become creditors of the partnership for the said sum of $40,000, but as it appeared by the said articles of partnership, that the said plant was subject at the time to a lien of $24,000, and that said lien had been paid off with the partnership moneys, the respondents were only entitled to be credited, as a creditors of the partnership, with the sum of $16,000, being the difference between the sum paid by the partnership to redeem the plant and the value at which it had been estimated by both parties in the articles of partnership.

APPEAL on behalf of *James Worthington*, one of the defendants in a suit of *Macdonald* v. *Worthington*, instituted in the Court of Chancery of *Ontario*, from the

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judgment of the Court of Appeal for *Ontario* (1) which reversed the decree pronounced by the Court of Chancery, said decree having dismissed the plaintiff's bill with costs and said judgment in appeal having reversed said decree and granted the plaintiff a decree referring it to the master to take the usual partnership accounts, &c.

The bill in this cause was filed on 27th October, 1880, by *Angus Peter Macdonald* as plaintiff against the defendants *Worthington* and *Macdonald*. By articles of agreement bearing date the 29th March, 1875, the plaintiff and the defendants the *Macdonalds* entered into a partnership with the defendant *Worthington*; the 4th article of partnership, the only material one in this case, is given at length in the head-note. The bill was filed to have it declared that the plaintiff and the defendants *Macdonald* are under the agreement in question entitled to a credit of $40,000 in the books of the firm of *Macdonald* and *Worthington*, being the alleged value of the plant formerly owned by the plaintiff and the defendants the *Macdonalds*.

The bill asked that it should be declared that according to the true construction of the agreement the *Macdonalds* were entitled to this credit and in the alternative that if necessary the contract should be reformed by inserting a provision giving to the plaintiff and the defendants the *Macdonalds* credit for the said sum of $40,000.

The cause came on for trial before his lordship, Vice Chancellor *Proudfoot*. The Vice-Chancellor was of opinion that according to the true construction of the contract the plaintiffs are not entitled to the credit of the $40,000 claimed by them. After hearing the evidence for the plaintiff his lordship was also of opinion

(1) 7Ont. App. R. 531.

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that there was no evidence upon which the court would be justified in rectifying the contract.

The cause was heard in appeal before the Court of Appeal for *Ontario* and the said court granted a decree rectifying the agreement in question by inserting a provision to the effect that the plaintiff and the defendants *Macdonald* are entitled to a credit of $40,000, the value of the said plant. From this decision the present appeal was brought.

Mr. *C. Robinson*, Q.C., and Mr. *J. R. Metcalfe* for appellant, and Mr. *D. McCarthy*, Q.C., and Mr. H. *Cameron* for respondents.

The points relied upon and authorities cited by counsel sufficiently appear in the judgments hereinafter given.

RITCHIE, C.J.:—

The Bill in this cause was filed on 27th October, 1880, by *Angus Peter Macdonald*, as plaintiff, against the defendants *Worthington* and *Macdonald*. By articles of agreement bearing date the 29th March, 1875, the plaintiff and the defendants the *Macdonalds* entered into a partnership with the defendant *Worthington*. The fourth article of the partnership deed being as follows:—

ARTICLE FOURTH.

The stock of the said partnership consists of the whole of the plant, tools, horses and appliances now used for the construction of said works, by the said party of the first part; also all quarries, steam tugs, scows; and also all the rights in said quarries that are held by the said party of the first part, or any of them, the whole of which is valued at the sum of forty thousand dollars, and is contained in an inventory thereof hereunto annexed for reference after having been signed for identification by the said parties and notary; but whereas the said plant, tools, horses and appliances, steam tugs, scows, quarries and other items had been heretofore sold by the said party of the first part to the firm of *Morland & Watson*, of the City of *Montreal*, hardware merchants, to secure them certain claims

which they had against the said *A. P. Macdonald* & Company, for moneys used in the construction of the works referred to, to the extent and sum of about twenty-four thousand dollars and interest; and whereas the said *James Worthington* has paid said amount of twenty-four thousand dollars and redeemed said plant, tools, horses and appliances and quarries, steam tugs and scows, &c., and now stands the proprietor of the same under a deed of conveyance; it is hereby well agreed and understood that the said plant, tools, horses and appliances that are or may be put on the said work shall be and continue to be the entire property of the said *James Worthington* until such time as he shall have realized and received out of the business and profits of the present partnership a sum sufficient to reimburse him of the said sum of twenty-four thousand dollars and interest so advanced by him as aforesaid, as also any other sum or advances and interests which shall or may be paid or advanced to the present firm or partnership, after which time and event the whole of the said stock shall become the property of the said "*James Worthington* & Company," that is to say: The one-half thereof shall revert to and belong to the party of the first part, and the other hal to the said party of the second part, as the said *James Worthington* has a full half-interest in this contract and all its profits, losses and liabilities, and the said *A. P. Macdonald, W. E. Macdonald* and *Randolph Macdonald*, parties of the first part, jointly and severally the other half-interest in the same.

The bill was filed to have it declared that the plaintiff and the defendants *Macdonald* are, under the agreement in question, entitled to a credit of $40,000 in the books of the firm of *Macdonald & Worthington*, being the alleged value of plant formerly owned by the plaintiff and the defendantst he *Macdonalds.*

The bill asks that it should be declared that according to the true construction of the agreement, the *Macdonalds* are entitled to this credit, and in the alternative that, if necessary, the contract should be reformed by inserting a provision giving to the plaintiff and the defendants the *Macdonalds*, credit for the said sum of $40,000. The cause came on for trial before his lordship, Vice-Chancellor *Proudfoot.* The Vice-Chancellor was of opinion that according to the true construction of the contract, the plaintiff is not entitled to the credit of the $40,000

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claimed by them. After hearing the evidence for the plaintiff, his lordship was also of opinion that there was no evidence upon which the court would be justified in rectifying the contract.

The cause was heard in appeal before the Court of Appeal for *Ontario*, and the said court upheld the decision of the Vice-Chancellor, so far as the construction of the contract is concerned, but reversed his decision on the other branch, and granted a decree rectifying the agreement in question by inserting a provision to the effect that the plaintiff and the defendants *Macdonald* are entitled to a credit of $40,000, the value of the said plant. From this decision the present appeal is brought.

I do not think, in this case, any question of reforming the contract arises. I think the clear intention of the parties to be gathered from the deed and the surrounding circumstances and acts of the parties was, that this plant was to be taken into the partnership as capital and the amount was carefully fixed and inventoried for that purpose after full discussion, it being *Macdonalds'* interest to get its value established at a high, and *Worthington's*, on the contrary, at a low rate.

I can discover nothing whatever to indicate that Mr. *Worthington* was to have a bonus for entering into the co-partnership, nor that the plant was to be a present to him, on the contrary the care that was taken to estimate and fix the value of the plant, and to have it duly inventoried in accordance with the principles of the law regulating partnership matters in the Province of *Quebec*, in reference to capital contributed by individual partners which consume by use or deteriorate by keeping, or which are contributed at a fixed valuation, shows conclusively that the plant, less the amount due *Morland, Watson & Co.*, was to be treated as put in by the *Macdonalds*, to be accounted for to them on the final winding up of the partnership accounts.

It is, in my opinion, now a mere question of the taking of a partnership account, *Macdonald* being, in my opinion, entitled to a credit on account of the plant, but not to the amount of $40,000 as claimed.

The value of plant was arbitrarily fixed and inventoried at $40,000, in my opinion, for the express purpose of establishing that sum as the amount to be taken into the capital account of the partnership.

This plant was subject to a payment to *Morland, Watson & Co.* of $24,000 advanced by them to *Macdonald*, and they held the property in security for the re-payment of such advances.

This sum *Worthington* agreed to advance to discharge *Morland, Watson & Co's.* claim, to be repaid by the partnership out of the profits to be made from the contract. *Worthington* did advance this amount and was repaid in the manner contemplated, and when so repaid to that extent, the partnership, not the individual partners, was interested in the plant as a partnership capital asset, which both parties in effect contributed, having been to that extent paid for by the earnings to which each were equally entitled. This left the difference between the $24,000 thus paid and the $40,000, or $16,000 as capital put into the partneship to be credited to the individual partner by whom it was contributed, who, clearly was *Macdonald*, to whom the plant belonged, minus the amount of *Morland's* claim which the firm discharged, and for which *Macdonald* would be no more entitled to be credited than *Worthington*, the amount having been paid by earnings of the concern in which they were equally interested.

The judgment, therefore, of the Appeal Court was, in my opinion, wrong in adjudging that *Macdonalds* were entitled to a credit of $40,000 instead of for $16,000, being the full amount of any individual interest they

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had in the plant, and, therefore, the only amount they contributed to the capital or for which they are entitled to a credit.

STRONG, J.:—

The contract of partnership between the parties to this cause was entered into at *Montreal* in the Province of *Quebec*, and was in the form of a notarial deed duly passed before a Notary Public. The parties were all resident at *Montreal*, and as nothing appears in the evidence to the contrary we must presume that they were also domiciled there. The rule *locus regit actum* therefore applies to the contract and the construction of it, and the rights of the parties thereunder are to be governed by the law of *Quebec*. That law is, however, according to the general rule, to be presumed to be the same as the law of *Ontario*, the *lex fori*, except in so far as it is established by the evidence to be different from it (1). Whether the evidence does sufficiently show what the law of *Quebec* applicable to this contract is, is a matter of some doubt (2). Two witnesses were called for this purpose, who appear to be competent to prove that law as experts. One of them is Mr. *Normandeau*, the notary who prepared the deed, the other was the late Mr. *Ritchie*, a distinguished advocate and Queen's counsel of the *Quebec* bar, practising at *Montreal*. They do not state what the law of the Province of *Quebec* upon the points involved is, but merely refer to the Civil Code of *Lower Canada*, as containing in the title on partnership, the law which regulates the rights of parties under contracts like the present. The authorities before cited seem to show that it is not sufficient proof of foreign law thus to produce a Code or Statute, without showing by the evidence of experts, what the

(1) Westlake, Int. Law, 323.

(2) *Baron de Bodes Case*, 8 Q. B. 250; *Sussex Peerage Case*, 11 C. & F. 141, 117.

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written law so referred to actually establishes. But it may be that, as this court is an Appellate Court having to determine the law of *Quebec* on appeals from that Province, we ought to follow the example of the House of Lords, which in an appeal from *Scotland* will take judicial notice of the law of *England*, and will not consider itself bound by the evidence of that law given to the courts in *Scotland* (1). I am of opinion, however, that we need not now decide this preliminary question, for after the best consideration I have been able to give this case, it does not appear to me that it makes any practical difference whether we apply the law of *Quebec* or the English law prevailing in the Province of *Ontario*, inasmuch as the legal results must be the same under either system. I will then first consider the questions presented for our decision according to the principles of English law. In taking partnership accounts, Lord *Hardwicke* lays it down that: "Each is entitled to be allowed as against the "other everything he has advanced or brought in as a "partnership transaction" (2). This is of course only meant to be applied *primâ facie*, and is a rule liable to be excluded by the agreement of the parties, which agreement again may be shown either by the express terms of the contract or by implication. There is here no dispute so far as certain material facts are concerned. The *Macdonalds* had these two contracts with the government. They admitted the appellant to a partnership with them for the purpose of carrying out the works to be performed under the contracts. The shares of the partners in profit and loss were accurately ascertained by the articles to be equal as between the appellant on the one side and the *Macdonalds*, father and sons, on the other. The only question is whether the plant, which

(1) See *Douglas* v. *Bruce*. 2 Dow. & C. 171.

(2) *West* v. *Skip*, 1 Ves. Sr 242; Lindley on Partnership, 4 ed. 973.

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was valued, in a inventory intended to be annexed to the deed, at $40,000, and which was requisite for carrying on the works, and which at the time of the formation of the partnership, was the property of the *Macdonalds*, is to be regarded as having been contributed by them to the new firm as a bonus or capital for which they were not to be entitled to any credit in account, or whether it is to be considered as having been sold by them to the firm for $40,000, and that as a consequence they are entitled to receive credit in taking the accounts for this $40,000. *Primâ facie*, if there had been no valuation and no agreement as to the value or price of this plant, I take it to be clear that it would have remained the property of the *Macdonalds*. There is, however, an express provision in the 4th article of the partnership deed, that it shall become partnership property, and the shares which the partners are to have in it are expressly defined. This was an unnecessary provision, as the law would have implied precisely what the articles state, namely, that in this as in all other partnership assets, the shares are as between the appellant, on the one hand, and the three *Macdonalds* on the other hand, to be equal. The 4th article declares that this plant "is valued at the sum of $40,000 and is "contained in an inventory thereof hereunto annexed "for reference after having been signed for identification by the said parties and notary." The question is then reduced to this: does this valuation taken in connection with the surrounding circumstances, and with the presumption that all parties are to be entitled to an allowance in account for what they bring into the partnership, except in so far as they are expressly excluded from the right to such an allowance, indicate that the *Macdonalds* were to be entitled to a credit for the amount of this valuation. And I am of opinion that upon a fair interpretation of these articles of part-

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nership, this is the true construction of this fourth article. The plant in question was indispensible for the purposes of the new firm, to enable them to continue their works, and if they had not purchased the old plant of the *Macdonalds*, they must have procured it elsewhere. If no provision had been made that the property in the plant should vest in the firm, it would have remained the property of the *Macdonalds*, and though they might have permitted the firm to use it, at the termination of the partnership they would have been entitled to the exclusive possession of it. Then, for what purpose can it be suggested that this valuation was affixed to the plant, if it was not to show that the amount of the valuation was to be considered a contribution by the *Macdonalds* to the capital of the firm? The only answer given to this is, that we are to assume that the *Macdonalds* intended to give the appellant a bonus of $20,000 to come into the partnership. Nothing in the articles themselves warrant any such assumption, the probabilities, as forcibly pointed out in the judgment of the learned Chief Justice of the Court of Appeal, are all against it, and from the history which we have in the evidence of the negotiations which preceded the conclusion of the agreement, such a proposition never appears to have been made by either party. Then the bargaining which took place between the parties preceding the passing of the deed respecting the amount of the valuation, which was first placed by the *Macdonalds* at $57,130, was objected to by the appellant, and afterwards reduced to $40,000 to meet his views, can be explained in no other way but upon the hypothesis that a sale of the plant by the *Macdonalds* to the firm was what was intended by both parties. It has been argued that by the agreement thus construed, the appellant would be placed under a great disadvantage, and would, in effect, be paying a

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premium for his admission to the partnership. That no such consequence follows is, I think, manifest from the consideration that the plant being obviously requisite for carrying on the works, the same amount of capital as that for which it was purchased from the *Macdonalds* would have been, in any event, necessarily expended in acquiring it. The fourth article of the partnership deed must therefore be construed upon the principle of the maxim "*Œstimatio facit venditionem*," a rule which has an extensive application in French law, with which alone the notary who prepared the deed was familiar, and which is particularly applied to cases like the present, when capital brought into the partnership by one of the partners, not in money but in property, which is handed over in specie, is inventoried and valued (1), in which case, says *Troplong*, the valuation is taken to show that the intention of the contracting parties has been to render the partnership a debtor for the valuation affixed in the inventory instead of for the things themselves. If, however, I am wrong in the conclusion that the respondents are entitled to this credit, upon the construction of the articles, or rather as a matter of account not excluded by the articles, I entirely agree with the learned Chief Justice of the Court of Appeal that the evidence is amply sufficient to entitle the respondents to a rectification of the deed. The barganing which took place prior to the execution of the articles respecting the valuation, the respondents holding out for the higher amount of their original valuation and the appellant insisting on an abatement, clearly shows that they placed themselves towards each other, as regards this plant, in the attitudes of sellers and buyer, and can only be accounted for on that supposition, and excludes the inference that the plant was to be a gratuitous contribution to the capital by the

(1) Troplong Contrat de Société, Nos. 595, 596.

respondents. A difficulty about rectification, however, arises from this deed having been a notarial instrument executed in the Province of *Quebec*, which, according to the law of that Province, must remain in the repository of the notary, and cannot be altered except upon a peculiar proceeding known to the law there called, "*Inscription de faux*" or improbation. The original cannot, therefore, be produced for the purpose of rectification, and I do not see how a rectification of the mere notarial copy can be substituted for it. I observed that the order of the Court of Appeal says nothing about rectification, although the judgment of the learned Chief Justice certainly points to that as the proper relief to be given.

In the view I take, however, the order of the Court of Appeal is perfectly correct in directing, not a variation of the deed, but that the master, in taking the account, should give credit to the respondents for the amount of the valuation. I do not, however, agree that the amount for which credit should be given should be the full amount of the inventory value without any deduction by way of debit. Considering, as I do, that this was in effect a sale of this property by the respondents to the partnership firm to be regarded for this purpose, according to the mercantile notion, as a distinct legal entity from the individual partners composing it, we find that the price was $40,000, but then, on account of this price, a sum of $24,000 has already been paid by the partnership. This $24,000 was the amount for which *Morland, Watson & Co.* held a charge upon the plant, at the date of the partnership agreement, to secure which amount—and in order, I suppose, to get over the difficulty occasioned by the impossibility, according to the law of *Quebec*, of validly hypothecating movables—a formal sale of the plant had been made to them upon the terms that they should re-sell it

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to the respondents upon their debt of $24,000 being paid off. This $24,000 was in the first place paid by the appellant, and for this amount he was afterwards recouped by the partnership. It is clear, therefore, that of the original price of $40,000 which the partnership was to pay as the price of this plant, $24,000 has actually been paid, leaving a residue of $16,000 only unpaid, and the respondents have, therefore, only a right to a credit for this amount, for it cannot, of course, be pretended, in the face of the valuation, that the $40,000 was to be allowed over and above the $24,000 due to *Morland, Watson & Co.* The order of the Court of Appeal should, therefore, be varied by inserting $16,000 instead of $40,000, or by adding a direction to the master to charge the respondents with the amount paid out of the partnership assets to *Morland, Watson & Co.*

If we are to consider the law of the Province of *Quebec* as governing the case, either because it is sufficiently in evidence from Mr. *Ritchie* having deposed that it was contained in the Code, or for the reason that the *Ontario* courts ought to take judicial notice of that law, inasmuch as the Code derives its force from and is in effect part of a statute of the late Province of *Canada*, or for the reasons already referred to, that this court should follow the precedent afforded by the practice of the House of Lords in Scotch appeals, I think it will make no difference in the result. The general provisions of the Code as to the interpretation of contracts contained in the articles 1013 to 1021, inclusive, with a few exceptions not applicable here, lay down the same rules as those which apply to the construction of contracts according to the law of *England*. In taking the account at the dissolution of the partnership and making the partition of the property of the partnership (art. 1898) each partner is entitled to be credited with what he has brought into the partnership, unless his right to such

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a credit is excluded by agreement, or (according to some authors, whose opinions are again controverted by others) (1), by a presumption which is to be made in the particular case of one partner alone putting in capital and contributing nothing else, and the other only contributing his services,—a case with which we have nothing to do under the facts now before us.

And according to the interpretation placed on art. 1846, property contributed to the partnership at a fixed valuation (as in the present case), is considered to be sold to the partnership upon an application of the rule *æstimatio facit venditionem*, which is well explained by *Troplong* in No. 595 of his Contrat de Société. The law of *Quebec*, if we ought to apply it, which, however, I doubt, would therefore lead to the same result in all respects, with the single exception of relief by way of rectification, as the English law.

I am of opinion that the order of the Court of Appeal should be varied by reducing the amount for which the respondents are entitled to credit for $16,000, and that subject to this variation the order should be affirmed.

I think there should be no costs on either side, either here or in the Court of Appeal, both parties having failed in establishing the propositions for which they contended.

FOURNIER, J. :—

A. P. McDonald, l'Intimé, ayant un contrat avec le gouvernement pour des travaux sur le canal de *Lachine* s'élevant à au delà d'un million de dollars, et éprouvant des difficultés sérieuses à se procurer les moyens pécuniaires pour en poursuivre l'exécution, fit des démarches

(1) See in favour of this view Troplong société Nos. 122, 125; Delangle No. 699; Duvergier société No. 204; and against it Duranton 717, No. 408 *et seq.*; Pardessus vol. 4, No. 990; Allauzet Droit Commercial, ed. 5, vol. 2, No. 421 *et seq.*

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pour trouver un associé qui pût faire les avances de fonds nécessaires. Après quelques tentatives inutiles auprès de capitalistes étrangers, il s'adressa, à la suggestion de *C.J. Brydges*, à l'Appelant et entra en négociations avec lui pour la formation d'une société pour la continuation des travaux en question. Les conditions d'arrangement furent débattues avec soin, et surtout celle relative à l'évaluation du stock d'outillage (plant) qui fait l'objet de la difficulté en cette cause.

L'Intimé qui avait déjà dépensé tant en travaux préparatoires qu'en travaux d'exécution de ce contrat une somme de $190,000, avait un grand intérêt à conserver son contrat.

Dans le cours de ses travaux, l'Intimé ayant été obligé d'emprunter une somme de $24,000 de MM. *Morland Watson* et Cie, marchands de *Montréal*, leur fit une vente de son outillage sous forme de nantissement et de sûreté collatérale pour le remboursement de la somme empruntée. D'après ses conditions avec *Morland, Watson* et Cie, l'Intimé avait le droit de rentrer en possession de sa propriété en les remboursant ; mais lors de ses négociations avec l'Appelant, il n'était pas en état de le faire. C'est ce qui l'amena à faire avec ce dernier les conditions consignées dans l'art. 4 de l'acte de société ainsi conçu (1).

On voit que la première partie de cet article contient la déclaration que le fonds social "The Stock of the said partnership" consiste dans tout l'outillage alors employé dans la construction des dits travaux par la partie de première part au dit acte, l'Intimé et ses deux fils associés ; il en est de même des carrières, remorqueurs, etc, et aussi des droits dans les dites carrières possédées par la dite partie de première part, le tout désigné dans un inventaire signé par les deux parties et le notaire, et évalué à $40,000.

(1) See Page 330.

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En déclarant que cet outillage composait le fonds social, était-ce l'intention des parties que cette mise de l'Intimé entrât dans la société pour devenir un objet commun, ou bien cette mise devait-elle être prélevée par l'Intimé avant partage des bénéfices ?

Ordinairement ceux qui contractent une société s'expliquent sur la proportion et la nature de leurs mises respectives. On ne peut présumer que les apports sont égaux que dans le cas où les parties ont gardé le silence à cet égard. Dans le cas actuel, l'Intimé *McDonald* a-t-il suffisamment déterminé son apport au fonds social pour conserver le droit de le reprendre à la dissolution de la société ? Il semble avoir pris toutes les précautions nécessaires à cet effet.

Le contrat de société dont il s'agit ayant été passé dans la province de Québec, doit, suivant la maxime *locus regit actum*, être régi par les principes du C.C. de cette province. L'art. 1846 contient au sujet des choses mises dans la société une disposition particulière à laquelle les parties, d'après leurs procédés, paraissent s'être conformées. Il y est déclaré que celles qui sont mises dans la société sur estimation arrêtée, sont aux risques de la société. Or, celle-ci n'est tenue aux risques que parce qu'elle devient propriétaire en vertu de l'estimation. L'associé qui a contribué de cette manière au fonds social devient créancier de la somme fixée par l'estimation qui détermine le montant de son apport. Comme il s'agissait dans le cas actuel d'un outillage susceptible de diminuer de valeur par l'usage, on comprend tout l'intérêt que l'Intimé avait à le faire entrer dans la société à une valeur déterminée. Cette précaution prise, il ne compromettait nullement sa position en déclarant que le fonds social se composait de l'outillage en question, car il en avait fait une vente en faveur de la société au prix de l'estimation arrêtée qui servirait au moment de la liquidation à régler ses

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droits. La preuve en cette cause fait bien voir que c'est réellement la transaction qui a été faite.

Cet outillage avait coûté $57,000 et ce n'est qu'après de longs débats qu'il fut convenu d'en porter l'évaluation à $40,000, non à $57,000. Pourquoi s'arrêter à ce chiffre si le stock en question devait devenir propriété commune des associés et si l'Intimé devait en faire le sacrifice. Le but évident de la part de celui-ci était d'obtenir crédit pour son stock avant partage, de même que le but de l'Appelant en le faisant réduire de $57,000 à $40,000 était de diminuer le montant des prélèvements à faire sur les bénéfices lors de la liquidation. Cette première partie de l'art. 4 me semble avoir simplement mis à la disposition de la société le stock en question, sans que l'on puisse en induire une renonciation de la part de l'Intimé au droit d'en être crédité lors de la dissolution de la société. Le soin tout particulier qu'il a pris de faire déterminer son apport confirme cette interprétation, qui d'ailleurs est conforme non-seulement à l'art. 1846, C. C, mais aussi à la doctrine exposée par les commentateurs sur l'art. 1851 C. N. qui contient les mêmes dispositions que l'art. de notre code.

Laurent (1) s'exprime ainsi au sujet des choses apportées dans la société sur estimation.

> Enfin les choses sont encore aux risques de la société, quoiqu'elle en ait la jouissance, *lorsqu'elles ont été mises dans la société sur une estimation.* Nous avons dit, ailleurs, que l'estimation vaut vente quand les parties contractantes ont intérêt à ce qu'il en soit ainsi; on suppose dans ce cas que leur intention est de transporter la propriété des choses qui doivent être restituées par celui qui les reçoit. L'article 1851 interprète en ce sens l'estimation que font les associés des choses dont ils mettent la jouissance dans la société, sauf à eux à déclarer que l'estimation ne vaut pas vente. Comme la loi parle de *choses* en termes généraux, il faut décider qu'elle s'applique aux immeubles aussi bien qu'aux meubles.....

Comment l'estimation doit-elle se faire? L'article 1851 suppose que l'estimation est portée dans un inventaire.

(1) 26 vol., n° 276.

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Tous les auteurs s'accordent à dire que ce n'est pas là une condition ; elle n'aurait pas de raison d'être. Il suffit que l'estimation se fasse d'un commun accord, n'importe dans quelle forme ; elle doit se faire de commun accord, parce que c'est sur l'intention des parties contractantes que la loi se fonde pour décider que l'estimation vaut vente. (1)

Quel est le droit de l'associé ? L'article 1851 répond que si la chose a été estimée, l'associé ne peut répéter que le montant de son estimation. Il est réputé vendeur et, à ce titre, il est créancier du prix.

Troplong. Droit civil expliqué—Société civile—parle de l'effet de l'estimation dans les termes suivants (2) :

La quatrième et dernière exception a lieu, quand la chose dont la jouissance a été mise dans la société a éte estimée (3, *Pothier* 126). C'est le cas d'appliquer la maxime ; *estimatio facit venditionem*. L'estimation fait supposer (à peu près comme dans le cas de l'article 1551 du Code civil) que la pensée des contracteurs a été de rendre la société débitrice de la prisée, et non pas de la chose même.

Duranton (3), après avoir posé le principe que les choses dont la jouissance seulement a été mise dans la société à la charge de l'associé, passe en revue les différentes exceptions qu'il reçoit soit à raison de la nature des choses, soit à raison de l'intention exprimée ou présumée des parties. A la quatrième exception en parlant des choses mises sur estimation, dit :

4o. Lorsque les choses, même autres que celles qui se consomment par le premier usage, et quoique simplement mises dans la société pour la jouissance, ont été mises sur une estimation portée par un inventaire, ou dans l'acte même de la société, il est clair que la perte de ces choses concerne aussi la société, et non l'associé.

Dans ce cas l'associé ne peut répéter que le montant de l'estimation.

Après avoir expliqué qu'il n'y aurait pas de distinction à faire dans le cas où il s'agirait d'immeuble, et le cas ou il s'agirait de simples meubles il fait la remarque que,

(1) *Pont*, p. 282, Nos. 399-401, et les auteurs qu'il cite.

(2) No. 595.

(3) Vol. 17, au No. 409.

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Les détériorations et la simple dépréciation concernent la société, et non l'associé, puisque celui-ci a conféré la propriété de la chose à la société par cette estimation, quoiqu'il ait entendu n'y mettre seulement que la jouissance du montant de l'évaluatien, c'est-à-dire, dans l'espèce, le droit d'en faire le prélèvement lors du partage.

Mc Donald en faisant entrer son outillage dans la société sur estimation se réservait donc en réalité le droit de prélever le montant de l'estimation lors du partage. Il agissait en cela d'après l'usage assez général des sociétés de commerce dans lesquelles les mises sont rarement confondues quant à la propriété. Le plus souvent chaque associé retire annuellement les intérêts de la mise lorsque la société a suffisamment de fonds pour ses opérations.

Je ne vois pas qu'il puisse y avoir doute sur l'intention des parties en faisant l'estimation du *plant ;* mais dans le cas où il y en aurait, il faudrait d'après l'autorité de *Duranton* (1) chercher à découvrir l'intention probable des parties ; et, pour la connaître, il y a lieu à considérer l'importance relative des mises. Comme illustration de la solution qu'il donne dans le cas en faveur de la reprise de l'apport il offre le cas suivant :

Supposons d'abord (dit-il), que tous les associés aient fait une mise en derniers ou autres biens en déclarant qu'ils mettaient ou promettaient de mettre dans la société, l'un tel objet, l'autre telle autre chose, un troisième telle sommes, sans autres explications, c'est-à-dire sans déclarer que c'est en propriété ou en jouissance seulement que consistent les mises. Si l'acte de société déclare que les contractants auront chacun telle part (égale ou inégale, n'importe) *dans les profits* ou *dans les pertes* il nous paraît évident que l'on a voulu s'associer que pour le profit ou la perte ; que la jouissance seulement, et non la propriété des mises, a été commune, et d'après cela, que chacun doit, à la dissolution de la société, retirer son apport, soit en nature, si la chose exist encore dans la société, soit la valeur si elle a été vendue ou consommée, ou si elle a péri pour le service de la société.

Il y aurait encore bien moins de doute si les objets mis par chacun des associés avaient été estimés et que les mises fussent évidemment inégales.

(1) Vol. 17, p. 437, N° 403.

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Cette dernière observation s'applique tout particulièrement au cas actuel,—*McDonald* et ses fils ayant apporté $40,000 au fonds social, tandis que *Worthington* ne s'oblige qu'à faire des avances au montant de $24,000 dont il devrait être remboursé sur les profits de la société.

A la page 439, *Duranton* cite encore le cas suivant pour faire voir que les parties ont entendu que la jouissance seulement des capitaux serait commune et qu'il y aurait lieu à leur prélèvement.

Mais supposons que Paul et Pierre aient contracté société pour cinq ans et qu'il ait été convenu que Paul y verserait 30,000 francs et Pierre seulement 10,000 fr. avec son industrie ou son travail ou simplement qu'il fournirait son industrie ou son travail; s'il a été dit dans le contrat que chacun des associés aurait telle part (égale à celle de l'autre ou non, n'importe) dans les profits ou dans les pertes, il n'y a pas non plus de difficulté dans ce cas, car il est évident que les parties ont entendu que la jouissance seulement des capitaux serait commune, puisque c'est dans *les profits ou dans les pertes* qu'elles ont réglé les parts, et que le fonds des mises n'est point un *profit*: il y aura donc lieu au prélèvement des sommes mises par chacun d'eux, ou par l'un d'eux seulement, et les bénéfices s'il y en a se partageront suivant les proportions convenues (1).

Les autorités ci-dessus citées auxquelles il est facile d'en ajouter un grand nombre d'autres établissent positivement le droit de l'associé de prélever le montant de l'estimation des choses qu'il a apportées au fonds social. Ainsi, d'après l'article 4 de l'acte de société, et conformément aux autorités l'Intimé a droit d'être crédité pour sa mise. Il en devrait être de même d'après l'autorité de *Duranton* et les exemples qu'il en donne, lorsque les circonstances font voir que l'intention des parties a été de ne mettre en commerce que la jouissance et non la propriété des capitaux. L'acte de société et la preuve ne permettent pas de douter que l'intention de l'Intimé était d'être crédité pour le montant de l'estimation.

(1) Marcadé, vol. 7, art. 1851—Alauzet, Droit commercial—Bedaride, des Sociétés, 1, 2, 3.

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Mais d'après l'article 4 et les circonstances dans lesquelles a été formé le contrat de société en question, si l'Intimé avait ou non le droit de faire les stipulations qu'il a faites au sujet de son stock, il ne faut pas oublier qu'il existait sur ce stock en faveur de *Morland. Watson & Co*, un droit de gage au montant de $24,000, Pour retirer ce stock des mains de ces derniers, il fut convenu par le dit acte que l'appelant ferait les avances de fonds nécessaires—c'est ce qu'il a fait en payant la somme de $24,000 au moyen de laquelle il est alors devenu lui-même et devait devenir propriétaire de ce stock sous les modifications mentionnées en l'art. 4, jusqu'à ce qu'il eût retiré des profits de la société une somme suffisante pour se rembourser des $24,000 et intérêts par lui avancés ainsi que de toute autre somme qu'il aurait pu avancer pour la dite société. La société ayant réalisé des bénéfices, l'appelant a été remboursé de ses avances à même les bénéfices de la société. Que devient dans ce cas le stock qui était jusqu'alors conditionnellement sa propriété ? L'article 4 déclare qu'il a cessé de lui appartenir pour devenir la propriété de la société. Quel est le véritable sens de cette disposition ? Après la déclaration faite au sujet de l'évaluation du stock indiquant clairement l'intention de l'Intimé d'en obtenir crédit, peut-on raisonnablement croire qu'il s'est désisté de ses prétentions et que dans cette dernière partie de l'art. 4, il fait enfin le sacrifice de son stock en l'abandonnant à la société ? Mais cet abandon de sa part était déjà fait par suite de l'effet légal de l'estimation ; au lieu du stock il n'avait plus qu'une créance, le montant de l'estimation. Ce n'est pas l'Intimé mais bien l'appelant qui, devenu temporairement propriétaire du stock en question, par l'acquittement de la créance de *Morland, Watson & Co.*, s'en dessaisit en faveur de la société sur remboursement de ses avances comme il

était tenu en vertu du dit art. 4. Ce droit de propriété de la société n'a rien de contraire à la première partie de l'art. 4 qui reconnaît à l'Intimé une créance de $40,000 en échange de ses droits dans ce stock. Par le remboursement des avances faites par l'appelant elle en est irrévocablement devenue propriétaire, mais elle n'en est pas moins débitrice de l'estimation, c'est à-dire que dans le cas de liquidation elle doit tenir compte à l'Intimé de son apport.

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Mais quel doit être le chiffre réel de cet apport, sera-t-il de $40,000 comme l'a déclaré la Cour d'Appel, ou bien n'est-il pas, dans les circonstances où il a été fait, sujet à une diminution ? On sait que le stock était grevé d'une dette de $24,000, acquittée temporairement par l'appelant. Dans ce cas l'estimation de l'apport ne devrait-elle pas être diminuée d'autant ? Je le crois.

Aubry et Rau. (1), Cours de droit civil français :

D'un autre côté, chaque associé a le droit de reprendre en nature, avant tout partage, les objets qu'il n'avait mis en commun que pour la jouissance. Si ces objets ont péri ou ont été détériorés sans la faute des autres associés, celui qui les a apportés n'a droit à aucune indemnité. (Art. 1851, al. 2.) Il en est cependant autrement, lorsqu'il s'agit, soit de chose dont on ne peut user sans les consommer naturellement ou civilement, soit de chose qui, d'après une convention expresse, ou d'après leur nature et le but de la société, étaient destinées à être vendues. Dans ces deux cas l'associé a droit au prélèvement de la valeur au moment de la dissolution de la société, des choses qui ont péri, et à une indemnité à raison des détériorations qu'auraient subies celles qui existent encore. (Art. 1851, al. 2.) Du reste, les propositions qui précèdent, sont étrangères à l'hypothèse où des objets quelconques, mis en commun pour la jouissance seulement, ont été apportés sur estimation. Dans ce cas l'associé qui les a apportés, a toujours droit au prélèvement de l'estimation, et ne peut jamais répéter que ce prix. (Art. 1851.)

D'après l'art. 1851 (1846) l'apport en jouissance est attributif de propriété au profit de la société dans les cas suivants : 1. Apport de choses qui se consomment ; 2. De choses qui se détériorent en

(1) Vol. 4, p. 572.

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les gardant; 3. De choses destinées à être vendues; 4. Enfin de choses mises en société sur estimation.

Ce qui est précisément le cas dans la présente cause. Voir d'après les auteurs quel est l'effet de cette estimation et le droit qui en résulte pour la partie qui l'a stipulée, etc, *Aubry* et *Rau*, Cours de droit civil français (1).

Marcadé et *Pont*, Explication du code civil (2):

4. Des choses mises dans la société sur une estimation portée dans un inventaire.—De ces choses encore, il est vrai de dire que, quoique apportées pour la jouissance, elles deviennent la propriété de la société par l'intention présumée des parties. L'estimation qui en est faite constitue en quelque sorte une vente qui rend la société propriétaire, à la charge de payer, quand elle prendra fin, le prix arbitré entre elle et l'associé au moment où elle s'est formée.

A la page 283, No. 401:

Les conséquences à déduire de là ont été déjà souvent formulées. D'une part, la propriété résidant désormais sur la tête de la société, il s'ensuit que l'extinction ou la perte de la chose ne rompt pas le contrat (art. 1867, § 3). D'une autre part l'associé n'étant plus qu'un simple créancier, non de la chose même qu'il est censé avoir vendue. mais de la valeur, il en résulte que, quoi qu'il arrive et soit que la chose existe encore en nature à la dissolution, soit que, pour une cause quelconque, elle n'existe plus, il ne pourra jamais avoir droit qu'au prélèvement du prix.

L'apport social est sans doute matière de convention. Il peut être en propriété ou en jouissance seulement. Cette dernière espèce a lieu en quatre cas principaux réglés par l'art. 1846.

Pothier, Contrat de société, (3) d'où l'Article 1846 a été extrait presque textuellement, après avoir parlé de l'apport de corps certains et déterminés, des choses qui ne se consomment pas par l'usage, dit:

Au contraire, si ces choses qu'un associé a mises dans la société, étaient des choses qui se consomment ou se détériorent en les gardant, ou qui fussent destinées à être vendues, et qui eussent été mises dans la société sous une certaine estimation portée par quelque inventaire, l'associé, qui les y a mises pour que l'associé en eût seulement la jouissance, est créancier, non des choses mêmes,

(1) Vol. 4, p. 572.

(2) Vol. 7, IX, 398, p. 282.

(3) N° 126.

mais de la somme à laquelle monte l'estimation qui en a été faite, et les choses sont aux risques de la société et non aux siens.

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C'est à ce dernier avis que je m'arrête comme étant le plus propre à concilier les diverses parties de l'article 4 de manière à donner à chacune d'elle un effet plus conforme à l'intention des parties.

En conséquence je suis d'avis que le jugement de la Cour d'Appel d'Ontario devrait être réduit de la somme de $40,000 à celle de $16,000

HENRY, J.:

The respondent in this case filed a bill in the Court of Chancery in *Ontario* against the appellant asking for a decree declaring him and his two sons, *W. E.* and *Randolph*, entitled to receive credit to the amount of $40,000, the estimated value of certain plant and effects transferred by *Morland, Watson & Co.*, to the appellant, to be used in the execution of a contract in the Province of *Quebec*, taken by the appellant, in which he was interested to the extent of one moiety, and the respondent and his sons to the extent of the other moiety, under certain articles of agreement entered into between them before a notary; or, if found necessary, for a decree to reform the contract.

The fourth article of the contract under which the respondent seeks to recover is as follows:

[The learned judge read art. 4 of the agreement *ubi supra.*]

It is shown and admitted that out of the business funds of the partnership the appellant was repaid the $24,000 and interest advanced by him, and in that event the plant, &c., by the terms of the agreement, became the property of the partnership, but the respondent claims that it virtually became the property of him and his sons. It cannot be denied, for it is patent on the face of the agreement, that the appellant, in the

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words of the article I have quoted, was to have "a full half interest in this contract and all its profits, losses and liabilities." If, therefore, there was a loss he was to bear one-half of it, and, in case of a profit, he was to benefit in it to the extent of one-half. Out of the sum of the profits he was entitled to receive one-half, but the plant, &c., being under a lien, he and his co-partners each paid one-half of what was sufficient to redeem it. Had it not been redeemed by the partnership funds it would have been the sole property of the appellant. If the property in the plant had remained in *Morland & Watson*, and had been purchased from them by the partnership as it was by the appellant, it would be owned by the members of the co-partnership according to their several interests. This is exactly what the agreement provides to be the result in case of the purchase by the firm from the appellant.

If the law in *Quebec* prohibited parties from entering into such an agreement as to the ownership of the plant, &c., after the payment of the $24,000 and interest to the appellant as that shown by the article, we would hen have to consider the interests, according to law, of the several co-partners. To admit and give effect to the contention and claim of the plaintiff we should be compelled to award to him and sons property to the value of $40,000, for the purchase of which the appellant had at least paid one-half the purchase money. By the law in *Quebec* the respondent and his sons had virtually no interest in or title to the property in question, except the right to the use of it under certain limitations before the purchase of it by the appellant. The respondent and his sons were in straitened circumstances and unable to proceed with their contract, or to redeem the property from *Morland & Watson*, when the appellant came to their relief as far as necessary to enable them to continue it, and not only to recoup the losses

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they appear to have previously sustained, but to participate in future net profits. Equity and law would at least require them, under the circumstances, to repay to the appellant the moiety he contributed out of the partnership funds towards the repayment of the $24,000 and interest he advanced to *Morland & Watson*. The respondent might as well have claimed any other property purchased by the firm, and for which the appellant contributed half the cost. The agreement, however, is too plain and comprehensive to admit of a doubt that after the appellant was paid out of the partnership funds the amount he paid *Morland, Watson & Co.*, with interest, he was to own one-half the property. This shows that the $40,000 named as the assets of the partnership was really not *Macdonalds* but had to be purchased by the partnership. The parties by this agreement declare that to be the destination of it in the most unequivocable and plain terms, and I cannot see how any one could fairly read it any other way. The property being valued at $40,000 was held for $24,000. The interest in it of the respondent and his sons was but $16,00, putting the case most favorably for them. They paid the half of the $24,000, and for that they claim to charge the appellant in account for $40,000, when their whole interest could not amount to over about $28,000; but the agreement entered into by them shows they were willing to take one-half interest in lieu of any claim they had. On that claim, I am of opinion, our judgement should be for the appellant. If the parties had made no special agreement as to the advance by the appellant of the $24,000 to pay off the claim of *Morland & Watson*, he, having paid that sum, would have been a creditor of the partnership to that amount, and he having one-half interest in the partnership, and that sum having been repaid to him by the partnership, his equitable interest in the stock, plant, &c, would be

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$12,000, and that of the respondent and his sons $28,000, and not $40,000, as his claim. By the agreement entered into, however, a different result is provided. It is there agreed that he is the sole owner of the stock, plant, &c., and that if he should be repaid the amount advanced by the partnership, it was agreed that he shall be the owner of the half interest in it and the respondent and his sons of the other half. To adjudge any other interest in the latter, or to allow them to rank on the partnership funds for anything beyond their half interest in the stock, plant, &c., would be in direct opposition to the provision made in the agreement and would be giving the respondent and his sons an interest contrary thereto. We need not inquire into their reasons, but several good ones are suggested by the circumstances at the time, why the *Macdonalds* entered into those stipulations? It is enough that they are easily understood and they negative the claim of the respondent The respondent, however, claims that the articles do not contain the agreement really entered into and seeks to have it reformed.

The reformation of a contract by a Court of Equity requires the exercise of the most extreme care and caution, and "to substitute a new agreement for one which "the parties have deliberately subscribed, ought only "to be permitted upon evidence of a different intention "and of the clearest and most satisfactory description," as held by Lord *Chelmsford* in *Fowler* v. *Fowler* (1).

In *McKenzie* v. *Coulson* (2), Vice-Chancellor Sir *W. James* said:

> Courts of equity do not rectify contracts. They may and do rectify instruments purporting to be made in pursuance of the terms of contracts. But it is always necessary for a plaintiff to shew that there was an actual concluded contract antecedent to the instrument, and which is sought to be rectified; and that such contract is inaccurately represented in the instrument.

(1) 4 DeG. & J. 264. (2) L. R. 8 Eq. 753.

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And again:

It is impossible for this court to rescind or alter a contract with reference to the terms of the negotiations which preceded it * * * Men must be careful if they wish to protect themselves, and it is not for this court to relieve them from the consequences of their own carelessness.

Mr. Justice *Story*, in his treatise on equity jurisprudence (1), says:

Relief will be granted in cases of written instruments, only where there is a plain mistake clearly made out by satisfactory proof.

He also says:

It forbids relief where the evidence is loose, equivocal, or contradictory, or it is in its texture open to doubt or to opposing presumptions. The proof must be such that will strike all minds alike as being unquestionable and free from reasonable doubt.

Lord *Thurlow*, in one case, said that—

The evidence must be strong, irrefragable evidence (2).

I am of opinion, for the reasons I have stated, that the appeal should be allowed, the judgment of the Appeal Court of *Ontario* reversed, and the decree of the Court of Chancery confirmed with costs.

GWYNNE, J.:—

The plaintiff and his sons, the defendants, *Edwin Macdonald* and *Randolph Macdonald*, being in partnership together as contractors, and having contracts with the Dominion Government for the construction of certain public works situate within that portion of the Dominion of *Canada* constituting the Province of *Quebec*, became indebted to *Morland, Watson & Co.*, and to divers other persons for monies advanced to the plaintiff and his said sons to enable them to proceed with the performance of the said contracts.

To secure their debt to *Morland, Watson & Co.* they

(1) Sec. 157.

(2) See also *Shelburne* v. *Inchequin*, 6 Ves. 333 and 334.

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executed, in accordance with the law of the Province of *Quebec*, a bill of sale of the plant which they had for carrying on such works. By force of the law prevailing in the Province of *Quebec* this bill of sale vested in *Morland, Watson & Co.* the absolute property in all the plant so sold to them, that law recognizing no mortgage of chattel property. It was intended, however, that to enable the plaintiff and his said sons to carry on the works which they had contracted to execute, they should have the use of the plant so sold by them to *Morland, Watson & Co.* A clause was therefore introduced into the bill of sale of the plant, to the effect that in order to secure repayment of the advances made and to be made by *Morland, Watson & Co.*, they should have the possession and control of all the property and effects mentioned in the bill of sale, by the agency of some person employed by them, but paid by the plaintiff and his sons. Accordingly, *Morland, Watson & Co.* appointed one *McCracken*, a person in the employment of the plaintiff, as their agent, and delivered the said chattels to him to retain possession for them of all the said plant and effects while the plaintiff and his sons should have the use of them to enable them to proceed with the execution of the said works. In the month of January, 1875, the plaintiff and his sons being then indebted to *Morland, Watson & Co.* in the sum of $24,000 for monies advanced upon the security of the said bill of sale, the time for re-payment of which had arrived, and being also largely indebted to divers other persons, and being so straitened in their circumstances that without considerable pecuniary assistance they could not fulfil their contracts, became anxious to obtain the assistance of a man of capital and credit to join them as a co-partner; and this, their desire, having been communicated to the defendant, *Worthington*, through a mutual friend of his and of the plaintiff,

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negotiations for the formation of such a co-partnership were entered into between the plaintiff and *Worthington*. Such negotiations resulted in an agreement that a partnership should be formed between the plaintiff and his sons and *Worthington* in the event of their being able to procure the cancellation by the Government of the contracts then in existence, under which the plaintiff and his sons were carrying on the said works, and a new contract for the completion of the same to be given to the new firm, which should be known by the name of *James Worthington & Co.* It was a term in the negotiations that the defendant *Worthington* should procure to himself an assignment and transfer from *Morland, Watson & Co.* of all the plant and effects so as aforesaid sold and conveyed to them by the bill of sale executed by the plaintiff and his sons.

The government having agreed to cancel the old contracts, and the defendant, *Worthington*, having procured a deed to be executed by *Morland, Watson & Co.*, whereby all the plant and effects so as aforesaid sold and conveyed to them, were sold and conveyed to, and vested in the defendant *Worthington*, partnership articles, by notarial deed, in accordance with the law of the Province of *Quebec*, where the works were situate and where the contract of partnership was entered into, were drawn up and executed in due form of law by and between the plaintiff and his sons, of the one part, and the defendant *Worthington*, of the other part, bearing date the 29th day of March, 1875, whereby, after reciting the previous contracts under which the plaintiff and his sons had been carrying on the said works, and that they had been cancelled and a contract for the completion of the same had been given by the government to *James Worthington & Co.*, bearing date the same 29th day of March, it was declared and agreed that the above plaintiff and his sons

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described therein as parties of the first part to the said instrument had agreed to contract a partnership with the defendant *Worthington*, described therein as the party thereto of the second part, for the prosecution and completion of the said works, under the name, style and firm of *James Worthington & Co.*, under and subject to the conditions thereinafter set forth, the 4th article of which conditions was as follows:

[The learned judge then read article 4 (1).]

Now, it is to be observed that this article, in very plain terms and in strict accordance with the law prevailing in the Province of *Quebec*, recites the fact to be, that by a deed executed by *Morland, Watson & Co.* to the defendant *Worthington*, the latter had become and then was the proprietor of all the plant, property and effects which had been sold to *Morland, Watson & Co.* by the plaintiff and his sons, and it is declared to have been well agreed and understood that the same and all other plant, &c., &c., which might be put on the said works should be and should continue to be the entire property of the defendant *Worthington*, until he should be repaid, out of the profits of the partnership then formed, the said sum of $24,000 and interest, paid by him to *Morland, Watson & Co.*, and all other sums which he should or might advance to or for the said firm, and that upon such re-payment the said plant, property and effects, which are enumerated in an inventory and valued therein at $40,000, and for the purpose of identification signed by the parties and the notary, should then, and not sooner, become the property of the members of the firm of *James Worthington & Co.*, in equal moities, one of such moities to be the joint property of the plaintiff and his sons and the other the property of the defendant *Worthington*. In this manner and upon this sole condition, namely, re-payment to *Worthington* of his

(1) Ubi supra.

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advances out of the business and profits of the firm of *James Worthington & Co.*, in which the defendant *Worthington* is declared to have a full half interest, does the property which the defendant *Worthington* had purchased from *Morland, Watson & Co.*, and which was then his property and not the property of the plaintiff and his sons, become the property of the co-partnership.

The works in respect of which the co-partnership was formed having been completed, the plaintiff has filed his bill, claiming that in the taking of the partnership accounts he and his sons are entitled to receive credit to the amount of $40,000, the estimated value of the said plant and effects so as aforesaid assigned and transferred by *Morland, Watson & Co.*, to the defendant *Worthington*, before the profits of the said partnership, if any there be, divisible between the plaintiff and his sons of the one part, and the defendant *Worthington* of the other part, can be ascertained in the same manner as if the said plant, property and effects had been brought into the co-partnership as the capital and property of the plaintiff and his sons, and no special provision in respect thereof had been inserted in the articles of co-partnership; and he alleges that it was never contemplated or intended that the defendant *Worthington* should have a half interest in the said property without first giving credit to the plaintiff and his said sons, for the said sum of $40,000; and that the defendant *Worthington* has no right whatever to make such claim without first giving such credit, and the plaintiff contends that such is the true construction of the articles of partnership of the 27th March, 1875, as the same are framed, or if not, that the said articles should be reformed and rectified so as to conform with such contention of the plaintiff, which, he alleges, was the true intention of all the parties to the said articles

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of co-partnership, and such in substance is the first and main part of the prayer of his bill.

The defendant *Worthington*, by his answer, utterly denies the plaintiff's contention, and upon oath alleges that during the negotiations which he had with the plaintiff, with a view to the formation of the said co-partnership, the plaintiff and his said sons were in great financial embarrassment, and unable to complete the works mentioned in the plaintiff's bill, and in consequence of such embarrassment became obliged either to abandon the said works and forfeit their outlay in the performance of the contracts, or else to obtain the assistance of some person of capital and credit to carry out and complete the same; and he alleges that being a person of capital and credit sufficient to complete the works, and after repeated offers by the plaintiff to give to him one-half interest in the said contracts and in the said plant and stock in consideration of his assistance, he, the said defendant, agreed to the formation of the said co-partnership, and that the same was entered into by the defendant *Worthington* upon the express condition and understanding with the plaintiff and his said sons, that all the plant and stock set forth in the inventory annexed to the articles of co-partnership should be brought into the partnership upon the defendant *Worthington* being reimbursed all his advances in acquiring the same from *Morland, Watson & Co.*, and otherwise, and that thereupon he should own and have one undivided half interest in the said plant and stock, and that such undivided half interest and property of him the said *Worthington* therein, was the consideration of his agreeing to enter into the said co-partnership and to pay off and discharge the said liabilities of the plaintiff and his sons to *Morland, Watson & Co.* and others, their creditors, and to assist them with his capital and name and credit, to carry on and complete the

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said works, and that it was fully understood by the plaintiff and his said sons, that the said plant and stock were to become assets of the said co-partnership firm in manner and for the consideration aforesaid, and that it never was contemplated or intended that the defendant *Worthington* should be chargeable with or accountable for, or that the plaintiff and his said sons were to get credit for the said sum of $40,000, as alleged in the plaintiff's bill. The learned Vice-Chancellor *Proudfoot*, before whom the case was tried, was of opinion that the articles of partnership were not open to the construction that was contended for by the plaintiff, that he was to get credit for the $40,000 on the taking of the partnership accounts, the effect of which credit, if given, would be to make *Worthington* to pay something over $12,000 as consideration for his being admitted as a partner, without his having any share or property in the plant and stock in which he is, by the articles, expressly given a half interest upon the purchase, by the co-partnership firm, of such plant and stock, by payment to *Worthington*, out of the business and profits of the firm, of the amount advanced by him to acquire such plant and stock from *Morland, Watson & Co.*, and as to that part of the bill which prayed for a rectification of the articles, he was of opinion that in the face of the clear denial by the defendant, upon his oath, of the plaintiff's allegations, no case for the rectification of the instrument had been made out; in fact, he was of opinion, that the whole dealing of the parties seemed to support the defendant *Worthington's* allegation of the intention of the parties rather than that of the plaintiff, and being of opinion that the plaintiff had failed to establish the case made by his bill, he made a decree dismissing the plaintiff's bill. The learned judges of the Court of Appeal for *Ontario* concurred with the learned Vice-Chancellor in the opinion that

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it was impossible to construe the articles of co-partnership otherwise than as an agreement, that upon the defendant *Worthington* being paid by the partnership the amount paid by him to *Morland, Watson & Co.* for the said plant and stock, one-half of such plant and stock and only one-half should belong to the plaintiff and his sons, and the other half to *Worthington*; but while admitting that the rule as to the rectification of instruments upon the ground of mistake was that the mistake must be mutual, and that the evidence in support thereof should be of the clearest and most satisfactory nature, they were of opinion that the evidence adduced in this case not only preponderated in favor of the plaintiff's contention, but that it was, in truth, of such weight and cogency as to exclude all reasonable doubt that the agreement, as stated by the plaintiff, was the true agreement entered into between the parties, and they, therefore, reversed the decree of V. C. *Proudfoot* and made a decree for rectification of the articles of partnership, by the insertion of a clause giving to the plaintiff and his sons credit in the accounts of the firm for the said sum of $40,000, the value of the plant, materials and appliances mentioned in the inventory annexed to the articles of partnership. The learned Chief Justice of the Court of Appeal who delivered the judgment of the court admitted, in his judgment, that the effect of the judgment would be to make *Worthington* pay over $12,000 for admission into the co-partnership; and in arriving at the conclusion which he announced as the judgment of the court, he rested that judgment upon the discussion, which, during the negotiations for the partnership, he considered to have been proved to have taken place between the parties as to the value of the plant. "This matter as to the value of the plant," (he says in his judgment) "is a piece of conduct on the part of *Worthington*

"which he regarded as a piece of evidence of the "greatest weight, inasmuch as he thought it was con- "sistent with no other theory than that the *Macdonalds* "were to be entitled, as between themselves and the "firm, to be credited with the agreed value of the stock "as so much capital brought in by them to the partner- "ship."

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To alter the articles of partnership which have been deliberately signed and sealed by all the parties thereto, by the insertion therein of a clause having an effect so diametrically opposite to that which, in the opinion of the courts, the articles, as executed, in plain terms express, and which terms, as the defendant *Worthington* swears, correctly express not only his intention but that of all the parties to the articles at the time of their execution, appears to me to be the making of a wholly new contract for the parties and not the rectification of an instrument purporting to express the contract which was entered into between the parties, by the insertion therein of a clause clearly established to have been omitted by mutual mistake.

If, as appears to me to be very clear, the language of the articles of partnership is so plain as to exclude, as both of the courts below have held, any other construction than that the plaintiff and his sons were to have one clear half interest in the plant, stock, &c, if and when—and only when—the co-partnership firm should, out of its business and profits, pay and reimburse to *Worthington* the amount advanced by him to purchase them from *Morland, Watson & Co.*, until which time they were, by the law of the Province in which the plant was, and in which the contract was entered into, the exclusive property of *Worthington*, it is, in my judgment, impossible to conceive how, in view of the care and attention attending the preparation of the contract and the reading of it over by the notary

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to the parties, clause by clause, before execution, a contract having an effect so diametrically opposed to that which the plaintiff now contends was the real intention and agreement of all the parties thereto, could have ever been assented to and signed by the plaintiff.

The enquiry into the value of the stock and plant by *Worthington*, and the difference of opinion and discussion in relation thereto, upon which the judgment of the Court of Appeal for *Ontario* is rested, took place at the very commencement of the negotiations between the parties, and had relation, as I think plainly appears, to a very rational desire in *Worthington* to know the real value of the security which, by becoming purchaser of the plant and stock by a conveyance thereof executed by *Morland, Watson & Co.*, he should have for his advances, in case the works which were the subject of the contemplated partnership should prove to be unprofitable. It was very natural, as it appears to me, that he should be satisfied that the value set upon the security should not be in excess of its real value, fairly estimated, and that he should have an opportunity of considering whether the probable advances which he might be called upon to make should be in excess of the fair value of the proposed security. The scheme of the partnership was that *Worthington* should, as the first step to be taken, acquire by purchase from *Morland, Watson & Co.*, the absolute property in the plant and stock, to which, in case the proposed partnership should prove to be unprofitable, he should look as his sole security for the advances which he was to make in carrying on the works; but in the event of the partnership works proving to be profitable, the scheme was that the partnership firm of *James Worthington & Co.* should reimburse *Worthington* his advances and so acquire the plant and stock which then, and then only, were

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to cease to be the exclusive property of *Worthington* and to become the property of the firm, *Worthington* himself thus paying half of the monies applied to such purpose. Now, the inventory having been made and the value of the plant and stock arrived at, for the purpose of satisfying *Worthington* as to the value of the security he should have for his contemplated advances, and the articles of partnership, providing that the firm, upon reimbursing him his advances, should become the owners of the plant which should thus become partnership property, as the inventory had to be referred to for the purpose of identifying the articles which should thus become partnership property, it was not at all extraordinary that the notary should have referred to them in the manner in which he has in the articles, or that he should have mentioned in the articles the value at which the plant and stock so to become the new stock of the partnership were valued in such inventoy.

Inasmuch as the first step towards the formation of the partnership was to make *Worthington* proprietor of the plant and stock of which the *Macdonalds* had the use only by their agreement with *Morland, Watson & Co.*, they were the parties chiefly interested in having provision made in the articles for divesting *Worthington* of the property in the plant and stock acquired by him by conveyance from *Morland, Watson & Co.*; it was natural, therefore, that they should be anxious as to the provision made in the articles, as to the plant, upon the co-partnerthip paying *Worthington* the amount of his advances, and thus, as it appears to me, is naturally explained the anxiety upon this head alleged to have been exhibited at the time of the signature of the articles by one of the plaintiff's sons, who, in the language of the notary (whose version of the matter, though not very clear, is safer to

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rely upon than that of the plaintiff's son himself) enquired of him whether the clause in the articles as to the plant was plain enough that it was for the benefit of the partnership. Now, in the articles it is very clearly expressed that upon payment of his advances to *Worthington* by the partnership firm out of its business and profits, the plant and stock, &c., shall belong to the co-partners in equal shares; that is to say, one-half to the *Macdonalds*, and the other half to *Worthington*, who, in such case, should pay for his half $12,000 or one-half of whatever the amount of his advances over and above that sum was; and it seems to me so much more reasonable and so much more in accordance with the undisputed facts of the case that *Worthington* should pay such sum, as the articles executed by the parties make him pay, for a half interest in deteriorating property of the then estimated value in the whole of $40,000, and which at the close of the works for which the partnership was formed, appear to be worth only about $20,000, than that he should pay so considerable a sum to enable the plaintiff and his sons to acquire a right to obtain a credit in the taking of the partnership accounts of $40,000 to *Worthington's* prejudice, while neither in the articles nor in the negotiations leading to the formation of the partnership, does anything signifying such an intention appear, that I entirely agree with the learned Vice-Chancellor *Proudfoot* in the opinion that no case for rectification of the articles has been made. I can attach no such weight as the Court of Appeal has done to the enquiry and discussion as to the value of the plant and stock, which appear to me to have been quite consistent with *Worthington's* declaration of the intention of the parties. But, however difficult the court might find it to be to ascertain with certainty the object with which the valuation of the plant was made and referred to in the articles of

co-partnership, it is impossible, in my opinion, consistently with the practice of the court and the doctrine upon which it proceeds in rectifying signed agreements upon the ground of mutual mistake of the parties thereto, to introduce into the articles of partnership in this case, signed and executed as they were with great deliberation, a provision of the nature asked by the plaintiff, in the face of the peremptory denial of the defendant, that any such intention or any such agreement as is averred by the plaintiff was ever entertained or concurred in by him, or thatany such intention was ever expressed to be entertained by the plaintiff, and when we find the terms of the partnership which the parties had agreed expressed in the articles of partnership in such a clear, explicit and unequivocal manner as to exclude all idea of such intention having been entertained, and to make it impossible to conceive how the partnership articles could have been signed by the plaintiff and his sons, if, in truth, such an intention had been entertained.

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A view has been suggested, however, by a majority of this court, which was not suggested by the plaintiff in his bill, and which, in my judgment, is directly at variance with the case as made in the bill, and which was not suggested on the plaintiff's behalf in the argument of his learned counsel before us, namely, that in the taking of the partnership accounts *Macdonald & Sons* should have a credit given to them for $16,000 instead of the $40,000, as claimed by themselves. We have no authority whatever, in my judgment, to justify us in directing, by an order of this court, a thing to be done in the interest of the plaintiff, as if agreed upon by the parties to the partnership articles which the plaintiff himself, by his bill, admits and shows never was agreed to, and which is different from what he says was, in fact, agreed to.

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All that we have to do, in my judgment, is to determine what is the true construction of the contract entered into between the parties, as appearing in the articles of partnership deliberately executed in notarial form; and whether or not, by mutual mistake something has been inserted therein or omitted therefrom which makes the instrument purporting to express the agreement to appear to be different from what the agreement and contract of the parties in fact was, and from what was the real intention of both parties that the instrument should express.

It was not contended before us that the true construction of the articles of partnership, as executed, is, that the *Macdonalds* are entitled to have credit for $16,000 instead of the $40,000, as claimed in the bill. The sole contention was, that in respect of the plant in question they were entitled to have credit for $40,000, as in fact agreed upon by the parties, and not for any other and different sum. A decree that in the taking of the partnership accounts they shall have credit given to them for $16,000 cannot, in my judgment, be supported upon the basis that such credit is warranted by the express terms of the contract, as executed. Such a direction is, in my judgment, in direct conflict with the express terms of the contract, apparently prepared with great care and deliberation, and of this opinion were both of the courts below.

Then, under the other branch of the prayer of the plaintiff's bill, namely, that the instrument purporting to express the contract of the parties may be rectified by the insertion therein of a provision, as if omitted by mutual mistake, we cannot give any such direction. For a direction that a credit shall be given to one of the parties to a contract, which neither party pretends ever was agreed upon and which is at variance with what the plaintiff avers was agreed upon,

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certainly cannot be justified upon the ground of a mutual mistake in the omission of such a provision from the instrument purporting to express the contract of the parties. If, then, a direction that the *Macdonalds* shall, in the taking of the partnership accounts have the credit of $16,000, is neither warranted by a true construction of the contract as signed, and there is no agreement alleged by the plaintiff to have ever been made that they should have credit for such amount, while the plaintiff does allege an wholly different agreement, which the defendant peremptorily and unequivocally denies upon his oath, I am unable to understand upon what principle the direction can be supported. I entirely concur with the Court of Appeal for *Ontario*, that unless the plaintiff and his sons are entitled to the credit for the whole of the $40,000, as claimed by their bill, they cannot have credit given to them for a part of such sum, and I entirely concur with the judgment of the learned Vice-Chancellor *Proudfoot*, that they are not entitled to credit for the $40,000 or any part thereof, either upon the construction of the articles of partnership or upon any other ground whatever.

It was not contended, in the argument before us, nor in any stage of this cause, that, nor from anything that I have heard does it appear that there is any difference between the law of the Province of *Quebec* and that of the Province of *Ontario*, affecting the principles governing the construction of written contracts, or governing the rectifying or re-modelling instruments purporting to express, but which by mutual mistake fail to express what the parties in reality intended to express; and if there be any difference in the proceedings of the courts of these Provinces for effecting the latter purpose, which would present a difficulty to the courts in *Ontario* rectifying an instrument executed in

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notarial form in the Province of *Quebec*, that difficulty is quite unimportant as regards the case before us

The proper decree to be made, in my opinion, is, that upon taking of the accounts of the co-partnership (which may be taken under a decree, if the plaintiff desires it) the plaintiff and his sons are not entitled to be credited with the said sum of $40,000, as claimed by the plaintiff, but that he and his sons together are entitled to one moiety of the plant and stock, and the defendant, *Worthington*, to the other moiety thereof; and that the appeal should be allowed with costs, and that the plaintiff shall pay to the defendant *Worthington*, all his costs incurred in the case in the Court of Chancery, and that further considerations and further costs should be reserved.

Order of Court of Appeal varied.

Solicitor for appellant: *J. R. Metcalfe.*

Solicitors for respondents: *Bain, McDougall, Gordon and Shepley.*

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*Feb'y. 23.

*June 18.

PATRICK GEORGE CARVILL, GEORGE McKEAN AND GEORGE T. CARVILL, (DEFENDANTS)..... } APPELLANTS;

AND

GEORGE A. SCHOFIELD, THOMAS GILBERT AND JAMES NEVIS, (PLAIFTIFFS)..... ..... } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Charter Party—Damage to ship—Unavoidable delay—Refusal of charterers to load—Action by shipowners.

By a charter party of December 11th, 1878, it was agreed that plaintiff's vessel, then on her way to *Shelburne, N.S.*, should proceed

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

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with all possible despatch, after her arrival at *Shelburne*, to *St. John*, and there load from the charterers a cargo of deals for *Liverpool*; and if the vessel did not arrive at *Shelburne* on or before 1st of January, 1879, the charterers were to be at liberty to cancel the charter party. The vessel arrived at *Shelburne* in December, and sailed at once for *St. John*. At the entrance of the harbor of *St. John* she got upon the rocks and was so badly damaged that it became necessary to put her on the blocks for repairs. Although she was repaired with all possible despatch, she was not ready to receive her cargo until 21st of April following, prior to which time—on 26th March—the charterers gave the owners notice that they would not furnish a cargo for her. The owners sued for breach of the charter party, and on the trial defendants gave evidence, subject to objection, that freights between *St. John* and *Liverpool* were usually much higher in winter than in summer; that lumber would depreciate in value by being wintered over at *St. John*, and also as to the relative value of lumber during the winter and in the spring in the *Liverpool* market; and it was contended that the time occupied in repairing the damage was unreasonable and had entirely frustrated the object of the voyage. The judge directed the jury that if the time occupied in getting the vessel off the rocks and repairing her was so long as to put an end, in a commercial sense, to the commercial speculation entered into by the shipowners and charterers, they should find for the defendants. The verdict being for the defendants, the court below made absolute a rule for a new trial.

On appeal to the Supreme Court of *Canada*, it was

Held (affirming the judgment of the court *a quo*), that as there was no condition precedent in the charter that the ship should be at *St. John* at any fixed date, and as the time taken in repairing the damage was not unreasonable, and the delay did not entirely frustrate the object of the voyage, the charterers were not justified in refusing to carry out the contract.

APPEAL from judgment of the Supreme Court of *New Brunswick* (1) making absolute a rule for new trial.

This was an action brought by the respondents, owners of a vessel called the "*Venice*," against the charterers (appellants) for a breach of the charter party in refusing to load her.

(1) 21 N. B. R. 558.

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Plaintiffs, owners of the ship *Venice*, agreed with defendants by charter party dated 11th December, 1878, that the *Venice* should proceed with all possible despatch after arrival at *Shelburne, N. S.*, to *St. John, N. B.*, or so near thereunto as she may safely get, and there load from the charterers, their agents or assigns, a full and complete cargo (including deck load, if lawful and desired by the master), to consist of deals and battens, &c., and being so loaded should therewith proceed to *Liverpool, Great Britain*, discharging same and delivering same on being paid freight as follows:

Should vessel not arrive at *Shelburne* on or before 1st January, 1879, charterers to have the privilege of cancelling this charter by giving Mr. *Schofield* notice to that effect next day; otherwise this charter to remain in full force and effect.

Freight payable on deals, battens, and other sawn lumber on the intake measure of quantity delivered, and measuring charges, if any, to be borne by the charterer.

Cargo to be delivered alongside at *St. John, N. B.*, at shippers' risk and expense.

(The act of God and rulers, the Queen's enemies, fire and all and every other dangers and accidents of the seas, rivers and navigation, of whatever nature and kind soever, during the said voyage, always mutually excepted).

Cargo to be furnished at *St. John, N. B.*, as fast as required by master, and twelve running days are to be allowed the merchant (if the ship be not sooner despatched) for discharging cargo.

The declaration alleged that:

The plaintiffs did all things necessary on their part to entitle them to have the agreed cargo loaded on board the said ship therein at *St. John* aforesaid, and that the time for so doing has elapsed, yet the defendants made default in loading the agreed cargo, and the plaintiffs claim ($2,000) two thousand dollars.

Defendants pleaded a number of pleas *inter alia*:

3. That the defendants were prevented from loading the said vessel by perils of the sea, which rendered the said ship or vessel unable to perform her intended voyage within a reasonable time after the making of the said charter party, and the said agreed voyage was rendered impossible and its object wholly frustrated.

7. That the said ship or vessel was so damaged and injured by perils of the sea as to be wholly unfit to perform the voyage intended by said charter party, and so long a space of time elapsed before she was repaired and ready to proceed on her said voyage that all benefit and advantage from said intended voyage was wholly lost to the said defendants, whereby the said defendants were released from the performance of their agreements in said charter party contained.

9. That the said ship or vessel was by perils of the sea prevented from receiving her said intended cargo, and from proceeding on her said voyage for so long a time that the said intended cargo was becoming injured and damaged, and the said defendants were compelled, in order to prevent such damage, to ship the said cargo by another vessel; and the said defendants lost all benefit and advantage from said intended voyage, whereby they were discharged from the performance of their agreements in said charter party contained.

10. That the said ship or vessel was by perils of the seas prevented from receiving her said intended cargo, and from proceeding on her said voyage for so long a time that defendants were compelled to remove said intended cargo from where it was stored, whereby they lost all advantage from said intended voyage; whereby they became released from the performance of their agreement in said charter party contained.

Vessel arrived at *St. John* about 19th December, got on rocks at mouth of harbour, and was not in a condition to receive cargo. The owners proceeded with all reasonable despatch to repair the vessel, but on the 26th March, her repairs not then being completed, the plaintiff addressed the following letter to the agent of the ship:

St. John, N. B., 26th March, 1879.

S. Schofield, Esq., City.

DEAR SIR,—In consequence of the great delay in the performance of your part of the charter of the barquentine *Venice*, chartered by you to us under date 11th December, 1878, we hereby give you notice that we cannot supply cargo to said vessel, and consider the charter null and void.

Your truly,

(Signed), p. pro. *Carvill, McKean & Co.*
R. A. Macintyre.

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St. John, N. B., 26th March, 1879.

Messrs. *Carvill, McKean & Co., St. John.*

DEAR SIRS,—In reply to your letter of this date, I have to inform you that there has been no delay in regard to the *Venice*, except what was the unavoidable result of her getting on shore in *Courtenay Bay*, in December last. She is yet undergoing repairs of the damage sustained at the time referred to, but as soon as the same are completed and the vessel is ready for loading, I shall notify you and demand the cargo which you agreed to ship by her.

In the meantime, I beg to inform you that I claim that the charter party made between us, and dated 11th December, 1878, is still in force and will continue to be so, until it is fulfilled or cancelled by mutual consent of both parties.

Yours truly, *S. Schofield.*

St. John, N.B., 21st April, 1879.

Messrs. *Carvill, McKean & Co., St. John:*

DEAR SIR,—You will please take notice that the barquentine *Venice*, 625 tons register, is now fully repaired again, and in a loading berth at *Walker's* wharf, ready to receive and load the cargo for which she was chartered to you as per charter party, dated 11th December, 1878.

The cargo will be required at the rate of forty standard per day, commencing at once.

Yours truly,

Adolf Beryman, Master. *S. Schofield*, Agent for Owners.

Defendants did not load the vessel; she was not ready to receive cargo until this demand was made.

Mr. *Gilbert* and Mr. *Millidge* for appellants:

The voyage contemplated and for which the *Venice* was chartered was a voyage carrying acargo of deals from *Saint John* to *Liverpool*, and there is an implied contract that she will commence that voyage within a reasonable time, which is not filled by a delay of nearly four months. And had there not been the clause excepting the perils of the seas, the charterers would have been entitled to an action against the owners for not being ready to take the cargo within a reasonable time. It is true they are protected by the clause excepting the perils of the seas, but this clause is a

mutual agreement and enures to the benefit of both parties. The effect of it is as if the charterer had said to the ship owner, "you have agreed to have your vessel ready to take in a cargo within a reasonable time, but if any of the excepted perils occur you will be released from the performance of your agreement by reason of such perils." And on the other hand it is a declaration or agreement made by the owner to the charterer: "you have agreed to provide and load on board my ship a cargo to be ready on her arrival, but if by reason of any of the excepted perils I am unable to have my vessel ready to take your cargo within a reasonable time you will be released from the performance of your agreement to provide a cargo for my vessel, or in other words, if any of these contingencies against which we have provided occurs, we are mutually discharged from our agreements and the contract is at an end." It is a fair construction of the agreement that by making the excepting clause mutual the intention of both parties must have been that in the event of the contingencies provided against occurring, both parties should be discharged from the performance of their several agreements, the one from carrying a cargo, the other from providing a cargo to be carried.

Assuming that the defendants are incorrect in their claim that the word mutual in the excepting clause enures to their benefit, on what principle is the contract to be construed?

It is scarcely within the range of probability that the idea that the vessel having arrived safely at *Shelburne*, within a day or two's voyage of *Saint John*, should have been wrecked and so damaged as to require four months to repair, ever entered into the contemplation of either of the parties to the contract. And it is not within the range of possibility that if it had occurred to them, that the defendants knowing the advantage of

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having their deals delivered at *Liverpool* in winter or early spring, knowing that the freight they were to pay was exceptionally high, and knowing that they were bound to clear their deals from where stored before the first of April, would have agreed that in case of such an accident the plaintiffs should have four months, or as much longer as might be necessary, to repair their vessel and still hold them bound to provide a cargo for her and at so exceptionally high rate of freight, or that the plaintiffs would have bound themselves to repair the vessel, no matter how great the damage short of total loss, at no matter how long it might take, as quick as possible, and hold her ready for the defendants to load, no matter what changes might take place in the freight market. The only reasonable provision any sane man on either side would have made, had such a contingency been presented to them, would be that in case of such a contingency occurring both parties should be discharged from the contract, and free to act as they deemed best.

The questions whether the delay was so unreasonable as to frustrate the whole object of the contemplated voyage, and whether the time of getting the ship repaired was so long as to put an end, in a commercial sense, to the commercial speculation entered into by the ship owners and the charterers, are questions of fact and not of law, were raised by the pleadings and fairly left by the learned judge (who tried the case) to the jury, and found by them in the affirmative.

The cases relied upon were the following: *Geipel* v. *Smith* (1); *Jackson* v. *Union Marine Insurance Co.* (2); *Dahl* v. *Nelson* (3); *Rankin* v. *Potter* (4).

Mr. *Weldon*, Q.C., for respondents:

In the case of *Jackson* v. *Union Marine Insurance Co.* the

(1) L. R. 7 Q. B. 404.
(2) L. R. 8 C. P. 572, 10 C. P. 125.
(3) 6 App. Cases 38.
(4) L. R. 6 H. L. 83.

jury found: 1. A constructive total loss of the ship, which however, was not approved of by the court, and the case was argued without that element in it; 2. That the time nesessary for getting the ship off and repairing her so as to be a cargo carrying ship was so long as to make it unreasonable for the charterers to supply the agreed cargo at the end of such time; and 3. That the time was so long as to put an end, in a commercial sense, to the commercial speculation entered upon by the shipowner and charterers; or, in other words, that the object of the voyage as contemplated and understood by the shipowner as well as the charterers—that a specific cargo for a specific purpose should be carried from *Newport* to *San Francisco*, and where time was essential, was wholly frustrated.

But in this case the object of the voyage was not wholly frustrated. The mere speculation as to the rise and fall of the market, or of freight, or the ordinarily better state of a market at a particular time, is not the object of the voyage as contemplated between the parties, or the risk of which the shipowner agrees to run.

The case falls within the principle of the following cases:—*Tarrabochia* v. *Hickie* (1); *Hurst* v. *Osborne* (2); *McAndrew* v. *Chappell* (3); *Chipsham* v. *Vertue* (4); *Jones* v. *Holm* (5). See also the case of *Dimeck* v. *Corlett* (6).

RITCHIE, C. J.:

The defendants' contention on this appeal is that the object of chartering was to have the cargo carried in winter, but that when the vessel was ready to receive cargo the time for a winter voyage had expired.

The only evidence we have in reference to a winter

(1) 1 H. & N. 183.
(2) 18 C. B. 144.
(3) L. R. 1. C. P. 643.
(4) 5 Q. B. 265.
(5) L. R. 2 Ex. 335.
(6) 12 Moore P. C. 199.

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voyage, or the difference between a winter and a spring or summer voyage, is as follows:

George McKean.—We entered into the charter party on 11th December; freights were high then. Cargo was ready on 1st January, 1879. It was lying at *Miller & Woodman's* mill. I left *St. John* in February, 1879, for *England*. The vessel was not ready to receive the cargo before I left; had she been offered up to that time, I was ready with cargo to load her.

Q.—What would be the effect on the commercial value of that cargo of keeping it until April 21 for shipment? A.—The cargo would be deteriorated by the action of the weather, and it would have had to be removed, as we were bound to clear the wharf for *Miller & Woodman*. We had bought the deals from *Miller & Woodman*, and agreed to clear the wharf to allow them to commence sawing by 1st April.

Q.—What would be the difference in value in *Liverpool* on those deals between the 1st February and 1st May? A.—They had fallen in price fully 10s. a standard.

Q.—Is there any special advantage to the charterer to send to *Liverpool* a winter cargo as against a cargo arriving in the late spring or early summer? A.—There is a very special advantage, because this is the only open port in the winter, and the cargo therefore will arrive on a bare market. Cargo arriving during the winter season can be sold from the quay, thus avoiding storage. Cargo leaving here in April will sometimes get in before cargo from gulf ports. Large number of ships from *Miramichi* and gulf ports get away by middle of May; but great part leave about 1st June.

Robert A. McIntyre.—Q. What would be the effect on the commercial value of that cargo, of keeping it until 21st April for shipment? A.—The deals get stained, and thus depreciate in value; and new deals being mixed together, the cargo will not sell as well.

Q.—Is there any advantage to the shipper in sending forward an early winter cargo of deals from *St. John* to *Liverpool*, as against a similar cargo shipped as soon as she could possibly load on and after 21st April? A.—I have been in *Liverpool*, but I have no personal knowledge of the deal trade, except what I have got from correspondence papers.

Witness: A cargo shipped in winter is much more valuable than one in spring, because it goes in free from competition from other ports, and it is generally sold on arrival free from all stowage charges.

This evidence does not show that there is such a

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substantial difference between a winter and a spring voyage for deals from *St. John* to *Liverpool*, that while the one may reasonably be undertaken as a mercantile speculation, the other could only be a mercantile failure? On the contrary, the advantages put forward of a winter voyage from *St. John*, are that winter voyages from that port are exceptional, by reason of the open harbour of *St. John*, and that such voyages do not come into competition with the usual spring or summer voyages from other deal ports which are closed by ice in winter. Therefore, if a cargo from *St. John*, shipped in contemplation of arriving in *Liverpool* in the winter, does not reach that port until the spring, the voyage is not lost, the cargo is still at its destination in the due course of the deal trade, though possibly not under quite as favorable circumstances as if it had arrived earlier, and therefore is wholly unlike a fruit cargo or ice cargo, or a cargo to be delivered for a certain specific purpose, when the benefits of the voyage are entirely lost by delay.

Nothing whatever is said in the charter party of a winter voyage, nor is any time fixed within which the ship shall be ready to load and sail from *St. John*. I do not think there is any sufficient evidence to justify the conclusion that in entering into this charter both parties understood and agreed that it was confined to a winter voyage. Had such been the intention, it should have been so expressed in the charter party, and there is no implied contract that I can discover as to when the vessel should be ready to commence the voyage. The fact that it was stipulated that the vessel should be at *Shelburne* by a certain day, or, if not, that the charterers might elect to cancel the charter, would indicate that to this extent time was deemed of importance, and the charterers thus secured that in due course and without accident the ship would reach *St. John* and be in a posi-

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tion to take in cargo promptly; but the absence of any stipulation fixing the time when she should reach *St. John*, and be ready to load, would, in like manner, appear to indicate that if the vessel arrived at *Shelburne* within the time limited and proceeded from thence to *St. John* with all reasonable despatch, each party took upon themselves the risk of her arrival at *St. John* and of the period when she would be in a position to receive cargo and ready to sail. The parties not having expressly provided that unless the vessel was loaded and ready to sail by a specified day the charter party would be at an end, as was said in *Dimeck* v. *Corlett* (1), "Courts ought to be slow to make such a stipulation for them." I think the question in this case is, was the delay so great as to destroy the voyage or merely to retard it?

To enable a charterer to put an end to the contract, the delay must be such as frustrates the object of voyage; in other words, the voyage both parties contemplated must have become impossible. In this case the time necessary to get the ship repaired so as to be a cargo carrying ship was not, in my opinion, so long as to put an end, in a commercial sense, to the commercial speculation entered into by the ship owners and charterers; a voyage, undertaken after the ship had been sufficiently repaired would not, in my opinion, have been a different voyage, either as to the port of loading and discharge, or a different adventure. I cannot discover anything to justify the conclusion that these charterers contemplated a winter voyage so as necessarily to raise an implied condition that the ship should be ready in time to receive the cargo for such a voyage, and so to make it a condition precedent, whereby, she not being so ready, the contract was put an end to.

The question therefore is: Did the voyage, by reason

(1) 12 Moo. P. C. 227.

of the time lost, or delay caused by this accident, become a different voyage from that agreed for. In other words, did the delay deprive the charterers of the whole benefit of the contract, or entirely frustrate the object of the charterer in chartering the ship? If so, it is an answer to an action, for not loading the cargo (1). But if the vessel was in a condition to be repaired, and it is evident she was, the repairing having been done with all reasonable despatch, the delay was nothing more than a temporary obstruction to the voyage, which did not enable either party to put an end to the contract. Had freights in the meantime largely risen, the ship owners could not, in my opinion, when the ship was repaired and ready to take in cargo on the 21st April, have refused to receive cargo from the charterers if offered on that day. If the liability to carry continued, the liability to ship likewise necessarily continued.

The observations of *Bovill*, C. J., in *Jackson* v. *Union Marine Insurance Co.* (2), strike me as so peculiarly applicable to this case, that I may be pardoned quoting them at length :

> Upon a charter party where the charterer does not stipulate for the arrival of the vessel by any particular date, the risk of her non-arrival, by reason of weather and the accidents of navigation, always rests with the charterer; and, where the stipulation is simply that the ship will proceed to the loading port with all convenient speed, the dangers of the sea excepted, the ship owner performs his part of the contract, and there is no breach of it by him, if without his default the arrival of the vessel is delayed only by the accidents and dangers of the sea, even although that delay may prevent the loading of the vessel at the usual time, or so as to be profitable to the charterer.
>
> The law has no power to make a contract different from that which a person has entered into; and, where a shipowner does not agree that his vessel shall arrive at the loading port by any particular day,

(1) *MacAndrew* v. *Chapple*, L. R. 1 C. P. 643.

(2) L. R. 8 C. P. 585.

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but only that she shall proceed there with all convenient speed, or, what the law would imply, that she shall proceed and arrive within a reasonable time, and expressly stipulates that this shall be subject to the dangers and accidents of the seas and navigation, I do not see how that exception is to be got rid of, or how a contract with such an exception can properly be construed as, or converted into, an absolute engagement on his part that his vessel shall proceed or arrive within a reasonable time, as if there were no exception. If the contract could be so treated, it must be equally open to the shipowner to put an end to it, and this in some cases might be productive of the greatest inconvenience to the charterer.

I quite admit the great inconvenience and possible loss to both shipowner and charterer, when any serious delay is caused by the necessity for heavy repairs arising from sea perils; but the answer to such an argument, as it seems to me, is, that, if either party desires to protect himself from such risk or inconvenience, he should introduce stipulations into the contract with that object; and if, instead of doing so, both parties agree that the vessel is to proceed and load subject to the accidents of navigation, which they expressly except, I think it is not competent for either of them afterwards to claim to be absolved from his contract by reason of an accident of navigation which he has expressly agreed shall be excepted.

I am of opinion this appeal should be dismissed.

STRONG, J.:

I have had an opportunity of reading the judgment of the Chief Justice, and I entirely concur in his reasons given in this case.

FOURNIER, J., concurred.

HENRY, J.:

At the first blush of this case I was rather of the opinion that under the peculiar circumstances presented by the evidence, it was of importance that the provision that the vessel should be at *Shelburne* at a particular time (which is distant only a day or two sail from *St. John*) was intended and understood by the parties to be a provision made to ensure reaching the winter markets by the shipping of the cargo at an early date.

There is very little doubt on my mind that that was the intention of the parties, and that it was perfectly understood by them both; that the high price they agreed to pay for freight, which is higher in winter than in summer, and which the party is enabled to pay by the advantages which he secures by getting his lumber into *Liverpool* before the spring trade opens, which is shown to be of very great importance by the evidence fully shows this. And he who does not ship in time not only loses largely in price but loses also in the accommodation that he would otherwise receive in the docks at *Liverpool*. Taking these all together, I have no difficulty in coming to the conclusion that that was what the parties meant and understood, but then, as the learned Chief Justice has very well said, have they put that into their agreement? The words "in reasonable time, dangers of the sea only excepted," only required the parties to be at the place when they possibly could under the exception, and if the shipowner is prevented by accident in navigation from arriving at port within what would otherwise be reasonable time, that may be set up as a reasonable excuse. There is no doubt there are exceptions to that rule in the case of ice and other perishable articles, where it is understood that the voyage is to be made at a certain season and the cargo would otherwise be useless. Fruit and ice come within that classification, and I thought at first that under the peculiar circumstances of this case, it might be brought under the rule applicable to them, but I find that it is not so, according to the agreement. The decisions all go to show that the parties must provide for it in the contract. That is not done here, and I am of the opinion that the appeal should be dismissed. There is a case, however—*Jackson* v. *The Union Marine Ins. Co.* (1)—

(1) L. R. 8 C. P. 585.

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which is a case of a shipment of iron. There the vessel was on her way to receive the iron, when she was wrecked. She was damaged in such a way that it took some time to repair her, and the parties suggested in one of their letters that time was of importance to them, because the rails were wanted for a railway about to be put in operation. There was no proof of that fact, however, given, and if that case really could be taken as law governing such transactions, then I would have felt bound to have given the benefit of that decision to the charterers in this case. I find, however, that is rather an exception, and that it is not in accordance with the general rule of law laid down as governing the contract. I must, therefore, reluctantly come to the conclusion that the contract was still in force when the owners of the ship offered her services to the charterers, and at the time when they refused to furnish a cargo.

TASCHEREAU, J.:

I have come to the same conclusion, for the same reasons as the learned Chief Justice,—to dismiss this appeal. I think it is better to adhere to the rule that if parties wish to protect themselves against accidents of this kind, they should say so in their contracts.

GWYNNE, J., concurred.

Appeal dismissed with costs.

Solicitors for appellants: *G. G. Gilbert.*

Solicitors for respondents: *Weldon & McLean.*

THOMAS GRANGE.....APPELLANT;

AND

DUNCAN McLENNAN.....RESPONDENT.

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*May. 2.

*June 19.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA (APPEAL SIDE).

Promise of sale, Construction of—Condition precedent—Mise en demeure—Arts. C. C. 1,022, 1,067, 1,478, 1,536, 1,537, 1,538, 1,550.

On the 7th December, 1874, *T. G.* by a promise of sale, agreed to sell a farm to *D. M.*, then a minor, for $1,200—of which $500 were paid at the time, balance payable in seven yearly instalments of $100 each with interest at 7 per cent. *D. M.* was to have immediate possession and to ratify the deed on becoming of age and to be entitled to a deed of sale, if instalments were paid as they became due, "but if on the contrary *D. M.* fails, neglects, or refuses to make such payments when they come due, then said *D. M.* will forfeit all right he has by these presents to obtain a deed of sale of said herein mentioned farm, and he will moreover forfeit all monies already paid, and which hereafter may be paid, which said monies will be considered as rent of said farm, and these presents will then be considered as null and void, and the parties will be considered as lessor and lessee."

After *D. M.* became of age he left the country without ratifying the promise of sale, he paid none of the instalments which became due, and in 1879 *T. G.* regained possession of the farm. In October, 1880, *D. M.* returned and tendered the balance of the price, and claimed the farm.

Held,—Reversing the judgment of the court below (*Strong* and *Taschereau*, JJ., dissenting,) that the condition precedent on which the promise of sale was made not having been complied with within the time specified in the contract, the contract and the law placed the plaintiff *en demeure*, and there was no necessity for any demand, the necessity for a demand being inconsistent with the terms of the contract, which immediately on the failure of the performance of the condition *ipso facto* changed the relation of the parties from vendor and vendee to lessor and lessee.

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

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APPEAL from a judgment rendered by the Court of Queen's Bench for *Lower Canada* (appeal side) (1), confirming the judgment of the Superior Court in favor of the respondent.

This action was to compel the appellant to grant to the respondent a deed of sale of a farm situate in the parish of *St. Theodore*, in compliance with a promise of sale made before *Legris*, a notary public, on the 7th December, 1874.

The appellant pleaded, that the respondent had not fulfilled the conditions of the promise of sale which had thereby become inoperative. The Superior Court however, maintained the action and condemned the appellant to give to the respondent a deed of sale in due form and to deliver over to him the property claimed, and this judgment was affirmed with costs by the judgment of the Court of Queen's Bench (appeal side).

The appeal is from this latter judgment.

The circumstances which have given rise to the suit are as follows:

By a deed passed before *Legris*, a notary public, on the 7th December, 1874, the appellant promised to sell the farm in question in this cause to the respondent, then a minor, but assisted by *Roderick McLennan*, his father, who promised to have the transaction ratified by his son, when he should have attained the full age of twenty-one years.

This promise of sale was made for the sum of $1,200, of which $500 were paid at the time, and as to the balance of $700, the respondent promised to pay it to the appellant in seven yearly consecutive payments of $100 each, the first of which would fall due on the first day of October, 1875, with interest at the rate of seven per cent. per annum, to reckon from the first day of October, 1874.

(1) 3 Dorion's Q. B. R. 212.

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The deed contains the following provision, which has given rise to the present litigation:

It is especially covenanted and agreed upon between the said parties hereto, that if the said *Duncan McLennan* makes regularly the said payments of one hundred dollars said currency, when they will fall due respectively, together with the interest, till the full payment of said sum of seven hundred dollars, then and in that case the said *Thomas Grange* will be bound, as he doth hereby bind himself, to give the said *Duncan McLennan* a free and clear deed of sale of said farm; but on the contrary, if the said *Duncan McLennan* fails, neglects or refuses to make the said payments when they come due, then the said *Duncan McLennan* will forfeit all right he has by these presents, to obtain a deed of sale of said herein mentioned farm, and he will moreover forfeit all monies already paid and which might hereafter be paid, which said monies will be considered as rent of said farm, and these presents will then be considered as null and void, and the parties hereto will be considered as lessor and lessee.

At the date of this promise of sale, *Roderick McLennan* was living on the farm with the respondent and the other members of his family. The respondent became of age in the month of January, 1875, and continued to live on the farm with his father for about a year after he had become of age. He then left to reside in the *United States*, and has not come to *Lower Canada* since, except once, on a visit of three or four days, in the fall of 1880.

The respondent never ratified the promise of sale, as he was bound to do, on his coming of age, and neither he, nor his father *Roderick McLennan*, has paid to the appellant any portion of the principal and interest accrued on the balance of $700 due on the price stipulated in the said promise of sale. The appellant has moreover been obliged to pay the municipal and school taxes and the seigniorial charges due on said property.

After waiting for several years without receiving either principal or interest, the appellant sought to get back the possession of his property, and on the 6th day

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of May, 1879, *Robert McLennan*, who was still in possession of it, and who, it seems, had furnished the $500 which had been paid to the appellant, when the promise of sale was passed, consented to resiliate the same and to give up to the appellant possession of the farm, on condition that he should be allowed to occupy the house till the 1st of November following (1879). A deed was passed to that effect.

Subsequently, *Robert McLennan* refused to give up the possession of the house, and the appellant obtained a judgment of ouster, and finally recovered the possession of the house also.

It was not till the 23rd of October, 1880, after the appellant had been in possession of the farm for nearly eighteen months, and of the house for about a year, that a tender was made to him in the name of the respondent of the sum of $997.31 as the balance in principal and interest of the price stipulated in the promise of sale of the 7th of December, 1874.

This tender was made through a notary, and was accompanied by a demand on the appellant to grant to the respondent a deed of sale in the terms of the promise of sale.

The appellant having refused to comply with this request, the respondent brought this action whereby he renewed his tender and claimed that the appellant be ordered to give a regular deed of sale of the property in question, and to deliver him the possession of the same.

Mr. *Doutre*, Q.C., and Mr. *Joseph*, for appellant, and Mr. *Laflamme*, Q. C., and Mr. *Cross*, for respondent.

The points and authorities relied on by counsel are reviewed in the judgments hereinafter given.

RITCHIE, C. J.:

I think that article 1478 which says that "A promise

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of sale with tradition and actual possession is equivalent to sale," means that where there is a contract of sale and tradition is made, and actual possession given with a view of there and then consummating such sale by such tradition and actual possession, such a contract of sale and such tradition is equivalent to a sale, but not as in *Noel* v. *Laverdure* (1), where the contract provided that the tradition and actual possession should not be equivalent to the sale, or as in this case where such an operation would be inconsistent with the stipulations of the contract of sale, or as likewise in this case where a fair construction of the contract of sale leads to the irresistible inference that it was not the intention of the parties that actual possession should be equivalent to a sale, in other words does not apply to such a case as this where the terms of the contract of sale show clearly that it was not the intention of the parties that the sale should be brought to a completion or considered a complete sale. The tradition and actual possession in like manner as the contract of sale was, in my opinion, to be subject to the condition that if the payments were not made, and conditions complied with, such tradition and actual possession was to be a tradition and possession not under the contract of sale, but to be considered as the possession of a lessee holding under the vendor as lessor, for the contract expressly provides that:— "The said *Duncan R. McLennan* will take possession of said farm and appurtenances immediately, and will enjoy the same on the following conditions." That the tradition and actual possession only became such a tradition and actual possession as contemplated under Art. 1478 on fulfilment by the vendee of the conditions of the contract of sale, that then and from thenceforth only was the tradition and actual possession such a tradition and actual possession as within the

(1) 4 Q. L. R. 247.

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promise of sale would be equivalent to a sale; in other words, that until the conditions were fulfilled, the occupier of the property was in no better position than a tenant, whether it was *R. McLellan*, on his own behalf, (for it would appear that the property was in reality bought for him, and, so far as paid for, paid for with his money) or on behalf of his son, mentioned in the contract of sale as the vendee. On conditions being fulfilled the sale was then consummated, and then for the first time the plaintiff became entitled to the property as his own, or to claim a deed of sale. That it was not a real sale, subject to a revocatory condition, but, to my mind, it was in every sense of the word a conditional sale, and until the conditions were complied with there was no intention that there should be a complete sale, or that the property should be transferred.

The authority from *Aubry & Rau* (1), cited by the learned Chief Justice in the court below, seems to cover the case:

> La condition suspensive venant à défaillir, l'obligation et le droit qui y est corrèlatif sont, *ipso facto*, à considérer comme n'ayant jamais existé. Ainsi, par exemple, l'acquéreur qui aurait été mis en possession de la chose par lui acquise sous condition, serait obligé de la restituer avec tous ces accessoires et avec les fruits qu'elle a produits.

I therefore have come to the same conclusion as the learned Chief Justice of the Court of Appeals, viz., that the condition precedent on which the promise of sale was made, not having been complied with within the time specified in the contract, the contract and the law placed the plaintiff *en demeure*, and there was no necessity for any demand, the necessity for a demand being entirely inconsistent with the terms of the contract, which immediately on the failure of the performance of the condition *ipso facto* changed the relation of the parties from

(1) Vol. 4, sec. 302, p. 75—sec. B.

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vendor and vendee to lessor and lessee, and therefore the respondent not having fulfilled his obligation, is not in a position to insist on the appellant granting and executing to him a deed of the property in question, and therefore that this appeal should be allowed, the judgment of the court below reversed, and the action of the respondents dismissed.

STRONG, J.:—

Was of opinion that the appeal should be dismissed for reasons given by *Taschereau*, J., in his judgment, with which he concurs.

FOURNIER, J.:

L'action de l'Intimé (demandeur en cour inférieure) était fondée sur une promesse de vente en date du 7 décembre 1874 et avait pour but de forcer l'appelant à lui livrer la propriété mentionnée dans cette promesse de vente et de lui en passer titre, sinon que le jugement de la cour en tiendrait lieu.

Cette promesse de vente fut faite en considération de la somme de $1,200, dont $500 furent payés comptant et la balance stipulée payable à raison de $100 par année avec intérêt à sept p. c. Le demandeur était alors mineur, mais son père comparut à l'acte pour accepter pour lui. L'Intimé s'obligea de ratifier cet acte à son âge de majorité.

Le différend qui s'élève entre les parties est au sujet de l'effet à donner à la clause suivante :

It is specially convenanted and agreed upon between the said parties hereto, that if the said *Duncan R. McLennan* makes regularly the said payments of one hundred dollars said currency, when they will fall due respectively, together with the interest, till the full payment of said sum of seven hundred dollars, then and in that case the said *Thomas Grange* will be bound, as he doth hereby bind himself, to give to said *Duncan R. McLennan* a free and clear deed of sale of said farm; but on the contrary, if the said *Duncan R. McLen-*

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nan fails, neglects, or refuses to make the said payments, when they came due, then the said *Duncan R. McLennan* will forfeit all right he has, by these presents, to obtain a deed of sale of said herein mentioned farm, and he will moreover forfeit all monies already paid which might hereafter be paid, which said monies will be considered as rent of said farm, and these presents will then be considered null and void, and then the parties hereto will be considered as lessor and lessee.

Le jugement de la cour Supérieure, confirmé par celui de la majorité de la cour du Banc de la Reine, a refusé de donner effet à cette convention. Les principaux motifs de cette décision se trouvent dans les considérants du jugement prononcé en cour Supérieure par l'honorable juge *Papineau*. Quant aux raisons du jugement de la majorité de la cour du Banc de la Reine, on ne les trouve ni dans les factums ni dans le dossier, qui ne contient que celles de l'honorable juge en chef sir *A. A. Dorion* qui différait d'opinion.

Pour en arriver à cette conclusion l'honorable juge *Papineau* paraît s'être fondé sur les raisons suivantes : 1o délai accordé pour le paiement des sept cents piastres, balance due sur le prix convenu ; 2o que le défendeur (l'appelant) n'a jamais fait annuler la dite promesse de vente vis-à-vis du demandeur, (l'Intimé) ; 3o que le paiement de la dite balance du prix n'a jamais été demandé.

Il y a encore plusieurs autres considérants donnés par l'honorable juge que je me dispense d'indiquer ici, car je suis d'opinion, pour les raisons développées dans les notes de l'honorable sir *A. A. Dorion*, qu'ils sont insuffisants pour soutenir ce jugement. Je ne m'arrêterai donc qu'à ceux ci-dessus indiqués

La condition citée plus haut est-elle suspensive de l'effet de la promesse de vente jusqu'à l'accomplissement de la condition de paiement ? La peine de déchéance stipulée en cas de défaut de paiement doit-elle avoir son effet de plein droit, sans autre mise en demeure que

celle résultant de la convention et sans l'intervention des tribunaux ?

Ces deux questions n'en doivent faire qu'une seule, car, si la convention doit en loi produire l'effet convenu, il ne saurait être question de mise en demeure et d'intervention des tribunaux.

La prétention de l'Intimé est que la promesse de vente dont il s'agit, ayant été suivie de tradition et de possession, elle doit être, en vertu de l'art. 1478 C. C., considérée comme équivalente à la vente, et ne pouvait être annulée par un jugement prononçant déchéance contre lui.

L'Appelant prétend au contraire que cette promesse ne peut avoir d'effet qu'à l'accomplissement des conditions de paiement, qu'à défaut de paiement la promesse de vente, en suspens jusque-là, se trouve anéantie.

Comme le fait justement observer l'honorable juge-en-chef *Dorion*, l'art. 1478 ne peut aucunement appuyer la prétention de l'Intimé, que la promesse dont il s'agit ici équivaut à la vente. Car dans cet article il ne s'agit que d'une promesse de vente pure et simple, et non pas d'une promesse de vente accompagnée de conditions spéciales. Ici les parties sont formellement convenues que l'Intimé n'aurait pas droit à un titre de vente, à moins d'avoir payé, aux termes convenus, la balance des $700 sur le prix de vente, et que dans le cas de non paiement la promesse de vente deviendrait nulle et se transformerait en un bail de la propriété, et que les $500 payées iraient en déduction du loyer. Est-il possible, en présence d'une déclaration de volonté aussi clairement formulée, de prétendre que cette promesse est équivalente à la vente ? Les parties ont précisément dit le contraire ; elles ont effectivement dit : s'il n'y a pas de paiements, il n'y aura pas de vente mais bail de la propriété en question. Il ne peut pas, dans ce cas, y avoir de résolution de cette promesse, parce

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que la condition n'ayant pas été accomplie, la promesse n'a produit aucun effet. Aucun droit à la propriété n'est passé à l'Intimé, son occupation après le défaut de paiement devant être continuée à titre de bail.

Cette transformation de la promesse de vente en un bail, ou d'un contrat en un autre peut se faire en vertu de l'article 1022 C.C. :

Les contrats produisent des obligations et quelque fois ont pour effet de libérer de quelque autre contrat, ou de le modifier.

C'est en vertu de ce principe que la Cour de Cassation a admis la validité d'une condition par laquelle des parties en se mariant avaient stipulé que la communauté de biens, limitée par leur contrat de mariage, deviendrait une communauté générale à l'ouverture des successions respectives des pères et mères des contractants (1).

Qu'une promesse de vente puisse être légalement faite avec des conditions suspensives ou resolutoires, cela ne saurait être mis en doute d'après les autorités suivantes.

Ces autorités reconnaissent qu'une promesse de vente est susceptible des mêmes conditions que la vente.

Troplong, (2) commentant l'art. 1589, du code *Napoléon*, dit:

Puisque la promesse de vente est équivallente à la vente, il faut dire qu'elle est susceptible des mêmes conditions suspensives et résolutoires que la vente. Il est même assez ordinaire qu'elle soit conditionnelle.

Et au nº 134 l'auteur ajoute :

Si celui à qui la promesse a été faite ne se présente pas à l'époque indiquée pour passer contrat, il faut distinguer s'il y a un terme indiqué ou bien si la convention ne porte pas de délai.

Dans le premier cas, la convention est résolue de plein droit et le promettant est dégagé.

Dans le second cas il faut suivre la marche que nous avons tracée au No 117.

(1) Dalloz. Recueil de jurisprudence générale, Vo. condition suspensive.

(2) Vente, No. 132.

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Pothier (1) dit :

Les promesses de vendre se font de deux manières : *Avec* ou *sans* limitation de temps. Lorsque quelqu'un s'est obligé de vendre une chose dans un temps déterminé, il est déchargé de plein droit de son obligation par le laps de temps.....

Laurent, (2) parlant de la promesse de vente conditionnelle, dit :

La promesse de vente peut-elle être faite sous condition ? L'affirmative n'est pas douteuse : l'art. 1854 le dit de la vente, et la promesse bilatérale vaut vente. Il faut en dire autant de la promesse unilatérale, elle forme aussi un contrat ; donc elle peut être faite sans condition. On applique, dans ce cas, les principes qui régissent la condition.....

La promesse de vendre se trouve souvent ajoutée à un bail comme promesse de vendre sans que le preneur promette d'acheter ; la promesse peut aussi être bilatérale, soit pure et simple, soit sous condition.....

Si la promesse de vente était bilatérale, et pure et simple, quoiqu'ajournée à la fin du bail, par exemple, il y aurait vente et translation de propriété. Partant l'indemnité (due pour expropriation) appartiendrait à l'acheteur. Mais que faut-il décider si la promesse est conditionnelle ? La vente conditionnelle ne transfère pas la propriété, tandis que la vente à terme la transfère. Tout dépendra donc de l'interprétation du contrat. Est il conditionnel, l'indemnité sera due, et l'acheteur ne peut la réclamer parce qu'il n'y a pas encore de vente.

Une promesse de vente contenant des conditions analogues à celle dont il s'agit a été reconnue comme légale.

Dans la cause de *Noel vs Laverdure* (3) il a été décidé que la condition dans une promesse de vente, même suivie de possession,—que telle promesse ne serait pas équivalante à la vente, était valable. Il y avait une convention spéciale à cet effet, afin d'éviter au cas de défaut de paiement du prix, la nécessité et les frais d'une vente par le shérif. La légitimité d'une pareille condition a été admise.

Dans le cas actuel, la condition changeant la promesse

(1) Vente, No. 480. (2) Vol. 24, No. 25.
(3) 4 Q. L. R. 247.

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de vente en un bail a aussi pour but d'éviter les frais de poursuite et d'expropriation. Il est plus facile et moins dispendieux d'expulser un locataire que de prendre une action en résolution de promesse de vente pour rentrer en possession de sa propriété. L'appelant avait intérêt à faire cette stipulation et il avait le droit de la faire.

Mais ici d'après la nature de la condition il ne peut pas y avoir nécessité de demander la résolution, car il n'a pas existé d'obligation, la condition y faisant obstacle. Voici ce que dit à ce sujet *Demolombe* (1) :

La condition vient-elle à manquer ?

Rien de plus simple.

Le contrat est à considérer de plein droit, *ab initio* comme s'il n'avait jamais existé.

Quod si sub conditione res venierit, del Paul, si quidem defecerit conditio, nulla est emptio, sicuti nec stipulatio. (*L.* 8 *ff. De Perii et comm. rei venditæ.*)

D'où nos anciens ont déduit cette maxime.

" *Actus conditionales, defectu conditione nihil est.*"

386. Le plus souvent quand la condition manque, tout est dit *de plein droit* comme nous venons de le remarquer, et il n'y a rien à faire de part ni d'autre. S'il était arrivé, par exception, que la chose qui faisait l'objet de l'obligation eût été livrée au créancier conditionnel, il serait tenu de la rendre avec tous ses accessoires, et même dans le cas, généralement aussi, avec les fruits qu'elle aurait produit ; car aucun contrat ne s'est formé, et il n'y a aucune cause d'où puisse résulter un appel juridique quelconque (*comp. infra,* Nos 409-410. *Toullier* t. III, No 548 ; *Zacharie, Aubry & Rau,* t. III, p. 51 ; *Bufnoir,* p. 315.

Aubry & Rau (2) disent :

La condition suspensive venant à défaillir, l'obigation et le droit qui y est corrélatif, sont *ipso facto,* à considérer comme n'ayant jamais existé. Ainsi, par exemple, l'acquéreur qui aurait été mis en possession de la chose par lui acquise sous condition, serait obligé de la restituer avec tous ces accessoires et avec les fruits qu'elle a produits.

Larombière, vol. 2, p. 118, Nos 1, 2 et 3, or art. 1176 & 1177, C. N. et p. 120, No. 6.

(1) Code Napoléon, No. 375. (2) Vol. 4, § 302, p. 75—sect. B.

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Laurent (1) dit:

Les parties, en traitant sous conditions, font dépendre l'obligation de l'accomplissement de la condition; donc si la condition défaillit, il n'y a pas d'obligation. D'ordinaire, les parties ne font aucun acte d'exécution tant que la condition est en suspens; dans ce cas le contrat n'a jamais produit d'effet, les parties sont censées n'avoir jamais traité. Si le créancier avait été mis en possession, il devrait restituer la chose avec tout ce qu'il en a perçu.

Les conditions imposées par l'appelant sont aussi conformes à l'article 1079 de notre code qui les permet en ces termes:

L'obligation est conditionnelle lorsqu'on la fait dépendre d'un évènement futur et incertain, soit en la suspendant jusqu'à ce que l'événement arrive, soit en la résiliant, selon que l'événement arrive ou n'arrive pas.

La condition stipulée par l'Appelant suspend l'exécution de la promesse jusqu'à ce qu'il y ait eu paiement; en conséquence, il ne peut pas y avoir résiliation parce qu'il n'y a pas eu d'obligation. C'est en considérant la condition dont il s'agit non comme suspensive, mais simplement comme résolutoire d'une obligation complète que la Cour du Banc de la Reine a cru devoir faire application, au cas actuel, des principes concernant la résolution des contrats en *France*, matière sur laquelle il existe une différence notable entre notre code et celui de *France*.

On peut encore citer comme s'appliquant également à l'effet de la condition suspensive, ce que *Laurent* (2) dit au sujet de la condition résolutoire expresse:

Ce qui la caractérise et la distingue de la condition résolutoire tacite dont nous parlerons plus loin, c'est qu'elle opère de plein droit. En effet, l'art. 1183 dit que la condition résolutoire expresse "opère la révocation de l'obligation." La loi n'ajoute pas que la révocation se fait de plein droit, mais c'est bien là le sens des expressions qu'elle emploie; c'est le seul accomplissement de la condition qui résout le contrat, il ne faut pas autre chose, *ni sommation, ni demande judiciaire*. La raison en est très simple: c'est que telle est la volonté

(1) No. 100, vol. 17, p. 121. (2) Vol. 17, No. 114.

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des parties contractantes formellement exprimée, et la volonté des parties fait bien loi (art. 1134). Voir aussi les Nos 115, 117, 118.

Je citerai encore du même auteur au sujet de la condition résolutoire son opinion sur l'effet de cette condition. Elle doit avoir d'autant plus d'importance dans son application à l'effet de la condition suspensive que l'auteur dit que la condition résolutoire implique une condition suspensive ; l'acheteur sous condition résolutoire, dit-il, est débiteur sous condition suspensive.

Au No. 129, même volume, *Laurent* dit encore :

Si la condition résolutoire stipulée par les parties opère de plein droit, c'est que telle est leur volonté, et leur volonté tient lieu de loi.

Après avoir donné les raisons pour lesquelles dans le cas de la condition résolutoire tacite, il n'en est pas de même, l'auteur continue au No. 130 les développements sur l'effet de la condition résolutoire expresse :

De là suit que dans le cas de résolution expresse, le juge régulièrement n'intervient point. C'est le contrat qui d'avance a prononcé la résolution si tel évènement arrive; dès l'instant où la condition s'accomplit, le contrat est résolu. Il n'y a rien à demander, *il n'y a donc pas d'action à intenter.* Quant il y a une contestation sur le point de savoir si réellement la condition s'est accomplie telle que les partie l'avaient stipulée, le débat doit naturellement être porté devant les tribunaux, mais la seule question que le juge aura à décider, c'est la question de fait. Ce n'est pas lui qui prononcera la résolution, il se bornera à déclarer que la condition étant accomplie, le contrat est résolu en vertu de la volonté des parties contractantes. Le juge n'aurait même pas besoin de faire cette déclaration, il suffit qu'il soit constaté que la condition s'est réalisée ; dès lors la volonté des parties reçoit son exécution et le contrat est résolu. A plus forte raison le juge ne peut-il pas décider que le contrat ne sera pas résolu quoique la condition résolutoire soit accomplie. Ce serait violer l'art. 1134, d'après lequel la convention tient lieu de loi, et cette loi oblige le juge aussi bien que les parties contractantes.

Au No. 151, le même auteur dit encore :

La condition résolutoire expresse ne donne pas lieu à une action en résolution, puisque le contrat est résolu de plein droit en vertu

du contrat même. Il peut seulement y avoir lieu entre les parties à des demandes en restitution.

D'après ces autorités il est clair que ni la mise en demeure ni l'action en résolution ne sont nécessaires pour faire produire à la condition résolutoire les conséquences dont les parties sont convenues. A plus forte raison en doit-il être de même dans le cas de la condition suspensive où il n'a pas existé d'obligation.

Ainsi que l'a observé l'hon. juge en chef *Dorion*, avant la publication de notre code civil les tribunaux ne donnait pas à ces conditions leur plein et entier effet. Ils avaient pour habitude de les modifier suivant certaines règles d'équité, dont ils faisaient application suivant les circonstances de la cause. Toutefois, même avant le code, la jurisprudence à cet égard avait été changée par un jugement du 30 septembre 1854, dans la cause de *Richard* vs. *La Fabrique de Notre-Dame de Québec*, (1) rendu par la Cour du Banc de la Reine, alors présidée par sir *L. N. Lafontaine*, Bart., juge en chef, et composée des juges *Panet*, *Aylwin*, et *C. Mondelet*; dans cette cause il fut décidé "que dans un bail d'un banc dans une église, par laquelle il est stipulé qu'à défaut de paiement du loyer aux termes et époques fixés, dès lors et à l'expiration des dits termes le dit bail sera et demeurera nul et résolu de plein droit, et que le bailleur rentrera en possession du dit banc, et pourra procéder à une nouvelle adjudication d'icelui, sans être tenu de donner aucun avis ou assignation au preneur, n'est pas une clause qui doit être réputée comminatoire, mais qui doit avoir son effet." D'après le rapport de cette cause, un des arguments, de l'honorable juge *Duval*, qui prit part au jugement, en première instance, est rapporté comme suit :

The rule, in relation to this matter, is that parties to contracts have a right to insert in such contracts all clauses or conditions

(1) 5 L. C. R. 3.

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which are not *contra bonos mores*, or against law. Such being the rule it is difficult to understand, as it has been pretended by the Plaintiff, why this covenant should not be enforced.

L'hon. juge *Meredith*, actuellement juge en chef de la Cour Supérieure de la province de *Québec*, après avoir cité les remarques de *Toullier* au sujet du refus des tribunaux de donner effet aux conditions résolutoires, dit :

This jurisprudence has been condemned as arbitrary and unjust by our most eminent jurists; and I have no hesitation in saying that I think it so.

Il cite à l'appui de son opinion un grand nombre d'autorités auxquelles je réfère.

Le principe sanctionné par ce jugement reçut l'approbation des codificateurs de notre code civil, comme on peut s'en convaincre par les remarques suivantes que l'on trouve dans leur premier rapport, p. 19, (1865).

Les inconvénients qui résultent de la règle qui regarde certaines clauses des contrats comme seulment comminatoires et conséquemment ne devant pas être exécutées, sont indubitables et se présentent chaque jour. Sous la jurisprudence qui s'était formée, les tribunaux modifiaient les stipulations des contrats, ou sans en tenir compte, substituaient, à la volonté écrite des parties, une équité douteuse pour ajuster leurs droits. Dans ce pays cette intervention n'a peut-être pas été poussée aussi loin, mais en principe elle est également sujette à objection, et quoique soutenue de l'autorité de *Dumoulin* et de *Pothier*, elle ne paraît pas devoir son origine au code Justinien, ni justifiée par aucune législation positive de la *France*. Les raisons données par les deux éminents jurisconsultes sont certainement peu satisfaisantes. *Toullier* qui discute la question au long, déclare que les tribunaux se sont arrogé ce pouvoir qui, par la suite, est passé en usage. Quoi qu'il en soit, il est certain que la doctrine de l'intervention judiciaire alors que le sens du contrat est clair, est désapprouvée par les juristes modernes. Deux des commissaires sont d'opinion de suggérer un changement de la loi en force par projet d'amendement soumis. De l'autre côté, M. le commissaire *Morin* croit plus sûr et plus équitable de s'en tenir à la règle en force. En conséquence le sujet est respectueusement soumis."

La législature a adopté la suggestion de la majorité des commissaires. Mais on fait observer que cet article n'est

pas indiqué dans le code comme établissant un droit nouveau. La raison en est claire, c'est que les codificateurs eux-mêmes n'ont considéré l'usage établi par les cours que comme un abus contre lequel ils se sont prononcés comme étant contraire à la loi. Ce qu'ils ont déclaré c'est que la loi prévaudrait contre l'usage des cours. Lorsqu'ils ont fait cette déclaration l'usage était déjà répudié par le jugement de la cour du Banc de la Reine. Il s'agit donc dans cette cause de consacrer un principe déjà admis.

On prétend aussi que la condition, soit suspensive soit résolutoire, ne peut produire son effet qu'après la mise en demeure. La réponse à cette objection est déjà donnée par l'autorité citée plus haut de *Laurent*. J'ajouterai celle de *Merlin* (1).

Suivant les principes du droit romain, dès qu'une obligation renferme un terme précis, on est obligé d'y satisfaire, sans qu'il soit besoin à ce sujet d'aucune sommation; mais dans nos usages, il en est autrement: un débiteur n'est exactement en retard ou en demeure de payer, de donner ou faire ce qu'il doit, que du jour qu'il a été judiciairement interpellé à cet effet, *à moins qu'il n'y ait à cet égard par la convention, une stipulation précise qu'une telle obligation se remplira dans un tel temps, auquel cas la stipulation faisant une partie essentielle de la convention, on ne peut y manquer sans encourir la peine attachée au retard que l'on met à l'exécuter.*

Il est évident qu'en pareil cas la mise en demeure résulte du caractère même de la stipulation,—ou que le débiteur y a renoncé en adoptant une condition qui la rend impossible. En effet, dans le cas actuel, *McLennan* avait délai jusqu'au 1er octobre pour faire le premier des sept paiements qui lui restaient à faire. En vertu de l'art. 1090 C. C., "ce qui n'est dû qu'à terme ne peut être exigé avant l'échéance." Donc, jusqu'au 1er octobre, l'Appellant n'avait rien à demander; mais le lendemain, la déchéance étant arrivée quelle mise en demeure pouvait-il faire? Demander paiement c'eût

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été renoncer au bénéfice de la déchéance. Lui demander de résilier la promesse de vente? Elle l'était par l'effet de la convention. Il n'y avait donc qu'à demander possession de la propriété, et, au cas de refus, la contestation, comme le dit *Laurent*, ne devait reposer que sur la question du fait de savoir si la condition a été accomplie ou non. La mise en demeure, dans ce cas, n'était pas nécessaire,—si elle l'était, elle a eu lieu en vertu de l'art. 1067. "Le débiteur, dit cet article, peut être constitué en demeure soit par les termes mêmes du contrat, lorsqu'il contient une stipulation que le seul écoulement du temps pour l'accomplir aura cet effet." C'est ce qui a été convenu entre les parties de la manière la plus claire et la plus positive. Cette mise en demeure est suffisante pour pouvoir exiger l'exécution du contrat. *Demolombe*, en parlant de la mise en demeure lorsqu'on veut exiger non pas l'exécution du contrat, mais des dommages et intérêts résultant de sa non-exécution, dit: (1)

D'autre part, si le débiteur doit être constitué en demeure, c'est parce que le silence du créancier peut l'autoriser à croire que celui-ci a consenti tacitement à lui accorder ce délai; telle est, avons-nous dit, la présomption du législateur.

La convention dont il s'agit repousse toute idée d'une présomption accordant un délai—puisqu'il est stipulé que l'obligation sera immédiatement anéantie et transformée en un bail."

Pour mieux établir la proposition que la mise en demeure n'est pas nécessaire dans le cas de stipulation expresse de résolution, je citerai encore un arrêt de la cour de Cassation que l'on trouve dans *Dalloz* (2).

Les art. 1184 et 1244 C. Nap., qui permettent aux tribunaux d'accorder un délai au débiteur contre lequel soit la résolution soit l'exécution d'un contrat sont demandées, ne sont point applicables au cas où il a été stipulé que la résolution du contrat aurait lieu de plein

(1) Vol. I, Des Contrats, p. 533.

(2) Dalloz, manuel de jurisprudence, Vo *Résolution*—1891.

droit dans les formes et après les délais convenus entre les parties. *De Paraza*, 254.

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D'après les autorités et les décisions ci-dessus citées, il résulte bien clairement que les motifs adoptés par l'honorable juge *Papineau* fondés sur le terme de paiement, la nécessité de la mise en demeure et de l'intervention des tribunaux ne sont pas fondés, et qu'une condition expresse de la nature de celle dont il s'agit doit avoir son effet de plein droit sans aucune mise en demeure et sans l'intervention des tribunaux.

Il a été soulevé et discuté plusieurs autres questions, mais étant d'avis que le défaut d'accomplissement des conditions expressément stipulées a eu pour effet d'anéantir la promesse de vente, il serait tout à fait inutile de les examiner. D'ailleurs, sur les questions incidentes, comme sur la question principale, je concours pleinement dans les raisons données dans son jugement sur cette cause par Sir *A. A. Dorion*, J.C. En conséquence, pour les raisons qu'il a si habilement développées et pour les motifs ci-dessus exposés, je suis d'opinion que l'appel devrait être alloué avec dépens.

HENRY, J.:—

The only difficulty that presented itself to my mind in the argument on this case was the objection presented as to *mis en demeure*. On looking at the authorities I have come to the conclusion that that proceeding was unnecessary. The parties themselves provided by their agreement, one to sell for a certain sum of money the land to the other, by paying so much down and the balance by instalments, and there was a provision in the agreement that if he did not meet these instalments, he should become the lessee of the party who sold the land, and, not only that, but he should forfeit the amount he had already paid. If the matter stopped there, possibly the party might find a necessity to resort

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to legal proceedings, but the plaintiff himself went to the *United States*, and I believe only lately returned. This agreement was entered into six or seven years ago. The father paid the money and was the real party to the transaction, but the contract was made out in the name of the son. The son being away, the father went into possession, and after being in possession and failing to make any payment he became the actual tenant of the party who sold the land, and, after remaining some time in possession, an action for ejectment was brought against him, and he was dispossessed. It appears to me all these proceedings, the agreement of the parties and all that was done afterwards, are sufficient to satisfy any reasonable mind that there was no necessity for taking any proceedings to put this party in default. The son went away and left the father in possession and never looked after the property since; the father enters into all these arrangements, and afterwards he becomes a tenant. Six or seven years afterwards the son says: "You did not put me *en demeure*, and therefore at the end of this time I will come and offer you the amount that was due and simple interest." It would be an act of injustice to require the party to take simple interest for his money and lose the opportunity of investing these amounts as they became due. I should say under the circumstances it was not even an equitable offer. I think if he came into any English court and claimed specific performance of the agreement, it would be a matter the court would take into consideration if they at all allowed him to set that as a case against the party. They would say to him: "No you have not paid this as you should have done by instalments, and if you ask us to enforce this agreement, we will enforce the adoption of equitable principles, and not only payment of simple interest but interest on each instalment as it fell due." Under the

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circumstances I do not see any equity in favour of the respondent in this case; the equities are all in favour of the appellant, and besides that, this was simply a conditional sale, a sale to be fully effected only on the full payment of all the instalments. The party having allowed himself to be put out of possession, I do not think he has a right to come in at this time and ask the other party to give him a specific performance of the contract.

TASCHEREAU, J.:

I am of opinion to dismiss this appeal for the reasons contained in the *considerants* of the judgment of the Superior Court, whose judgment was confirmed by the Court of Appeal, upon these same reasons, I presume, as we have no notes (in the case) from the learned judges of that court who formed the majority.

That there was a sale by *Grange* to *McLennan* can admit of no doubt. There was *res*, *pretium*, and *consensus*. There was the translation of the actual possession, and such a complete transfer to *McLennan* of a full title and of all rights to that property that *McLennan* gave upon it, and *Grange* accepted, a mortgage for the security of the balance due on the price of sale.

This sale was unaccompanied with a clause *resolutoire* —in default of payment at the dates agreed upon—not at all in default of ratification by *McLennan*, when he would become of age, as has been said. This would, however, be immaterial, as *McLennan* did in fact ratify the said purchase by his continuing to keep the property sold to him, when, a few weeks after this deed, he became of age, and as fully as possible, though impliedly only.

Sir *A. A. Dorion*, the learned Chief Justice of the Court of Queen's Bench, who dissented from the judgment says:

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The parties have in effect declared that until the respondent should pay the $700 remaining on the stipulated price of sale, he should be the tenant of the appellant, and the $500 paid should be taken in payment of the rent, and that if the balance of $700 and interest was regularly paid as the several instalments became due, the respondent should then be entitled to claim a deed of sale of the property leased.

With greatest deference for the learned Chief Justice, whose opinions have always such weight, I think that this is a mis-interpretation of the contract between the parties. How can it be said that they in effect declared that *McLennan* would be only a tenant until he paid the balance of the stipulated price of sale, when by the very deed *McLennan* gives and *Grange* accepts a mortgage on that property for that balance of the price of sale? *Grange* evidently could not take a mortgage on the property if the title of that property had continued to be vested in him, and the fact that he accepts a mortgage from *McLennan* upon that same property is to me the most complete evidence that he, then and there, divested himself in favour of *McLennan* of the title to it.

Then, as to that clause stipulating forfeiture of the payments made and a lease, in default of the payments to be made. For how long was that lease to be? There is nothing in the deed about it. Could *Grange* have taken advantage of this to eject *McLennan* from the ground, when he failed to make the first payment—not a year after the deed—and yet keep the $500 paid, thus getting a yearly rent of $500 for a property he sold for $1,200. I believe not; yet this is what he really contends for.

Then, suppose *McLennan* had paid $1,100, that is to say, all the instalments up to the last, but had failed to make this last one, can *Grange* contend that he could have kept these $1,100, and yet consider *McLennan* as his tenant, and eject him at his, *Grange's*, will, as no

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length for the lease is fixed? Keep both the $1100 and the land? I say, undoubtedly, no. Yet, that is what his propositions would inevitably lead to.

This deed is, as I have said, nothing else but a deed of sale with a clause *resolutoire* in default of payment. And, it being so, an action was necessary to have the dissolution of the said deed declared. The code has made no changes in the old law on this point, arts. 1536, 1537, 1538, 1550. It has, as new law, decreed that a special stipulation as to dissolution for non-payment is necessary; it has made changes as to prescription of action in such cases. It has also decreed, as new law, that the stipulation is not to be considered as commina-tory, but that the judgment of dissolution is pronounced at once, adding that: "Nevertheless the buyer "may pay the price with interest and costs at any time "before the rendering of the judgment." Meaning clearly that though the dissolution had been stipulated, though the date fixed for the payment has lapsed, though the vendee had not paid, though even the vendor has taken an action to have the sale dissolved, yet the vendee at any time, before judgment on the action, can go up to the vendor and force him to accept the price of sale, and so relieve himself from the stipulated consequences of his default.

And adds art. 1550 (as new law), "If the seller fail to bring a suit for the enforcement of his right of dissolution within the stipulated term, the buyer remains absolute owner of the thing sold" (1). So that here, by an express provision of the code, *Grange* having failed to bring a suit for the dissolution of the sale, *McLennan* remained so far absolute owner of the property sold.

But, says the appellant, by the very terms of the deed no summons of any kind was necessary, and

(1) See Codifiers's Report, vol. 2, pp. 16, 17, 18, 55, 56.

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McLennan was *en demeure* by the very terms of the Act: Art. 1067 C. C.

This cannot help the appellant. The price here was *grévable and non portable*, that is to say, payable at *McLennan's* domicile, art. 1152 C. C., (and at date of first payment, he was in the country.)

> Or, dans ce dernier cas, (says *Demolombe*) (1), il ne suffit pas pour que le débiteur soit constitué en demeure qu'il existe contre lui une des trois causes, desquelles nous venons de dire que la mise en demeure peut résulter: soit un texte de la loi, soit une clause de la convention, soit une sommation. Il faut un autre que le créancier constate, par une sommation, ou autre acte équivalent, qu'il s'est présenté au domicile du débiteur. La convention porte, par exemple, que le débiteur sera, de plein droit, constitué en demeure par la seule échéance du terme, et sans qu'il ait besoin de sommation. Eh bien! le débiteur ne sera en demeure, par la seule échéance du terme, dès que la dette était grévable.

And all the authors agree on this.

So that, even taking the appellant's own interpretation of this deed as to this, the respondent was never legally put *en demeure* to pay the amount of his purchase. Of course, that the payment of it is a condition precedent to his getting a full deed, he does not deny. He has offered the full amount before instituting his action, and even before it was all due, and has deposited it in court. If the appellant had taken an action to have this sale dissolved, the respondent would clearly, according to the code, have been in time, at any period of the case before judgment, to pay the price of sale and prevent the dissolution. Because he paid before the appellant instituted any action at all, the appellant would have us declare that he is too late. With the two courts below, I cannot reach that conclusion.

Then art. 1184 of the code *Napoleon*, expressly enacts that the party who has to complain of the default by the other party to fulfil his engagements has the

(1) 1er des Contrats, page 341.

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choice either to demand a specific performance of the obligation, if possible, or that the contract be dissolved; but that the dissolution must be asked by an action in justice. That is what art. 1065 of our code expressly (except as to the last part) says, and the Codifiers say (1), that they have not expressly re-enacted this art. 1184 of the code *Napoleon* because its enactments, so far as consistent with other articles of our code, are contained in this art. 1065, of our own code.

And though, under art. 1088, with us, as in *France* under art. 1183, a resolutive condition effects of right, when accomplished, the dissolution of the contract, yet, when this condition depends on the act of one of the parties,

On ne peut exercer le droit résultant de la condition, qu'en le faisant ordonner par le juge, parce qu'alors elle tient de la clause pénale.

La résolution, ni la peine, ne sont acquises de plein droit: elles doivent être prononcées en justice, encore que le contraire soit stipulé au contrat (2).

These authorities, and the general principle of our law, demonstrate that an action in justice is necessary to ask the dissolution. If not taken, the creditor is supposed to have waived his right to ask it, and to have granted delay to his debtor for the payments due. Arts. 1537 and 1538 of our code I have already referred to, make this as plain as possible as to sale. See also *Delvincourt* (3) and authorities cited in Code Civil annoté par *Lahaye* (4).

It is clear that this right to ask the dissolution of the sale for non-payment, is a right given to the vendor and not to the vendee, who, according to all authority, would be estopped from invoking his non-execution of this contract to ask the rescision

(1) See report 1st vol. p. 20.

(2) *Lahaye* Code Civil Annoté arts. 1183, 1184.

(3) Vol. 2, Note 6, page 17.

(4) Under arts. 1654 and 1654 C. N.

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of it. The vendor has an action for the price of sale, though the contract stipulated that the sale would be rescinded by non-payment on the part of the vendee (1). Here the appellant was bound to notify *McLennan* by some act that he intended to avail himself of his right to have this sale rescinded, and to hold him, *McLennan*, as his tenant only. The appellant had to make or declare his option to ask the dissolution, if he intended to avail himself of his privilege. The lease provided for in the deed never began, never was in existence. If the appellant had sued the respondent for the price of sale, this one could never have contended that the contract had *ipso jure* lapsed, that he was only a tenant, and on these grounds have refused to pay the price of sale.

As to moveables, the code has thought it better that the dissolution of the sale for non-payment should take place without the necessity of a suit, but it has declared so, in express terms, by art. 1544, so giving it here again clearly to be understood that for immoveables, a suit is necessary.

In fact, the law, under art. 1536, 1537, 1538 and 1550, is now clearly that "No sale of immoveables shall be rescinded for default of payment of price, unless there is an express clause to that effect, and not then, until judgment of rescision is pronounced, and the judgment may be prevented if the buyer pays the price, with interest and costs, after action is commenced, at any time before judgment." This being so, *McLennan* having duly offered the price of sale to *Grange*, even before an action of dissolution, he surely must have been in time to do it, since he would have been in time after an action had been brought.

For these reasons, I am of opinion that the judgment of the two courts below maintaining the plaintiff's

(1) Art, 1542 C. C.

action is right, and that this appeal should be dismissed with costs.

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GWYNNE, J.:

I find it difficult to put upon an instrument, so inartistically and equivocally expressed as that upon which this case turns, a construction which can be said to be clearly free from doubt. I think, however, it does appear to have been a very prominent, and, indeed, the most prominent, feature in the intention of the parties to the instrument, that in case of default in payment of any of the instalments of the purchase money agreed upon, the instrument should operate only as a lease, and that the payments already made should, in such case, be treated as paid on account of rent. Now, this important feature in the intention of the parties would be wholly frustrated, if by reason of the clause which speaks of the vendor having an hypothec on the property for the purchase money the instrument should be construed as a completed sale. The construction therefore which has been put upon the instrument by the learned Chief Justice of the Court of Queen's Bench in *Montreal*, in appeal, appears to my mind to be most in accordance with what was the real intention of the parties to the instrument, and effect, I think, should be given to such intention, although not very felicitously expressed by the notary who prepared the deed. I am of opinion, therefore, that the appeal should be allowed.

Appeal allowed with costs.

Solicitors for appellant: *Doutre, Joseph & Dandurand.*

Solicitors for respondent: *Davidson & Cross.*

1882
*Nov. 10.
1883
*April 19.

WILLIAM HARRINGTON, *et al.*, (DEFENDANTS *en garantie* IN THE SUPERIOR COURT) ..... APPELLANTS;

AND

NORTON B. CORSE, *es-qualite*, (PLAINTIFF *en garantie* IN THE SUPERIOR COURT) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA (APPEAL SIDE).

Will, Construction of—Art. 889, *Civil Code—Liability of universal legatee for hypothec on immoveables bequeathed to a particular legatee.*

On the 30th April, 1869, *H. S.* being indebted to *J. P.* in the sum of $3,000, granted a hypothec on certain real estate which he owned in the city of *Montreal*. On 28th June, 1870, *H. S.* made his will, in which the following clause is to be found: "That all my just debts, funeral and testamentary expenses be paid by my executors hereinafter named as soon as possible after my death." By another clause he left to *W. H.* in usufruct, and to his children in property, the said immoveables which had been hypothecated to secure the said debt of $3,000. In 1879 *H. S.* died, and a suit was brought against the representative of his estate to recover this sum of $3,000 and interest.

Held,—(Reversing the judgment of the Court of Queen's Bench, *Strong*, J., dissenting.): That the direction by the testator to pay all his debts included the debt of $3,000 secured by the hypothec.

Per *Fournier*, *Taschereau* and *Gwynne*, JJ.: When a testator does not expressly direct a particular legatee to discharge a hypothec on an immoveable devised to him, art. 889 of the C. C. does not bear the interpretation that such particular legatee is liable for the payment of such hypothecary debt without recourse against the heir or universal legatee.

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

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APPEAL from a judgment of the Court of Queen's Bench for *Lower Canada* (appeal side) confirming the judgment of the Superior Court (*Montreal*) (1).

An action was brought by *Kate Ann Parkin* against the respondent *N. B. Corse*, as sole surviving executor of the last will and testament of the late *Hiram Seymour*, for the recovery of $3,150 and interest due under an obligation of date the 30th April, 1869, given by the late *Hiram Seymour* to the executors of the late *James Parkin*, and transferred to the plaintiff *Kate Ann Parkin*, by which the house and premises, No. 9 *Beaver Hall*, were specially hypothecated, the said obligation being duly registered. The respondent thereupon called *en garantie* the now appellants, special legatees under the last will and testament of *Hiram Seymour*, requesting them to discharge the debt, alleging that the universal legatees under *Hiram Seymour's* will had notified him not to pay the debt, but to claim it from the special legatees. The appellants refused to take up the *fait et cause.* of *Corse* and pleaded to this action *en garantie.* The following question of law was submitted to the court, viz:—

Does the special legatee of an immoveable property, hypothecated by the testator for a debt of his own due at the time of his death, take the property subject to the hypothec upon it, or is the universal legatee, or legatee by general title, bound to discharge the hypothec that is, to pay the debt, when not obliged to do so by the will?

The chief point submitted to the court turned upon the interpretation of articles 735, 740, 741 and 889 of the civil code *Lower Canada.*

These articles are as follows:—

Art. 735. An heir who comes alone to the succession is bound to discharge all the debts and liabilities. The same rule applies to

(1) 26 L. C. Jur. 79.

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a universal legatee. A legatee by general title is held to contribute in proportion to his share in the succession. A particular legatee is bound only in case of the insufficiency of the other property, and is also subject to hypothecary claims against the property bequeathed, saving his recourse against those who are held personally.

Art. 740. An heir or universal legatee, or a legatee under general title, who, not being personally bound, pays the hypothecary debts charged upon the immoveable included in his share, becomes subrogated in all the rights of the creditor against the other co-heirs or co-legatees for their share.

Art. 741. A particular legatee who pays an hypothecary debt for which he is not liable, in order to free the immoveable bequeathed to him, has his recourse against those who take the succession, each for his share, with subrogation in the same manner as any other person acquiring under particular title.

[Art. 889. If before or since the will, the immoveable bequeathed have been hypothecated for a debt of the testator remaining still due, or even for the debt of a third person, whether it was known or not to the testator, the heir, or the universal legatee, or the legatee by general title, is not bound to discharge the hypothec, unless he is obliged to do so by the will.]

A usufruct established upon the thing bequeathed is also borne without recourse by the particular legatee. The same rule applies to servitudes.

If, however, the hypothecary debt of a third person, of which the testator was ignorant, affect at the same time the particular legacy and the property remaining in the succession, the benefit of division may reciprocally be claimed.

Mr. *Doutre*, Q. C., for appellants; and Mr. *Strachan Bethune*, Q. C., and Mr. *Robertson*, Q. C., for respondent. The arguments of counsel and authorities relied on are fully noticed in the judgments of the Court of Queen's Bench, reported in 26 L. C. Jurist, p. 79, and in the judgments hereinafter given.

RITCHIE, C.J.:

The clauses in the will and codicils relied on are the following:

Thirdly.—That all my just debts, funeral and testamentary ex-

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penses be paid by my executors hereinafter named, as soon as possible after my death.

Now therefore I give, devise and bequeath to the said *Wm. Harrington* during the time of his natural life, the use, usufruct and enjoyment of my house No. 19, *Beaver Hall Terrace, Montreal,* aforesaid, with the lot of ground on which the same is built as aforesaid, the whole as described in the said will, and after the death of the said *Wm. Harrington,* I give, devise and bequeath the same *en pleine propriété* to the four children issue of his marriage with my said late daughter *Laura,* and to the survivors of them in equal proportions, share and share alike.

And by the said codicil the said testator ratified and confirmed said last will.

By article 919 "The Testamentary Executor pays the debts and discharges the particular legacies with the consent of the heir, or of the legatee who receives the succession, or, after calling in such heir or legatee, with the authorization of the court." This article and article 889, read in connection with the evidence in this case, leaves in my mind no difficulty in satisfactorily determining this case without discussing the other question raised.

This places the office and duty of executors on a very different footing from that of an executor under the English law, where the absolute duty is cast on the executor of paying the debts of the deceased without any consent or authorization, and therefore while it may be said, under the English law, that a clause directing the executor to pay the debts of the testator is a mere formal one, adding nothing to the position or legal obligations of the executor, it is, under article 919 C. C., clearly defined and affects the position and duty of the executor and imposes on him others than that obligatory by the law without such a provision, viz., absolutely to pay the debts without either consent or authorization, and that the testator intended that this was to be an absolute duty obligatory on the

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defendant sufficiently to relieve the immoveable bequeathed from the hypothecary debt appears from the clause read in connection with the other provisions of the will which, to my mind, very clearly indicates that such bequest was free from such hypothecary claim. The will shows, in no uncertain manner, in my opinion, that the daughter was to be on a par with her sisters, which could not be if this hypothecary debt wiped away the bequest to her.

Therefore there is a clear indication on the face of the will, as well as in the express words of the code, that he intended to oblige his executor to pay all his debts, including the hypothec in question, and the appeal should be allowed.

STRONG, J: was opinion that the appeal should be dismissed for the reasons given by the majority the Court of Queen's Bench.

FOURNIER, J.:—

La première question soulevée en cette cause est de savoir lequel, du légataire universel, ou du légataire particulier, doit, depuis l'adoption de l'article 889, C. C., acquitter une dette en paiement de laquelle le testateur a hypothéqué un immeuble compris dans un legs particulier. 2o. D'après les dispositions du testament dont il s'agit en cette cause, y a-t-il lieu de faire application au cas actuel de l'article 889?

Avant la promulgation du Code Civil cette question ne pouvait souffrir de difficulté. Il est indubitable que dans l'ancien droit français c'était à l'héritier ou légataire universel à acquitter l'hypothèque grevant une propriété comprise dans un legs particulier. Les codificateurs chargés de déclarer quel était l'ancien

droit à ce sujet ont formellement exprimé leur opinion comme suit (1):

If a thing bequeathed by a particular title be pledged or hypothecated for a debt due by the testator, or for any other debt, which, either before or after his will, be known to affect the particular legacy, the heir, or the universal legatee by general title, is bound to free it from such debt.

L'article 889 a-t-il changé l'ancien droit sous ce rapport et imposé au légataire particulier au lieu de l'héritier ou légataire universel, l'obligation de payer cette hypothèque? La Cour Supérieure, siégeant à Montréal, dont le jugement a été confirmé par une majorité de la Cour du Banc de la Reine, a décidé cette question dans l'affirmative.

L'article 889 est ainsi conçu:

Si, avant le testament, ou depuis, l'immeuble légué a été hypothéqué pour une dette restée due, ou même s'il se trouve hypothéqué pour la dette d'un tiers, connu ou non du testateur, l'héritier ou le légataire universel, ou à titre universel, n'est pas *tenu de l'hypothèque*, à moins qu'il n'en soit chargé en vertu du testament.

L'usufruit constitué sur la chose léguée est aussi supporté sans recours par le légataire particulier. Il en est de même des servitudes.

Si, cependant, l'hypothèque pour une dette étrangère, inconnue au testateur, affecte en même temps le legs particulier et les biens demeurés dans la succession, rien n'empêche que le bénéfice de division ait lieu réciproquement.

Dans le cas particulier dont il s'agit il était à peine nécessaire d'entrer dans l'examen de la première question, mais puisqu'elle a été soulevée, il vaut mieux dans l'intérêt public qu'elle soit décidée de suite. Après avoir non-seulement lu, mais étudié attentivement, les savantes dissertations des honorables juges de la Cour du Banc de la Reine sur ce sujet, je me suis convaincu que les raisons données par les honorables juges *Tessier* et *Cross* devaient l'emporter sur celles de leurs collègues, et je pense, comme eux, que l'article 889 n'a

(1) No. 140, p. 363, Nos. 4 et 5 des Donations testamentaires.

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pas changé l'ancien droit à cet égard. C'est encore, suivant moi, à l'héritier ou au légataire universel à acquitter l'hypothèque grevant une propriété comprise dans un legs particulier.

Le testateur a, en outre, lui-même décidé cette question par les dispositions de son testament.

Par l'article 3 de son testament il ordonne en ces termes le paiement de ses dettes:

That *all* my just debts, funeral and testamentary expenses be paid by my executors hereinafter named, as soon as possible after my death.

Mais, objecte-t-on, cette clause est insuffisante pour décharger le légataire particulier de l'obligation d'acquitter l'hypothèque. Les exécuteurs testamentaires étant déjà obligés par la loi de payer les dettes du testateur (art. 919), cette clause est de style et n'ajoute rien aux obligations légales de l'exécuteur, et elle n'est pas une preuve que le testateur avait l'intention de faire payer par les légataires universels une dette hypothécaire payable par le légataire particulier. Je ne puis adopter cette manière de voir.

La comparaison de la disposition testamentaire au sujet du paiement des dettes avec l'article 919, semble conduire à une conclusion tout-à-fait contraire. Les pouvoirs de l'exécuteur testamentaire au sujet du paiement des dettes sont très restreints d'après cet article. Ils ne le sont aucunement d'après le testament qui fait l'objet de notre examen. En effet l'article 919 dit:

Il (l'exécuteur) paie les dettes et acquitte les legs particuliers, du consentement de l'héritier ou du légataire qui recueillent la succession, ou iceux appelés, avec l'autorisation du tribunal.

Voilà bien des formalités auxquelles la loi assujétit l'exécuteur testamentaire dont les fonctions n'ont pas été modifiées par une extention de pouvoir qu'il est loisible au testateur de faire suivant l'article 921.

L'exécuteur testamentaire ordinaire ne peut donc,

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suivant l'article 919, payer ni une dette ni un legs sans avoir obtenu le consentement de l'héritier ou légataire universel ; s'il ne fait pas les démarches nécessaires pour obtenir le consentement il est alors obligé de lui faire des sommations pour les appeler au paiement ou du moins leur en donner un avis préalable. A défaut de ces procédés il doit recourir à l'autorisation judiciaire. Dans le cas actuel l'exécuteur est en vertu de l'article 3 du testament dispensé de recourir à toutes ces formalités. Il a un pouvoir général et absolu de payer les dettes et les legs sans recourir à toutes ces formalités. Si l'intention du testateur eût été de laisser ses exécuteurs soumis aux restrictions légales, il se serait contenté de les nommer sans définir leurs obligations. Mais il est évident qu'il a voulu exercer le privilège que donne l'article 921 de " restreinde ou étendre les pouvoirs, les obligations et la saisine de l'exécuteur testamentaire, et la durée de sa charge."

Lorsque l'on compare l'article 3 du testament avec la clause contenant la nomination des exécuteurs, il ne peut plus y avoir de doute sur la signification à donner à l'obligation imposée dans ce cas de payer toutes les dettes. Le testateur se dessaisit entre leurs mains de tous ses biens, tant mobiliers qu'immobiliers. Il prolonge l'exercice de leurs pouvoirs au delà de la durée légale. Il leur donne le pouvoir de vendre tous ses biens immobiliers, non légués, à tels prix et conditions qu'ils croiront avantageux, et enfin le pouvoir d'administrer tous ses biens comme s'ils leur appartenaient à eux-mêmes. Il n'était guère possible de donner à des exécuteurs testamentaires des pouvoirs plus étendus que ne le comporte cette clause. Ils avaient non-seulement le devoir de payer *toutes* les dettes, mais ils avaient également le pouvoir de vendre toutes les propriétés. N'est-il pas évident, en prenant ensemble les deux clauses du testament, que le testateur a soustrait l'exé-

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cution de ses dernières volontés à l'opération de la loi. Il a profité des pouvoirs que lui donnait l'article 921 pour faire sa propre loi aux exécuteurs testamentaires. Dans l'exécution des devoirs qu'il leur a tracés, il ne leur a fait d'autre loi que ses volontés, manifestées par le testament, et il ne les a soumis, en outre, à d'autres règles que celles que leur dicteraient leur conscience, leur prudence et leur bon jugement, comme hommes d'affaires.

L'effet de telles dispositions était évidemment de mettre de côté l'article 889, tout aussi bien que les autres articles concernant le paiement des dettes, la saisine des immeubles, la durée de l'exécution testamentaire.

L'obligation de payer *toutes les dettes* résultant inévitablement du testament, peut-on distinguer entre les dettes celles qui sont garanties par hypothèques de celles qui ne le sont pas, lorsque le testateur n'a pas distingué ? A moins que la loi n'ait fait à ce sujet une distinction qui s'impose, on ne peut pas non plus faire cette distinction sans enfreindre la volonté du testateur et sans faire pour lui une distinction qu'il n'a certainement pas voulu faire.

Mais la loi fait-elle une distinction entre une dette garantie par hypothèque et celle qui ne l'est pas. La première est-elle d'une nature différente de la seconde, forme-t-elle une classe distincte soumise à des principes différents ? La loi ne fait aucune différence à cet égard. Une hypothèque ne peut pas exister par elle-même et indépendamment d'une dette dont elle est l'accessoire. Elle n'est (l'hypothèque) dit le code, art. 2017, qu'un accessoire et ne vaut qu'autant que la créance ou obligation qu'elle assure subsiste. Il faut inévitablement en conclure qu'en disant à ses exécuteurs testamentaires de payer toutes ses dettes, le

testateur dans le cas présent a compris également celles qui étaient garanties par hypothèques.

En venir à une autre conclusion serait dans le cas actuel contrevenir aux intentions du testateur; ce serait déranger la distribution équitable et, autant que les circonstances le lui ont permis, égale de ses biens entre ses enfants. Le testateur avait trois filles et deux garçons. Parmi les biens de sa succession se trouvent trois maisons situées au *Beaver Hall Hill, Montréal*, étant les Nos. 19, 21, 23. Il donne à sa fille *Maria Eliza Seymour* veuve de *Jean Bruneau*, en usufruit, la maison No. 21, et la propriété à ses enfants pour être partagée par égales proportions. Le No. 23 est légué en usufruit à son fils *C. E. Seymour* et à sa femme, et après leur décès en pleine propriété à leurs enfants. A *Laura Seymour*, épouse, depuis décédée, de l'appelant, il lègue la propriété du No. 19 pour en disposer comme bon lui semble.

A dame *Charlotte Seymour*, épouse de *B. J. Heinsley*, il lègue $4,000, avec cette déclaration :—

This bequest I desire my daughter to regard as an expression of love and esteem, she being by God's blessing amply provided for. I have therefore not placed her on a par with my other daughters in this my will, who are more in need of it.

Son fils, *Melancthon H. Seymour*, ayant eu par anticipation tout ce qu'il aurait eu droit d'avoir dans sa succession, il lui fait en outre remise de tout ce qu'il peut lui devoir.

Il donne encore à ses deux filles, *Maria Eliza*, veuve *Bruneau*, et *Laura*, épouse de *Harington*, $3,000 chacune, payables après la mort de leur mère.

Il y a un legs en faveur de cette dernière de tous les biens mobiliers contenus dans la maison No. 23.

Enfin, il veut qu'après la mort de son épouse et l'exécution de ses divers legs dûment faite (*and after the foregoing bequests duly made*), que le résidu de sa suc-

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cession, quel qu'en soit le montant, soit également divisé entre ses trois filles, ci-dessus nommées, par parts égales (*share and share alike*), les instituant ses légataires résiduaires.

Il termine son testament par la clause citée plus haut définissant les pouvoirs des exécuteurs testamentaires.

Ce testament ne démontre-t-il pas clairement que l'intention du testateur était de regler lui-même sa succession et de n'en rien laisser à l'opération de la loi? Ne fait-il pas voir en même temps à l'évidence qu'il voulait autant que possible conserver l'égalité entre ses enfants, surtout entre ses filles, en donnant la raison pour laquelle il ne place pas Madame *Heiusley* sur un pied d'égalité (*on a par*) avec ses deux autres filles. Il donne encore à chacune de ces prenières une somme de $3,000, et, enfin, les institue toutes trois par parts égales légataires résiduaires. On voit aussi qu'il voulait mettre ses deux fils sur un pied d'égalité par la déclaration qu'il fait, que son fils, *M. H. Seymour*, ayant déjà reçu sa part, il lui fait remise de ce qu'il peut encore lui devoir. Peut-on croire après toutes ces déclarations, et surtout après l'injonction formelle de payer *toutes* ses dettes, que le testateur avait en vue de déranger le partage si bien ajusté de sa succession en laissant porter à l'un des légataires seul la charge d'acquitter l'obligation de $3,000, effectant une des propriétés léguées. Il n'y a certainement pas songé un instant. Mais on peut dire qu'il avait pu avoir l'idée de la difficulté si ingénieusement soulevée ici, difficulté que ne soupçonnait certainement alors ni les testateurs ni les notaires. On pourrait dire encore qu'il a pris les moyens nécessaires de la trancher en ordonnant le paiement de toutes ses dettes comme première disposition de sa succession. En se mettant au point de vue du testateur on comprend mieux toute la portée de cette déclaration.

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La mort de sa femme et celle de *Laura*, Madame *Harrington*, ont forcé le testateur de modifier son testament par deux codicilles. Les dispositions de ces codicilles n'affectent aucunement la signification que doit avoir dans le testament l'injonction de payer toutes les dettes. Par le premier de ces codicilles il institue, en conséquence du décès de sa femme, ses deux fils légataires résiduaires conjointement avec ses trois filles. Ainsi il y a maintenant cinq légataires résiduaires au lieu de trois. Par le deuxième, en conséquence de la mort de Madame *Harrington*, légataire en pleine propriété de la maison No. 19, il institue *Harrington*, mari de cette dernière, légataire en usufruit et leurs quatre enfants légataires en pleine propriété. Ce codicille semble n'avoir pas eu d'autre objet que d'étendre la libéralité du testateur jusqu'à l'appelant, qui par le prédécès de son épouse se trouvait à ne recevoir aucun avantage personnel dans la succession du testateur. L'idée de réparer cette omission semble avoir été l'unique préoccupation du testateur. Pensait-il par hasard que le legs de $3,000 et la part attribuée dans le résidu de la succession à Madame *Harrington* passeraient aux enfants de cette dernière? Malheureusement il n'en peut être ainsi. Ces legs sont devenus caducs par le prédécès de leur mère. Il ne reste à ces petits-enfants du testateur que la propriété de la maison No. 19.

Qu'arrivera-t-il si la prétention de faire porter aux légataires particuliers la charge de payer seuls l'hypothèque affectant la maison No. 19 qui leur est léguée, est maintenue? Privés sans doute par pure inadvertance des deux autres legs faits à leur mère, ils se verraient encore enlever la meilleure partie de leur legs s'ils étaient condamnés à payer l'hypothèque de $3,000 affectant la maison qui leur est léguée. En recherchant dans les dispositions du testament quelle a été l'intention du testateur est-il possible d'en arriver à une

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conclusion semblable? Rien ne me paraît avoir été plus loin de l'intention du testateur dont les dispositions repoussent toute idée d'un pareil résultat.

Bien plus, les légataires universels dans ce cas n'étant légataires que du résidu de la succession aux conditions formellement imposées par le testateur aux exécuteurs testamentaires, savoir: 1° paiement de toutes les dettes, 2° exécution de tous les legs particuliers, ne faut-il pas avant que l'on puisse constater un résidu, faire défalcation de toutes les dettes et de tous les legs particuliers.

Si les exécuteurs testamentaires saisis de tous les biens veulent exécuter leur mandat (*trust*) c'est l'opération qu'ils sont obligés de faire avant de remettre aux légataires universels le résidu des biens. Ceci est d'autant plus évident que le testateur en ne dépassant son actif, assurait à son point de vue l'exécution de toutes ses libéralités.

Il me paraît, en conséquence, clair que la nature du testament dont il s'agit rend impossible l'application au cas actuel de l'article 889.

Il me semble que cette question ne pourrait guère être soulevée que dans un cas où le testateur n'ayant fait aucune disposition quant au paiement de ses dettes, c'est alors à la loi à régler ce qui ne l'a pas été par le testament. J'ai donné à cette importante question si habilement traitée de part et d'autre dans les savantes dissertations des honorables juges qui ont été appelés à exprimer leurs opinions, toute l'attention qu'elle mérite; cependant je n'ai arriver à la même conclusion que ces Honorables juges sur l'interprétation à donner à l'art. 889, et je suis d'opinion que celle qu'ils ont adoptée ne devrait pas prévaloir.

Je me permettrai d'ajouter que l'interprétation de l'art. 889 adoptée par la majorité de la Cour du Banc de la Reine ne peut manquer d'entraîner des conséquences de

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la plus haute gravité. Cette question, soulevée en cette cause pour la première fois, n'a jamais attiré, que je sache, l'attention des testateurs ni des notaires. Si cette interprétation devait prévaloir que d'arrangements de famille, faits depuis la publication du code civil, vont être troublés. N'y aurait-il pas lieu dans ce cas à l'intervention de la législature pour donner à l'interprétation qui paraîtra la plus en harmonie avec l'esprit du code civil, la sanction législative?

HENRY, J. :—

I think the intention of the testator is very clear to divide his property among his daughters, and I think the direction to the executor was merely intended to take away the right of the party in whose favour the bequest was made to call upon the heir at law to pay off the hypothec. The effect of the law in the Province of *Quebec* is a little different from what it would be in other provinces. The executors in the other provinces and in *England* are called upon to pay the debts, while in *Quebec* they have nothing to do with the debts unless the testator calls upon them to do so. In this will there is a clear direction to pay all the debts, and it includes this hypothecary debt as well as the other debts. I think, therefore, the appeal should be allowed.

TASCHEREAU, J. :—

On both of the points urged by the appellant, I am of opinion to allow this appeal.

In addition to the cogent reasoning of *Tessier* and *Cross*, JJ., in the Court of Queen's Bench, in support of the view that art. 889 of the code does not make a particular legatee liable, without recourse, for the debt of the testator hypothecated upon the immoveable bequeathed to him, I remark that the said article of the civil code relates only to immoveables; and this not in-

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advertently, since art. 140 of the report of the codifiers, which it purports to amend, gives the law both as to pledge of moveables and as to hypothec of immoveables, so that clearly as to moveables, the rule is still that a debt of the testator is not payable by the particular legatee. If, for instance, he leaves to his particular legatee a watch which, at his death, is pledged for a certain debt, this debt has to be paid by the heir or universal legatee. Have the codifiers intended that a different rule should prevail as to immoveables ? Up to the code, moveables and immoveables have certainly always been on the same footing in this respect, and there were no reasons that I can see for creating a difference between them. I entirely concur in the reasoning of *Tessier* and *Cross*, JJ., in the Court of Appeal, and hold with them that this article does not bear the interpretation that the particular legatee is liable for the payment of the debts hypothecated on the immoveable left to him, without recourse against the heir or universal legatee.

On the other point, I am also with the appellant.

I am of opinion that if, as held by the courts below, the law was now that, unless otherwise ordered by the testator, the particular legatee is liable for the debt hypothecated on the immoveable bequeathed to him, the respondent here would even then not be liable for the debt in question in this cause, because *Seymour*, the testator, has ordered the contrary. The clause of his will relating thereto is :

> That all my just debts, funeral and testamentary expenses be paid by my executors hereinafter named as soon as possible after my death.

Does not this mean, nay, more, say, in as clear terms as possible, "all my debts ?" Can it be read as meaning only his chirographary and not his hypothecary debts ? I cannot see upon what principle this could be done.

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Now, when the testator said "all my debts," we cannot make him say "not all my debts," or may be "no debt at all," for this debt in question here may be the only one the testator owed.

This debt of $3,000 *Seymour* had contracted on the 30th April, 1869. On the 28th June, 1870, he begins his will by ordering his executor to pay all his debts, and then makes to the respondent and others certain particular legacies. This, it seems to me, shows not only that the testator intended these particular legacies to be free from all debts, but that he had this particular debt in his mind when he ordered his executor to pay all his debts. I cannot accede to the proposition that we may treat, as a matter of form and of no meaning whatsoever, this clause of the will by which *Seymour* orders the payment of his debts. I know of no rule under which we would be authorized to set at nought any part of a will under pretence that it is merely a matter of form. This clause, like all the others, must have its execution. If the law is, as it was before the code, that the particular legatee is not liable for the debts of the testator, the appellant must succeed independently of this clause of the will. If, on the contrary, the law was now, as held by the courts below, that the particular legatee must pay, without recourse, the debt hypothecated upon the immoveable bequeathed to him, unless the heir or universal legatee is obliged to do so by the will, then the clause of the will ordering all the debts to be paid by the executor is far from being a clause *banale*. To say that, as the law orders the executor to pay the testator's debts, this clause of *Seymour's* will means nothing, seems to me to be taking for granted that it does not include the debt hypothecated on the property bequeathed to the appellant. The law does not order the executor to pay this particular debt, if the interpretation given to the code by

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the majority of the court below is correct, but this clause of *Seymour's* will does it, as I read it, in as plain terms as possible.

Two *arrêts* of the *Parlement de Paris*, cited in *Merlin's* Rep. (1), relating to the meaning of the words in a will "pay my debts," have some analogy with the present case.

In the first case the will was as follows :—

"Je lègue à Madame *de Mailloc* et à Madame *de Buvron* tout ce que je peux leur donner je les prie de faire prier Dieu pour moi, *payer mes dettes* et récompenser mes domestiques." Cette disposition (says *Merlin*) a fait naître la question de savoir si les héritiers des propres devaient contribuer aux dettes. Une sentence par défaut du châtelet avait prononcé l'affirmative. Mais par arrêt rendu le 22 juin 1728, cette sentence a été infirmée, et il a été ordonné que les héritiers jouisaient des propres sans être tenus de contribuer à aucune dette.

The second case is given by *Merlin* as follows :—

La dame de *Talard* faisant son testament, s'était expliqué en ces termes : "Je veux que mes dettes soient payées sur mes biens patrimoniaux. J'institue le prince de *Rochefort* légataire universel de tous mes sus-dits biens en toute jouissance et propriété, à la charge toutefois de payer les dettes de ma succession et acquitter sur les biens fonds les legs que j'ai faits." Après sa mort, contestation entre les héritiers et le légataire universel pour la contribution aux dettes. La difficulté naissait de ce que la dame de *Talard* avait d'abord chargé ses biens patrimoniaux d'acquitter les dettes, et qu'elle en avait ensuite chargé son légataire universel, auquel elle ne pouvait laisser qu'une partie de ses propres. Le légataire universel disait que, dans de pareilles circonstances, il fallait consulter le droit commun, suivant lequel les réserves coutumières contribuent aux dettes, avec les objets compris dans le legs universel : "Mais par sentence des requêtes du palais, du 24 avril 1755, confirmée par arrêt rendu le 17 juillet de la même année, sur les conclusions de M. *Joly de Fleury* avocat-général, le parlement de *Paris* a jugé que les héritiers ne contribueraient pas aux dettes pour les réserves coutumières, et que le légataire universel le paierait seul."

I am of opinion to allow the appeal and to dismiss the action *en garantie*, with costs in the three courts against the respondent.

(1) Vo. Légataire.

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I remark that, though the registration of the obligation upon which is based the principal action is admitted at the *enquête*, such registration is not alleged either in the principal demand nor in the declaration *en garantie*. In the first, such an allegation was not necessary, but was it not in the second? I also remark that the action is upon a transfer to the plaintiff by the original creditors of the sum due by the late *Seymour*, and that the only signification of that transfer alleged by the plaintiff is a signification to *Corse*. If *Corse*, as held by the court below, was not liable for this sum, is the signification of the transfer upon him sufficient?

GWYNNE, J.:—

Although I fully concur in the judgment of my brother *Taschereau* (which I have had the opportunity of seeing) upon the question which has been so fully and ably discussed by the learned judges in the courts below and by the learned counsel in their argument before us, as to the true construction of the expression in article 889 of the civil code of the Province of *Quebec*, namely :—"L'héritier ou le légataire universel ou à titre "universel n'est pas tenu de l'hypothéque," as it is in the French text, and "The heir or the universal legatee "or the legatee by general title is not bound to dis- "charge the hypothec," as it is in the English text, still it is not, in my opinion, necessary that our judgment should be rested on that point, for, assuming the true construction to be that the universal legatee is not bound to pay the mortgage debt, I am of opinion that upon the other point argued the appellants are entitled to our judgment in their favor. The article provides that:

If before or since the will an immovable bequeathed be hypothecated for a debt of the testator remaining due, or even for the debt of a third person, whether it was known or not to the testator, the heir, or the universal legatee or the legatee by general title is not

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bound to discharge the hypotheque unless he is obliged to do so by the will.

Reading then these words "discharge the hypotheque" as synonymous with "pay the mortgage debt," I am of opinion that the testator has, by his will, sufficiently clearly expressed his intention to be that the special legatee shall in this case enjoy the immoveable bequeathed free from all liability to pay the debt secured by hypothec upon it, for payment of which special provision is made by the will.

Construing the words used in the article as above, a somewhat similar provision is made by the English Act, 17th and 18th *Vic.*, ch. 113, by which it was enacted that when any person should, after the 31st December, 1854, die seized of or entitled to any estate or interest in any land or other hereditaments which should, at the time of his death, be charged with the payment of any sum or sums of money by way of mortgage, and such person should not, by his will, or deed, or other document, have signified any contrary or other intention, the heir or devisee to whom such land or hereditaments should descend or be devised should not be entitled to have the mortgage debt discharged or satisfied out of the personal estate, or any other real estate of such person, but that the lands or hereditaments so charged should, as between the different persons claiming through or under the deceased person, be primarily liable to the payment of all mortgage debts with which the same shall be charged, every part thereof, according to its value, bearing a proportionate part of the mortgage debts charged on the whole thereof.

It will be convenient to review the decisions upon this Act. In *Woolstencroft* v. *Woolstencroft* (1) the question arose before Sir *J. Stuart*, V.C., whether a

(1) 6 Jur. N. S. 866,

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direction by the testator to his executors to pay all his debts out of his estate made his personal estate primarily liable for the payment of a mortgage debt charged on real estate devised by his will. The learned Vice-Chancellor was of opinion that the mortgage debt must be paid out of the personal estate, and he stated the ground of his decision to be, that where there was a direction by the testator that his debts should be paid by his executors, that exonerated the mortgaged estate. In the same year, but after the above decision of Sir *J. Stuart*, the question arose before Vice-Chancellor Sir *W. Page Wood*, in *Pembrooke* v. *Friend* (1), under a will whereby a testator directed that all his just debts, funeral and testamentary expenses should be paid as soon as might be after his decease; but he did not direct the payment to be out of any particular fund, nor did the will contain the words that the payment was to be made "by his executors," and he devised a house which he occupied to his wife in fee. The testator had created an equitable mortgage on the house by deposit of title deeds before his death, and the question was whether or not the personal estate should pay this mortgage. The Vice-Chancellor held that this will contained no sufficient expression of intention of the testator that the mortgage should be paid otherwise than under the provisions of 17th and 18th *Vic.*, ch. 113, that is by the specific devisee of the house, and he supports this conclusion by the following language:

> The testator does not say that the debts are to be paid out of his personal estate or by his executors. Had he used the words "by my executors" there would have been something on which to build the conclusion that he meant to express an intention that the general statutory rule should not apply. There would have been more room for argument if the property had been devised in strict settlement; but the gift to the widow being in fee, there was nothing to prevent a sale for payment of the mortgage debt immediately after the testator's decease.

(1) 1 J. & H. 132.

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Woolstencroft v. *Woolstencroft* came up before Lord Chancellor Lord *Campbell* in appeal (1), who reversed the decision of Sir *J. Stuart*, V.C. The Lord Chancellor says:

> I will not say that the words here relied upon are mere words of style, like the pious phrases with which wills usually begin, but they do not seem to me to show that the testator had in his mind the option given him of making the debt fall upon the mortgaged land or on the personal estate. He does not say that the payment is to be out of his personal estate, but out of his estate generally, and the real estate being charged with all the debts, and the payment having to be made by the executors, the executors would have the means of effecting a sale of part of the real estate, if necessary for that purpose.

And *Pembrooke* v. *Friend* having been cited, the Lord Chancellor says that there the Vice-Chancellor, Sir *W. Page Wood*, seemed to him, merely by the observations made by him, to intend to distinguish the decision of Sir *J. Stuart* in *Woolstencroft* v. *Woolstencroft* from the case of *Pembroke* v. *Friend*; and the Lord Chancellor attributed no weight to the words "by my executors," used in the will in the case before him, because he held and laid down as a rule, that a testator could only signify his intention that the personal estate should pay the mortgage debt by express words, declaring that the devisee of the land mortgaged should take the land free of the debt; that the same rule should be observed with respect to exempting the mortgaged land from the payment of the mortgage debt as was before observed with respect to exempting the personal estate, the mortgage land being by the statute made primarily liable as the personal estate had been previously; but in *Mellish* v. *Vallins* (2), Sir *W. Page Wood* takes the opportunity of showing that the learned Lord Chancellor had fallen into an error in laying down the above rule, arising from a want of due appreciation of the principle upon which the rule of law that to

(1) 2 DeG. F. & J., 347. (2) 2 J. & H. 194.

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exempt the personal estate express words to that effect must be used was established, and he held that the rule, as laid down by the Lord Chancellor, could not be of general application, and he held that a bequest of personalty, subject to the payment thereout of all the testator's just debts, following a devise of land in mortgage, which devise made no reference to the mortgage, sufficiently indicated the intention of the testator to be that the land should not be primarily liable to the payment of the mortgage debt, and the decree was that according to the true construction of the testator's will, the mortgage debt and interest ought to be borne by and paid out of his personal estate in exoneration of his real estate.

In *Allen* v. *Allen* (1), where a testatrix had an estate which she had herself mortgaged, and another estate which had been mortgaged by a former owner, and she devised the former for sale and payment of certain legacies, and the residue of her real and personal estate, including that which had been mortgaged by a former owner,to the defendants,directing that mortgages, debts, or other incumbrances on her residuary real and personal estate should be exclusively borne by the premises charged therewith, and that "all her debts and funeral and testamentary expenses should be paid out of her said residuary real and personal estate, Lord *Romilly*, Master of the Rolls, held that the mortgage debt incurred by herself was primarily payable out of the residuary real and personal estate, and not out of the mortgaged estate.

In *Newman* v. *Wilson* (2) where a testator, by his will, devised an estate, which he had subjected to a mortgage, to his wife for life, and afterwards to four of his children and their issue, and he devised all his freehold and leasehold estates and all other his real estate,

(1) 30 Beav. 395. (2) 31 Beav. 33.

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except what he otherwise devised by his will, unto trustees for sale, and he bequeathed all his personal estate to the same trustees upon trust to call in and convert, and he declared that his trustees should stand possessed of the monies to arise from the sale of his real estate, and from the calling in and conversion of his personal estate, upon trust, in the first place, to pay his funeral and testamentary expenses and certain legacies; and it was held that the personal estate and the real estate devised in trust for sale were primarily liable to pay the mortgage debt on the estate devised to the wife for life, &c., &c.

In *Rowson* v. *Harrison* (1), where a testator directed that all his just debts and funeral and testamentary expenses should be paid and discharged by his executors thereinafter named, as soon as conveniently might be after his decease, out of his personal estate, the master of the rolls, holding this case to be governed by the judgment of the Lord Chancellor in *Woolstencroft* v. *Woolstencroft*, held that this will did not indicate the intention of the testator to be that the devisee of the land mortgaged should take the land otherwise than as primarily charged with the mortgage debt; but in *Eno* v. *Tatam* (2), Vice-Chancellor Sir *J. Stuart* held that a devise of personal estate, subject to the payment of the testator's debts, funeral and testamentary expenses, was a sufficient indication of intention to make the personal estate the primary fund for the payment of a debt charged upon an estate particularly devised. The learned Vice-Chancellor there said:

> If I find a will in which there is some intention contrary to the mortgage being a burthen upon the mortgaged estate, I am bound by the language of the Act.

Finding there that there was such intention, he came

(1) 31 Beav. 207. (2) 9 Jur. N. S. 225.

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to the conclusion that the devisee of the personal estate did not take anything until she should pay the mortgage debt.

The Lord Justices, Sir *J. L. Knight Bruce* and Sir *George Turner*, upon appeal (1), affirmed this decision, and laid down the rule that the mortgaged estates are not liable where the debts are directed to be paid out of some other fund; and Sir *George Turner*, referring to the observations of Lord *Campbell*, in *Woolstencroft* v. *Woolstencroft*, that the same rule which was applied to exempt the personal estate, should now be applied to exempt the mortgaged estate, says that he thought that meant no more than that the intention must appear, and that if it meant that it was necessary for the expressions to show an intention, not merely to charge some other fund with the debt, but also to discharge the estate mortgaged, then he was not prepared to follow the decision; and in *Moore* v. *Moore*, which was a case similar to *Rowson* v. *Harrison*, the same lords justices (2), following their decision in *Eno* v. *Tatham*, overruled the decision of the Master of the Rolls, which was similar to that in *Rowson* v. *Harrison*. In *Maxwell* v. *Hyslop* (3), Vice Chancellor *Malins*, who approved of Lord *Campbell's* judgment in *Woolstencroft* v. *Woolstencroft*, and who says that if the Appeal Court had not decided the other way he should have gladly followed it, lays down the rule, as settled by the decisions, to be,—that whenever a testator has mortgaged his estates and, by his will provides a fund, either his residuary personal estate, or an estate devised for the purpose, or the general personal estate and other property mixed up with it, or, in other words, when he provides a fund of any description whatever for the payment of his debts, that is an indication of an intention that the land is not to

(1) 9 Jur. N. S. 481.

(2) 1 DeG. J. & S. 602.

(3) L. R. 4 Eq. 407.

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be the primary fund, but that the personal estate, or the particular fund provided, is to exonerate it from the mortgage debt.

By an Act passed by the Imperial Parliament on the 25th July, 1867, 30th and 31st *Vic.*, ch. 69, which was passed to explain the operation of 17th and 18th *Vic.*, ch. 13, it was enacted that in the construction of the will of any person who might die after the 31st day of December, one thousand eight hundred and sixty-seven, a general direction that the debts or that all the debts of the testator shall be paid out of his personal estate, shall not be deemed to be a declaration of an intention contrary to, or other than, the rule established by the said Act, unless such contrary or other intention should be further declared by words expressly or by necessary implication referring to all or some of the testator's debts or debt charged by way of mortgage on any part of his real estate. In *Brownson* v. *Lawrence* (1), which came before the Master of the Rolls in 1868, after the passing of the above Act, but in which the queston arose upon the will of a testator who had died in 1860, the Master of the Rolls, after reviewing *Woolstencroft* v. *Woolstencroft*, *Pembroke* v. *Friend* and *Eno* v. *Tatham*, was of opinion that in construing the wills of testators who have died between the 31st of December, 1854 and the 1st of January, 1868, he must follow *Woolstencroft* v. *Woolstencroft*, or *Eno* v. *Tatham*, according as the words of the will in each particular case came within the exact authority of one or other of those decisions; holding the rule to be that where a testator directs his debts to be paid out of some particular fund or property, or description of property, out of which, according to the rule established by the statute, they would not be primary liable, he must be taken to signify an intention to exclude the statutory

(1) L. R. 6 Eq. 1.

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rule, but where he merely directs his debts to be paid or to be paid out of his estate generally, he does not signify an intention to exclude that rule.

In *Coote* v. *Lowndes* (1), the testator had excluded any such conclusion as an intention that the mortgage debt should be paid out of the personalty, by the disposition in his will whereby he had expressly directed that the devisees in trust of his real estates should, during the minorities of the cestuique trust, receive the rents and profits, and by and out of the same keep down any annuity which might be charged on the premises, and the interest of any sum which might be charged by way of mortgage on the same premises. The alteration made in the English law upon the subject by the Imperial Statute 30th and 31st *Vic.* ch. 69, makes decisions under that Act inapplicable to the present case, but, if the true construction of article 889 be as for the purpose of the present discussion I have assumed it to be, then, as such a construction is at variance with the provisions of the Code *Napoleon* in like cases, and with the law of other countries where the civil law prevails and corresponds with the provisions of the Imperial statute, 17th and 18th *Vic.* ch. 113, we may have recourse to the decisions under this Act to assist us in the determination of the present question.

Now, the principle to be derived from the above English cases is that, if from any provision, express or by necessary implication, in the testator's will, we find his intention to have been that his debts generally, without any specific directions as to his mortgage debts, should be paid out of any particular fund, or part of his estate other than the mortgaged estates, such intention must prevail, and the will must be construed as imposing a primary obligation upon such particular fund, or part of his estate, for the payment of his mortgage

(1) L. R. 10 Eq. 380.

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debts (as well as his other debts) in relief of the mortgaged estates particularly devised; and for the purpose of arriving at the testator's intention upon the point, no particular form of words is necessary, but, as in all other questions arising under the will, the testator's intention is to be gathered from a perusal of the whole will.

Now the testator, in his will, declares his intention to be:

> That all my just debts, funeral, and testamentary expenses be paid by my executors hereinafter named, as soon as possible after my decease.

In connection with this clause, and as incorporated with it, we must turn to the clause appointing the executors here referred to, which is as follows;

> I appoint my well tried and trusty friends *Edwin Atwater* and *Norton B. Corse*, both of the said city of *Montreal*, Esquires, into whose hands I hereby divest myself of all my property, real or personal, and hereby expressly continuing their powers as such, beyond the year and day limited by law, and with full power to my said executors, or the survivor of them, to sell and dispose of all real estate to me belonging, and not hereby bequeathed, for such prices and on such terms and conditions as he or they may deem most advantageous, and to sign all conveyances and deeds of sale thereof, and to administer generally my said estate as if the same belonged to them personally.

Now these clauses, taken together, express the clear intention of the testator to be to devise the whole of his personal estate to his named executors and to give them complete power of disposition over all of his real estate not bequeathed by the will, to enable his executors, with such particular portion of his estate, to administer his estate generally, and in the course of such administration to pay all his debts as soon as possible after his decease. The bequeathed real estate is specially excepted from the real estate over which, in such administration of the testator's estate, his executors should have any control, and the clause operates as a charge of

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all testator's debts upon the whole of his personalty and that portion of his realty not specifically bequeathed, thus displaying a manifest intention of the testator that his bequeathed realty, of which the tenement and dwelling house in question is a part, should be exempt. The usufructuary life-estate devised to the testator's wife can plainly operate only upon the real estate excepted from the estate, over which, for the purposes of administration, control is given to the executors, and such personal estate, if any, and such real estate, over which the executors were given control, as should remain after the complete administration of the testator's estate, and consequently after the payment of all his debts.

The devise to the wife is as follows:

I give, devise and bequeath to my dearly beloved wife, Dame *Tamer Murray*, the use, usufruct and enjoyment during her natural life of all my property, whether real or personal, moveable or immovable, moneys, stocks, funds, securities for money, and, in fine, everything that I may die possessed of, without any exception, or reserve and without being obliged to render an account thereof to any person whomsoever, hereby constituting my said wife my universal usufructuary legatee and devisee.

Then, after the death of the wife, the particular realty in question, of which the testator's intention was that his widow should enjoy during her life the complete usufructuary enjoyment, without being obliged to render an account to any person whomsoever, is devised in fee simple to one of his daughters. The fact that the testator's widow died in his life time, and that he thereupon made a codicil to his will, providing that the devisees in fee in remainder should immediately upon testator's death enter into possession of the estates by the will devised to them after the death of the testator's wife, can make no difference in the determination of the question before us. Then, by the codicil made after the death of testator's daughter *Laura*, to whom the fee simple estate in remainder

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after the death of the testator's wife, in the tenement and dwelling house in question, was by the will devised, the use, usufruct and enjoyment of that tenement and dwelling-house was devised to *William Harrington*, husband of testator's daughter *Laura*, for the term of his natural life, and after his death the same was devised *en pleine propriéte* to the four children issue of his marriage with testator's daughter *Laura* and to the survivors of them, in equal proportions. And by this codicil *William Harrington* had as full use, usufruct and enjoyment of the property in question for the term of his natural life as the testator's widow, if she had survived him, would have had.

In view of the whole will, whereby it is apparent that the testator was making provision for his wife and his children, and their issue, equally out of his estate, after the whole of his debts being first paid out of the personalty and so much of his realty as was not specifically bequeathed, I am of opinion that the testator has, by his will, expressed a manifest intention that his mortgage debts as well as his other debts should be paid out of his personal estate devised to his executors, and out of the fund created by the sale of such testator's real estate over which special power, for the purpose of administration, was given to his executors, which power could only be exercised if the personalty should prove to be insufficient, and that the mortgaged estate should not be primarily liable for the debts charged upon them. A contrary decision would, in my opinion, defeat the plain intention of the testator, as appearing in his will.

The appeal, therefore, should be allowed with costs, and the judgment rendered by the Superior Court of the Province of *Quebec* should be reversed with costs.

Appeal allowed with costs.

Solicitors for appellants: *Doutre & Joseph.*

Solicitors for respondent; *Robertson & Fleet.*

DAME ELLEN TREACEY *et vir.*, (DEFENDANTS.)..... } APPELLANTS; 1883 *Nov. 16,17.

AND

THOMAS LIGGETT *et al*, (PLAINTIFFS)...RESPONDENTS. 1884 *Jan. 16.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR THE PROVINCE OF QUEBEC (APPEAL SIDE).

Articles 803, 1034 *C. C. P. Q.—Donation in marriage contract.—Proof of insolvency of donor at date of donation necessary to set aside.*

On 28th June, 1876, *L. et al* sold to *M. T.* a property for $12,250, of which price $3,789 were paid in cash. On 16th June, 1879, *E. T.*, daughter of *M. T.*, married *J. K.*, and in their contract of marriage *M. T.* made a donation to his daughter, *E. T.*, of certain property of considerable value, and remained with no other property than that sold to him by *L. et al.* In July, 1881, *L. et al* brought an action to set aside the gift in question, claiming that, the property sold having become so depreciated in value as to be insufficient to cover their claim for the balance remaining due to them and secured only by the property so sold, the gift in this marriage contract had reduced *M. T.* to a state of insolvency, and had been made in fraud of *L. et al*, and that at the time the gift was made *M. T.* was notoriously insolvent. *M. T.* pleaded, *inter alia*, denying averments of insolvency, fraud, or wrong-doing. The only evidence of the value of the property still held by *M. T.* at the date of the donation, 16th June, 1879, was the evidence of an auctioneer, who merely spoke of the value of the property in November, 1881, and that of a real estate agent, who did not know in what condition the property was two years before, but stated that it was not worth more than $6,000 in November, 1881, adding that he considered property a little better now than it was two years before, although very little changed in price.

Held (reversing the judgment of the court below), That in order to obtain the revocation of the gift in question, it was incumbent on the plaintiffs to prove the insolvency or *déconfiture* of the

*PRESENT.—Sir W. J. Ritchie, C.J., and Strong, Fournier, Henry, and Gwynne, JJ.

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donor at the time of the donation, and that there was no proof in this case sufficient to show that the property remaining to the donor at the date of his donation was inadequate to pay the hypothecary claims with which it was charged.

APPEAL from a judgment of the Court of Queen's Bench for *Lower Canada* (appeal side) (1), affirming the judgment of the Superior Court.

This was an action brought to set aside a gift made by *Martin Treacey* to his daughter *Ellen Treacey* and to her husband *John Killoran*, contained in their marriage contract executed 16th June, 1879, to which *Martin Treacey* was a party for the purpose among other things of conveying to them, in consideration of their marriage, property of considerable value.

The wrong which *Liggett et al* complained of was, that having sold *Martin Treacey* a property on the 28th June, 1876, which had only been partly paid for, a balance remained due to them thereon secured only by the property so sold, which having become depreciated in value was insufficient to cover their claim, that the gift in this marriage contract had reduced *Martin Treacey* to a state of insolvency and had been made in fraud of *Liggett et al* whose claim remained unsatisfied; they further alleged that at the time the gift in question was made, *Martin Treacey* was notoriously insolvent, that he had remained in possession of the property so given, the same as before the date of the gift, and that a year had not elapsed since they, *Liggett et al*, had become aware of the existence of the donation; they therefore claimed that the donation in question should be set aside and annulled.

The defendants each pleaded separately, but to the same effect, by a special categorical denial of each of the averments in the declaration, especially the averments of insolvency, fraud, or wrong-doing.

(1) 3 Dorion's 6 B. R. 247.

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The facts shown in evidence were that by deed dated the 28th June, 1876, *Liggett et al.* had sold *Martin Treacey* a property for $12,250, whereof $3,787 were paid in cash, and the balance was made payable to the acquittal of *Liggett et al.*, viz: $403 to *A. M. Foster*, 1st November, 1876, and the balance to the *Liverpool, London & Globe Insurance Co.* as follows, viz: $4,030 on the 1st July, 1878, and $4,030 on the 1st July, 1883.

That the contract of marriage complained of was made 10th June, 1876, and contained a large amount of valuable property which *Martin Treacey* thereby transferred to his daughter and son-in-law, and was duly registered.

That besides the property he gave to his daughter and her husband, Mr. *Treacey* held no other than that sold to him by *Liggett et al.*; also that they had taken judgment against him for the first instalment due under his deed of purchase, and seized and sold his moveables; further that since his daughter's marriage, she and her husband had lived on the property he had given her.

There was no proof of fraud or collusion on the part of the daughter or of her husband.

As to proof of the value of the property still held by *Martin Treacey* at the date of the donation 16th June, 1879, two witnesses were examined on the 12th November, 1881.

William J. Shaw, auctioneer, stated that on that day, 12th November, 1881, sub-divison No. 40, No. 1206 *St. Ann's* ward, he considered worth about $6,000.

Oliver W. Stanton, real estate agent, being examined, stated that he considered about $6,000 a very fair value of No. 1206 sub-division 40, *St. Ann's* ward. The houses, he said, were in bad order and the building also.

He was asked: "Is it worth to-day as much as it

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was two years ago? A. I did not see it two years ago."

"Q Supposing the property to be in the same state, was it more valuable two years ago than to-day? A. No; I consider property a little better now than it was two years ago, although there is very little change in price."

The Superior Court rescinded the donation made by contract of marriage to the female appellant by her father *Martin Treacey*, and that judgment was affirmed by the Court of Queen's Bench for *Lower Canada* (appeal side.)

From these judgments the appellants, Dame *Ellen Treacey et vir*, as well for themselves personally as beneficiary heirs to the estate of the late *Martin Tracey*, appealed to the Supreme Court of Canada.

The question which arose on this appeal was, whether the respondents had proved their averment in their declaration, that *Martin Treacey* was at the date of the said donation, and before, notoriously insolvent, *en déconfiture* and unable to pay his debts, and were entitled under art. 803 C. C. to obtain the revocation of the gift. Other points were argued by counsel but the court did not think it necessary to express any opinion on them.

Mr. *Doutre*, Q.C., and Mr. *Joseph* for appellants, and Mr. *Branchaud* for respondents.

RITCHIE, C.J.:—

The whole question turns on whether *Martin Treacey* was solvent at the time he made this conveyance, or whether making the conveyance which he did rendered him insolvent. For the reasons given by Mr. Justice *Cross*, and with which I entirely agree, and to which I have nothing to add, I think this appeal should be allowed. That is to say, I am of opinion that the insolvency of the party was not established.

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STRONG, J. :

For reasons substantially the same as those given by Mr. Justice *Cross*, I am of opinion that we ought to allow this appeal. Without entering upon a consideration of the important point of law which is dealt with in the opinion of the learned Chief Justice of the Court of Queen's Bench, but assuming, for the present purpose, that the law is as he states it, that a donation of immovable property by a father to his daughter, on the occasion of her marriage, is to be considered a gratuitous alienation, I am still of opinion that the proof in the present case is inadequate to invalidate the gift made by *Martin Treacey* to his daughter. Article 803 of the Civil Code provides that:

If at the time of the gift, and deduction being made of the things given, the donor were insolvent, the previous creditors, whether their claims are hypothecary or not, may obtain the revocation of the gift, even though the donee were ignorant of the insolvency.

Fraud must be proved, and is not to be presumed. Therefore, it was incumbent on the respondents to show that the property remaining to *Martin Treacey*, after he had made this donation to his daughter, was inadequate in value to pay the hypothecary claims of the respondents with which it was charged.

This property had been sold by the respondents to *Martin Treacey*, on the 28th June, 1876, for $12,250, of which price $3,787 had been paid in cash. There is a presumption, therefore, that on the day of donation by *Martin Treacey* to his daughter, the 10th of June, 1879, the property still remained of more than sufficient value for the residue of the unpaid purchase money.

The question we have to decide is, therefore, reduced to this: is it sufficiently proved that the property on the 10th June, 1879, was so reduced in value as to be worth less than the portion of the sum remaining unpaid, in other words, is the *primâ facie* presumption destroyed by the counter testimony of witnesses?

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Only two witnesses were examined on the point of value.

William J. Shaw's evidence is not material, since he merely speaks of the value at the date of his examination, which was the 12th November, 1881.

Stanton, a real estate agent, says that $6000 was the fair value at the date at which he speaks—in November, 1881. He says, he did not know the property two years ago. He then adds, he considers property a little better (when he speaks) than it was two years ago.

It appears to me, that this evidence of a single witness is much too vague and general to repel the fair inference arising from the circumstance of the sale in 1876, especially considering the well known fluctuations in the value of land in cities and towns in this country. It is true, that the only way of fixing a valuation in questions of this kind is by the estimation of persons having dealings in real estate, or otherwise experienced in its value, like the witness; but, certainly, it would be most unsafe to act on evidence like this, when it must have been easily within the power of the respondents, upon whom the burden of proof lay, to establish the value at the date of the marriage settlement by the evidence of witnesses who knew the property at that time. I doubt, indeed, if such evidence as this ought to be acted on, even in a case where there was no such criterion of the value afforded as there is here by the price agreed to be paid under the previous sale, to which the creditors were parties, but under the circumstances of the present case it seems clear to me, that there is not such distinct and clear proof of insolvency as is required to warrant the revocation of the donation.

I think the appeal should be allowed, and the action dismissed with costs in this court and the court below.

FOURNIER, J.:

Le 28 juin 1876, les Intimés vendirent à *Martin Treacey*, un des Appelants, un lot de terre avec bâtisses, pour la somme de $12,250, à compte de laquelle ils reçurent au moment de la passation de l'acte de vente $3,787. La balance était payable avec intérêt à 7 p. c. comme suit: $403.00 à *A. M. Foster* avec intérêt au 1er novembre 1876, $4,030.00, le 1er juillet 1878, et $4,030, le 1er juillet 1883.

Le 19 juin 1879, *Martin Treacey* intervint au contrat de mariage de sa fille, *Ellen Treacey*, avec *John Killoran*, et lui fit donation de toutes ses propriétés à l'exception de celle qu'il avait achetée des Intimés. Ceux-ci ont, par leur action en cette cause, demandé la révocation de cette donation, comme faite en fraude de leur droit, et parce qu'à l'époque de cette donation, le donateur *Martin Treacey* était notamment insolvable et en déconfiture. Cette dernière allégation étant la base principale de l'action, il est important de la donner textuellement, afin de faire voir clairement la position prise par les Intimés:

That the said *Martin Treacey* was at the date of the said donation and before notoriously insolvent, *en déconfiture*, and unable to pay his debts, and has ever since remained so to the full knowledge of the said *Ellen Treacey* and husband, who acted with the said *Martin Treacey* in fraud and collusion, to impair the interests of the said Plaintiffs.

That by the said deed of donation which was gratuitous and made by the said donor and accepted by the said donee fraudulently and with intent to defraud the said Plaintiffs in particular, the said donor divested himself in favor of the said donee, of a property which was the common pledge of his creditors.

Ils ont de plus allégué que l'existence de cette donation n'était parvenue à leur connaissance que depuis moins d'un an.

Les Intimés ont par des défenses séparées nié spécialement toutes les allégations de la déclaration et plus particulièrement celles concernant la fraude et l'insol-

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vabilité. Ils ont aussi invoqué la prescription introduite par l'art. 1040 C. C.

Le jugement de la Cour Superieure, confirmé par celui de la Cour du Banc de la Reine, a maintenu l'action et annulé la donation tout en ordonnant la discussion des autres biens de *Martin Treacey.*

La question très controversée de savoir si la donation contenue dans un contrat de mariage doit être considérée faite à titre gratuit ou onéreux, a été discutée par plusieurs des honorables juges appelés à décider cette cause.

Cette question qui pourrait être de la plus haute importance en certains cas, à cause de la différence de la preuve que la loi exige suivant le caractère de l'acte, n'en a aucune dans la présente cause ; car la preuve est tout à fait insuffisante pour établir les allégations de fraude, d'insolvabilité notoire et déconfiture qui sont les éléments essentiels de l'action révocatoire. Si la preuve en eût été faite, il est indubitable que le jugement rendu en cette cause aurait bien jugé, mais il est évident que cette preuve fait défaut.

D'abord quant à la preuve de fraude et de collusion de la part d'*Ellen Treacey* et de son mari, il n'y a pas eu la moindre tentative de la faire. Quant à la preuve de l'insolvabilité, *à la date de la donation*, il n'y en a aucune preuve non plus, si ce n'est celle que les Intimés prétendent tirer de l'admission de faits des Appelants, que *Martin Treacey* n'avait pas à cette époque d'autre propriété que celle achetée des Intimés ("*no other property but the one purchased from plaintiffs in this cause.*")

Cette admission qui ne fait pas mention des propriétés mobilières, ne fait pas preuve d'insolvabilité et encore moins de déconfiture. Pour suppléer à cette insuffisance et dans le but d'arriver, faute de preuve directe, à prouver l'insolvabilité, les Intimés ont fait entendre deux témoins au sujet de la valeur de la

propriété en question. M. *J. Shaw*, l'un d'eux qui a été entendu, le 12 octobre 1881, estime la propriété en question à $6,000. L'autre, *Olivier W. Stanton*, l'estime aussi à $6,000. Il dit que les bâtisses étaient en mauvais ordre. A la question qu'on lui a faite pour savoir si cette propriété valait autant il y a deux ans, il répond qu'il ne l'a pas vue à cette époque Elle pouvait alors valoir beaucoup plus, si elle était en bon ordre, mais le témoin n'en sait rien. Ainsi ces deux témoins ne font mention de la valeur de la propriété en question qu'à l'époque de leur examen, le 12 novembre 1881. Ce qu'elle pouvait valoir plus de deux ans auparavant, à l'époque de la donation du 16 janvier 1879, ils n'en savent rien. Devons-nous présumer que cette propriété vendue $12,253 le 28 janvier 1876, n'en valait plus que $6,000 le 16 janvier 1879, 3 ans après? Non, car lorsqu'il s'agit de prouver l'insolvabilité, c'est par des preuves directes qu'il faut le faire. Aucune tentative n'a été faite de la part des Intimés pour prouver la valeur de cette propriété à l'époque de la donation D'après la manière qu'ils ont fait leur preuve ils semblent avoir complètement perdu de vue que le fait essentiel à prouver était la valeur à l'époque de la donation, afin de démontrer que déduction faite des propriétés données il ne restait plus assez de biens à *Martin Treacey* pour payer ses dettes. Ils semblent aussi avoir été sous l'impression que dans un cas comme celui-ci, de simples présomptions seraient suffisantes pour faire la preuve requise, mais ils ont oublié qu'il s'agit dans cette cause de faire annuler un acte solennel entre non commerçants, et qu'ici les présomptions ordinaires, suffisantes lorsqu'il s'agit de l'annulation d'actes de commerçants en fraude de leurs créanciers, ne peuvent recevoir aucune application.

Il faut encore remarquer que quant à la preuve de l'insolvabilité, il n'en est pas de même que pour celle de la

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fraude; si celle-ci, faute de preuve directe, peut être prouvée par des preuves indirectes, il faut au contraire, pour établir l'insolvabilité ou la déconfiture, des preuves directes et positives.

Pardessus dit (1) :

La déconfiture est la position du non-commerçant qui se trouve par l'accumulation de condamnations ou de poursuites dirigées contre lui, hors d'état de payer ce qu'il doit.

.....Qu'un simple particulier laisseprononcer contre lui des condamnations, ne paie personne, quoiqu'il ait des meubles ou des immeubles, il ne sera pas en déconfiture, car ses créanciers peuvent le saisir, l'exproprier. Il n'y a de déconfiture que là seulement où la discussion de tous les biens ne produit pas l'acquittement de toutes les dettes.

Si telle eût été la position de *Martin Treacey* le 16 juin 1879, il eût été facile d'en faire la preuve par la production de condamnations et de poursuites dirigées contre lui, et en constatant d'une manière précise la valeur, à cette époque, de la propriété qui lui restait, après la donation,—la valeur de ses biens meubles et le montant exact de ses dettes ; on pouvait aisément par ce procédé arriver à faire la preuve nécessaire d'insolvabilité. Cette preuve les Intimés s'étaient engagés à la faire par les allégations de leur déclaration. En basant, comme ils l'ont fait, leur action sur l'art. 1034, ils devaient prouver l'insolvabilité de *Martin Treacey* à la date de l'acte de donation dont ils se plaignent. Un autre article non moins positif sur ce point, rendait encore cette preuve obligatoire. L'article 1034 C. C. dit :

Si, au temps de la donation et distraction faite des choses données, le donateur n'était pas solvable, les créanciers antérieurs, hypothécaires ou non, peuvent la faire révoquer quand même l'insolvabilité n'aurait pas été connue du donataire.

La preuve faite ne justifie nullement le principal considérant du jugement déclarant " qu'il a été prouvé " que le défendeur *Martin Treacey* s'est rendu insol-

(1) Vol. 4, No. 1,321, pp. 579, 580.

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" vable par la donation dont il est question en cette " cause, et qu'il était insolvable *lors de l'institution de la* " *présente action*, et que les immeubles qui lui restaient " n'étaient pas suffisants pour assurer le paiement de ses " dettes et nommément de la créance des demandeurs."

Quant à la dernière partie de ce considérant déclarant *Martin Treacey* insolvable lors de l'institution de l'action qui a été signifiée plus de deux ans après la date de la donation, il est évident qu'elle doit être sans effet sur le sort de cette cause, car elle est en contradiction manifeste avec les articles 1034 et 803, exigeant la preuve de l'insolvabilité à la date de l'acte attaqué. Mais elle fait voir que les honorables juges qui ont rendu ce jugement n'ont pas trouvé de preuve au dossier les autorisant à déclarer que l'insolvabilité existait au temps de la donation. Dans la première partie du considérant, quoiqu'il soit déclaré que *Martin Treacey* s'est rendu insolvable par la donation en question—il n'est pas dit quand cet effet s'est produit. Est-ce au moment de la donation ? – si c'est là l'interprétation qu'il faut donner au jugement, il est clair qu'il n'y a aucune preuve pour justifier cette conclusion. Pour en arriver là, il faudrait, comme il a été dit plus haut, avoir un état exact de la position de *Martin Treacey* au temps de la donation. Il faudrait être en état de dire si, après déduction faite des propriétés données il ne lui restait pas assez de biens pour payer ses dettes. Il n'y a dans le dossier aucune preuve quelconque sur laquelle on puisse baser cette opération. Pourtant, d'après l'article 803, c'est la manière de constater l'insolvabilité. Cette première partie du considérant n'est pas plus justifiée par la preuve que la seconde.

De l'existence, reconnue par la Cour, de l'insolvabilité de *Martin Treacey*, lors de la signification de l'action a-t-on voulu en induire qu'il en résultait une présomp-

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tion de fraude comme celle dont *Ricard* fait mention dans son Traité des Donations (1)?

Il y a peu d'analogie entre les deux cas. Dans celui dont parle *Ricard* il s'agissait de savoir si la donation était sujette à l'insinuation. Il est vrai qu'il dit que " le sort de la contestation fut sur ce qu'il y avait une *présomption violente* que le père avait fait à son fils, par son contrat de mariage, la donation dont il s'agissait, en fraude de ses créanciers, en conséquence de ce qu'elle contenait tous les immeubles qu'il possédait et qu'il avait fait banqueroute un an après." Il y a cette différence importante dans le cas présent, que la donation n'est pas de tous les immeubles—et que l'insolvabilité n'est survenue que plus de deux ans après la donation dont il s'agit,—tandis que dans le cas cité par *Ricard* la banqueroute avait lieu un an après, et que la donation était de tous les immeubles. L'insolvabilité survenue à une époque rapprochée des actes allégués pourrait bien former une présomption de fraude,—prouver l'intention de fraude, *consilium fraudis*,—mais cela seul ne suffirait pas pour faire prononcer la nullité, il faudrait encore pour se conformer à une autre condition essentielle de l'action révocatoire, prouver que cette insolvabilité est la conséquence de ces actes afin d'établir le préjudice causé, *eventus damni*, sans lequel l'action ne peut exister.

Aubry et *Rau* (2) disent à ce sujet :

L'exercice de l'action Paulienne suppose avant tout un préjudice causé aux créanciers qui l'intentent, et ce préjudice ne se comprend que moyennant le concours des trois conditions suivantes :

Il faut, en premier lieu, que les biens du débiteur soient insuffisants pour le paiement de ses dettes. Si son insolvabilité ne se trouvait encore, ni établie par sa déconfiture, ni légalement présumée à raison de sa faillite, le créancier demandeur devrait pour la justification de son action, discuter au préalable les biens du débiteur

(1) Vol. 1, p. 250, no. 1113. (2) Vol. 4, p. 132, § 313.

à l'exception cependant de ceux dont la discussion présenterait trop de difficultés.

Il faut, en second lieu, que le préjudice soit résulté pour le créancier de l'acte contre lequel son action est dirigée, en d'autres termes, que le débiteur ait été audessous de ses affaires dès avant la passation de l'acte attaqué, ou que du moins son insolvabilité en ait été la cause reconnue.

Chardon dit (1) :

De même que le dessein de tromper, sans un préjudice effectif n'autorise pas l'action révocatoire, le préjudice éprouvé ne permet de l'accueillir qu'autant qu'il a été la conséquence d'une intention hostile ; *Consilium fraudis, et eventus damni.* L'article 1167 du Code civil offre le même sens, puisqu'il n'autorise les créanciers à critiquer que les actes faits par leurs débiteurs en fraude de leurs droits.

.....Les créanciers doivent donc prouver, et le dommage qui leur est fait, et l'intention qu'a eue leur débiteur de le leur faire. Il est essentiel de faire cette preuve.

Bedarride dit (2) :

La seconde condition imposée au créancier suivant l'action révocatoire, est de prouver l'insolvabilité du débiteur. Cette action est essentiellement subsidiaire. Elle ne peut être exercée que pour amener le paiement que les biens restants sont, par leur insuffisance, dans l'impossibilité d'effectuer. Il faut donc préalablement établir cette insuffisance.

Cette condition se justifie avec autorité par cet autre principe que, pour intenter une action, il ne sut pas d'avoir qualité, qu'il faut surtout y avoir intérêt.

Chardon dit encore (3) :

Pour établir la fraude du donateur, il suffit de prouver son infortune au moment de la donation, parce qu'en effet si alors ses dettes surpassaient son avoir, il ne pouvait en rien donner qu'au préjudice de ses créanciers. C'est donc ce préjudice que doit prouver celui qui se plaint .....

Demolombe dit (4) :

Le préjudice éprouvé par les créanciers, c'est-à-dire l'insolvabilité du débiteur résultant de l'acte qu'ils attaquent, telle est donc la première condition, sous laquelle l'action Paulienne est recevable.

(1) De la Fraude, 2 Vol., No. 203, p. 369.

(2) Traité du Dol et de la Fraude, 3 Vol., p. 205, No. 1425.

(3) De la Fraude, 2 Vol., No. 237, p. 432.

(4) 25 Vol. Code Napoléon, p. 172, No. 179.

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Aussi, le premier moyen du tiers défendeur est-il, en effet, lui-même tiré de l'absence de préjudice et de la solvabilité du débiteur. Le tiers défendeur peut, en conséquence, à moins que le débiteur ne se trouve déjà en état de faillite ou de déconfiture ouverte, demander qu'il soit préalablement discuté dans ses biens.

C'est en ce sens que l'on a dit, avec raison, que l'action Paulienne est seulement *subsidiaire* ; en ce sens qu'elle ne peut être exercée qu'à défaut ou en cas d'insuffisance des autres biens du débiteur..... *bonis ejus excussis.*

Comme on le voit par ces autorités qu'il, serait facile de multiplier, la condition première, comme le dit *Demolombe*, sous laquelle l'action des Intimés était recevable était le préjudice lui résultant de l'acte de donation attaqué. Ils ne pouvaient exercer leur action qu'en cas d'insuffisance des autres biens de *Martin Treacey*, constatée par une discussion préalable de ses biens Cette condition est exigée par les autorités ci-dessus citées,—à moins que le débiteur ne soit déjà en faillite ou en déconfiture ouverte. Non seulement les biens de *Martin Treacey* n'ont pas été discutés avant l'émanation de l'action révocatoire, mais la preuve de son insolvabilité au temps de la donation, condition essentielle du succès de leur action, n'a pas été faite.

Quant à la question de savoir si les Intimés devraient discuter les biens de *Martin Treacey* avant de porter leur action, je ne crois pas que les circonstances de cette cause m'obligent à la décider Cependant, je ne puis m'empêcher de reconnaître que les autorités citées plus haut qui comptent parmi les plus considérées, sont en faveur de la discussion et la considèrent obligatoire, à moins que le débiteur ne soit en faillite ou en déconfiture ouverte. Mais comme d'après la preuve en cette cause, on pouvait considérer *Martin Treacey* comme insolvable à l'époque de l'émanation de l'action, cette circonstance rendait, suivant l'opinion de *Demolombe*, l'action recevable. Mais pour réussir à faire annuler la

donation attaquée, il aurait fallu établir par des preuves directes et positives, que cette insolvabilité remontait à la date de la donation attaquée, ou que la donation elle-même était la cause de l'insolvabilité.

En outre des observations que j'ai faites sur la nature de la preuve de l'insolvabilité, je dois déclarer que je concours dans celles qui ont été faites sur le même sujet par l'honorable juge *Cross*.

Pour tous ces motifs je suis d'opinion que l'appel doit être reçu.

HENRY, J.:—

I am entirely of the same opinion. I think the party was bound to prove that at the time of the transfer from *Treacey* to his daughter and her husband he was insolvent. I may say that no such evidence has been given. We are asked to presume that because one man put a valuation of $6,000 on the property two years and a-half afterwards, therefore it was not worth $8,000 at the time of the conveyance. It is a principle that not only must fraud be alleged, but it must be also proved. He undertakes to assert that that was a fraudulent and illegal transaction, and that the party became insolvent by the mere fact of making that transfer. Now, have we any reason to assume fraud? On the contrary, I think we are bound to assume the reverse on this occasion. At the time of the transfer he paid nearly one-third of the whole amount, leaving $8,000 due. At the time of the donation we could hardly assume that the property had fallen so much in value as to be worth no more than $6,000, that is, depreciated in value to the extent of one-half. I think if property went down by degrees and had two years to go down after the transfer of this property, we may assume that at the time this donation was made it had not got down to the depth of $6,000. I see no reason for imputing fraud in

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this case. He, the father of Mrs *Killoran*, was growing old, he had no wife and but one daughter. He was making provision for his daughter and probably for his own support in his old days. I cannot, under the circumstances, imagine, without express proof of fraud, that we are justified in assuming it. I think the appeal ought to be allowed with costs.

GWYNNE, J.:

I concur in the opinion that the plaintiffs have wholly failed to prove the case stated in their declaration.

The object of the action is to have a donation of realty, made by one *Martin Treacey* to his daughter *Ellen* on the occasion of her marriage, declared to be fraudulent and void and set aside, to enable the plaintiffs to recover thereout a balance due by the father upon a purchase of other property made by him from the plaintiffs three years previously to the daughter's marriage, and for securing which balance, amounting to two-thirds of the purchase money, the plaintiffs at the time of the sale to *Martin Treacey* had taken back from him a mortgage upon the property sold by them to him.

There are three paragraphs in the declaration upon which the plaintiffs rest their right to obtain the relief sought by the action, upon their establishing any one of which they would be entitled to recover. The first is:

> That the said *Martin Treacey* made the said donation to the said *Ellen Treacey*, his daughter, with a view to defraud the said plaintiffs in depriving them of the means of securing the payment of the said balance of the said price of sale herein above recited, the said defendants knowing well at the time that the property sold under the deed of sale was, and is, insufficient to secure the payment.

The second paragraph is:

That the said *Martin Treacey* was at the date of the said donation, and before, notoriously insolvent, *en déconfiture;* that is to say, hopelessly insolvent and unable to pay his debts, and has ever since remained so to the full knowledge of the said *Ellen Treacey* and husband, who acted with the said *Martin Treacey* in fraud and collusion to impair the interests of the said plaintiffs.

The third paragraph is:

That by the said deed of donation, which was gratuitous and made by the said donee fraudulently and with intent to defraud the said plaintiffs in particular, the said donor divested himself in favor of said donee of a property which was the common pledge of his creditors.

It will be observed that in none of these paragraphs do the plaintiffs seek to avoid the contract in virtue of the provisions of the 1084th article of the civil code, namely, that the donation was gratuitous and that the donor was insolvent at the time of making it, although that is really the sole ground upon which the respondents rest their contention, that the judgment of the court below should be supported. The ground relied upon in the first of the above paragraphs states nothing affecting the solvency of *Martin Treacey.* It charges that the donation was made with intent to defraud the plaintiffs who were his creditors by mortgage. Unless made with intent to defraud, it could not be avoided at the suit of a creditor of the donor, but the paragraph proceeds to specify the particular mode whereby this intent to defraud was to be carried out, namely, that by this donation the plaintiffs would be deprived of the means of securing the balance due to them on their said mortgage security, the defendants well knowing at the time of making the donation that the property held by the plaintiffs in mortgage was insufficient to secure payment of the money secured by the mortgage. The gist of this paragraph plainly is that the intent to defraud charged in it is manifested by the knowledge imputed to *Martin Treacey,* that at the time of

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making the donation, he well knew the property held by the plaintiffs in mortgage was insufficient to secure payment of the mortgage debt. Now, not to rest upon the absence from this paragraph, and indeed from the declaration, of an averment (to bring the case as stated in this paragraph within the 1038th section of the civil code, namely, that beside having been made with intent to defraud, the donation would have the effect of injuring the creditor,) to the effect that the donor had no property out of which the alleged deficiency of the mortgaged property to pay the mortgage debt could be supplied other than the property donated, it is sufficient to say in answer to the case as alleged in this paragraph, that there has been no evidence offered of a character sufficient to establish that *Martin Treacey* had any such knowledge as is imputed to him, or that he entertained any intent to defraud the plaintiffs when he made the donation, or that he made it with that intent. Indeed there is no sufficient evidence, that as a matter of fact, at the time of the donation in June, 1879, the property purchased by *Treacey* from the plaintiff in 1876 was not worth the two-thirds of the purchase money for which he purchased the property.

The charge as alleged in the second of the above paragraphs is—not only that prior to and at the date of the donation *Martin Treacey* was notoriously and hopelessly insolvent and unable to pay his debts, but that such his insolvency was well known to the donee and her husband, who acted together with *Martin Treacey* in fraud and collusion in accepting the donation from him with intent to injure the plaintiffs. Of this knowledge in *Ellen Treacey* and her husband and of the constructive fraud and collusion charged, there is not any evidence whatever offered, nor, indeed, is there sufficient evidence of the alleged insolvency of *Martin*, assuming such insolvency alone to be sufficient to avoid the dona-

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tion. *Martin Treacey* appears to have had no debt but that to the plaintiff, and which was secured by a mortgage. It is difficult to understand how a person owing no debts whatever, except one amounting only to two-thirds of the purchase money of a piece of property purchased by him, and which two-thirds was secured by mortgage upon the whole of the property, the purchase of which constituted the debt, can be said to have been notoriously and hopelessly insolvent. There is no evidence whatever in my opinion sufficient to establish the averment that *Martin Treacey* was insolvent when he made the donation to his daughter, nor of any fraudulent intent whatever in the daughter accepting the donation. The plaintiffs therefore failed to establish any one of the grounds upon which their claim to the relief they have prayed is based, and it is unnecessary to determine the point upon which there appears to be a conflict of opinion, whether the law of the Province of *Quebec* in regard to donations by a parent by way of provision for a daughter upon her marriage and for her husband and their children, is different from the law of *France* and that of *England* in which marriage is deemed to constitute valuable consideration.

The appeal, in my opinion, should be allowed with costs.

Appeal allowed with costs.

Solicitors for appellants: *Doutre & Joseph.*

Solicitors for respondents: *Judah & Branchaud.*

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*Feb'y. 28.

*June 18.

L. AYOTTE.....APPELLANT;

AND

CHARLES FRANÇOIS G. BOUCHER, *et al*.....} RESPONDENTS.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA (APPEAL SIDE).

Acceptation of an insolvent succession—When obtained by fraud—Notary, duty of—Arts. 646, 650 *C. C. P. Q. Appeal.*

A., who had a claim against the insolvent estate of Dr. *B.*, purchased a right of redemption Dr. *B.* had at the time of his death in a certain piece of land; and in order that *B., et al.*, (the respondents Dr. *B's.* children) who were perfectly solvent, should accept the succession of Dr. *B.*, *A.* caused to be prepared a deed of assignment by a notary of this right of redemption to *B. et al.*, who, a few days after the death of their father, had been induced for a sum of $50 to consent to exercise this right of redemption. The notary who prepared the deed without the knowledge of *B. et al.*, returned it to *A.*, telling him that he did not like to receive the deed because he believed that in signing it *B. et al.* made themselves heirs of Dr. *B*, and beside she believed that if *B. et al.* knew that in signing the deed they accepted the succession of their father, and were responsible for his debts, they would not sign. Another notary residing at a distance was sent for by *A.*, to whom he gave the deed as prepared, and the notary then went to the residence of *B. et al.* read the deed to the parties, and without any explanation whatever passed and executed the deed of cession whereby *B. et al.* became responsible for the debts of their father. On being informed of the legal effect of their signature, *B. et al.* formally renounced to the succession of their father. There was also evidence that *B. et al.* had done some conservatory acts and acts of administration for their mother, but it was not proved that in any of these transactions they had taken the quality of heirs.

Held,—That, although the amount claimed by the declaration was made to exceed $2,000 by including interest which had been been barred by prescription the appeal would lie.

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

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That the acceptance of an insolvent succession is null and of no effect when it is the result of deceit and corrupt practices artifices and fraud. That as *A.* in this case obtained the signatures of *B. et al.* to the deed in question by fraud, the latter should not be burthened with the debts of their insolvent father.

That it is the duty of a notary when executing a deed to explain to an illiterate grantor the legal and equitable obligations imposed by the deed and consequent on its execution. [*Henry*, J, dissenting.]

APPEAL from a judgment of the Court of Queen's Bench for *Lower Canada* (appeal side) (1) affirming the judgment of the Superior Court, dismissing the present appellant's action.

The appellant alleged in his action, that, by deed of transfer, made in the city of *Montreal* on the 30th November, 1863, *Charles Paphenus Anaclet Boucher* transferred to the said appellant an amount of eight hundred dollars ($800.00), to have and to take, in principal and interest, in the succession of the late *François Boucher*, upon the moneys appertaining to the said *Boucher*, in the said succession, by and in virtue of the wills of the said late *François Boucher* and of the late *J. Olivier;* that the said transfer was served upon the Rev. *C. P. O. Morrison*, one of the interested parties in the said successions.

That, on the 24th of September, 1869, the said plaintiff cancelled the said deed of transfer, but reserved to himself all the rights which he could have against the said *C. P. A. Boucher*, for the sum of $445.93, a balance which he declared was still due him on the said transfer, to which the said *C. P. A. Boucher*, represented by—*Mousseau*, Esq., his attorney *ad litem*, consented; that the interest accrued upon the said sum of $445.93, amounts to $349.81; that by a deed of sale, dated March 8th, 1867, the said *C. P. A. Boucher* sold to the firm of *Ayotte* and *Marchand* a piece of land, for $660, paid in cash; that, in May,

(1) 3 Dorion's Q. B. R. 123.

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1869, the said land was sold by the sheriff for hypothecary debts contracted by the said *C. P. A. Boucher* and existing at the time of the said sale, and that the said firm of *Ayotte & Marchand* received nothing from the proceeds of such sale; that the said sum of $660 and the interest accrued thereon amounts to $1,283.70, and is still due by the heirs of *C. P. A. Boucher;* that, on the 30th of April, 1867, the said *Noë O. Marchand* transferred to the said appellant the half of the said land, as well as the half of all his rights in the said firm; that the said transfer was served by a notice published twice in the newspapers, in August, 1880, and a copy deposited in the office of the prothonotary, in September, 1880; that the said *C. P. A. Boucher* contracted marriage with *S. Salmon* on the 25th of January, 1831; that from the said marriage have issued and are still living, seven children, among whom are the respondents; that the said *C. P. A. Boucher* died on the 16th March, 1872, without having made a will, leaving his said seven children as his heirs; that the respondents were the only ones who accepted the succession of the said *C. P. A. Boucher*, by taking the quality of heirs in authentic deeds and particularly in a deed of assignment of a right of redemption their father had in a certain piece of land executed on the 2nd April, 1872, before *H. G. Fusey*, notary public, and by performing other acts of heirship. And appellant demanded $2,029.54.

The respondents pleaded a general denial of the facts alleged in the demand and especially, by another defence, that they had not accepted the succession of the said *C. P. A. Boucher;* that, on the contrary, they had renounced it by deed before *J. O. Chalut*, notary, on the 23rd of May, 1877, and, consequently, that they were not liable to pay any of the amounts claimed by the action; that the deed of assignment of the right of redemption, of the

2nd April, 1872, pleaded by the appellant as being on the part of the respondents a deed of acceptance of the succession of the said *C. P. A. Boucher*, had been consented to by the respondents without any cause or consideration whatever; that the said deed was obtained from the respondents by the deceit and corrupt practices of the appellant, and they asked that it be declared, that the acceptance which they were alleged to have made, by the said deed of assignment, was the result of the deceit of the appellant, and that it be annulled and declared null and of no effect.

The respondents also pleaded that the deed of transfer consented to by *Marchand* to the appellant had never been served.

The Superior Court by its judgment of the 16th of March, 1882, maintained the claims of the respondents and dismissed the action of the appellant. This judgment was confirmed by the Court of Queen's Bench, sitting in appeal, at *Quebec*, in October, 1882.

From this judgment the appellant appealed to the Supreme Court of *Canada*.

The question which arose on this appeal was whether under the circumstances there had been a valid acceptance by the respondents of their father's succession.

Mr. *Laflamme*, Q.C., for appellant:

The respondents accepted their father's succession formally, by taking the quality of heirs and styling themselves as such in an authentic deed of transfer of rights of redemption made by them and dame *Suzanne Salmon* to the appellant on the 20th April, 1872.

The naked question therefore is: Was the deed of transfer of the right of redemption the result of fraud, deception and artifices on the part of the appellant? I contend that the evidence throughout positively shows that it was not.

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Respondents first attempted to fasten fraud on the appellant, from the fact that he employed a notary residing in the adjoining parish, instead of the resident notary at *Maskinongé*, to draw the deed. The reason of appellant's conduct is simple. When the deed was drawn, there was but one resident notary at *Maskinongé*, a gentleman named *Galipeau*.

But it is said that if respondents had known the responsibility they were assuming, they would never have signed the deed.

It is possible, but is it a valid reason in law that, because one has not foreseen the consequence of one's own act, that one is not to be held accountable for it? The doctrine is, to say the least, new, that gives a party the right to repudiate his acts because they do not prove advantageous.

But, even supposing appellant was aware that by signing the deed respondents were performing an act the consequences of which might prove disadvantageous to them, should such a contract be set aside on the ground of fraud? Why, we see in every-day business, transactions in which persons, not foresecing all the consequences, enter into contracts which turn out disastrously. Has the law any resource in reserve to compensate the losses of unfortunate speculators who freely and voluntarily bind themselves to an obligation, in the hope of reaping a profit? With *Demolombe* (1) we hardly think so.

All the authorities say that a contract to be null for fraud or deception, the fraud must have taken place with regard to the object itself, and not with regard to the consequences, and we believe that opinion to be founded not only in law but on common sense. [The learned counsel also contended upon the facts there had been a tacit acceptance].

(1) vol. 24, *contrat* p. 154, No. 170.

Mr. *Hould* for respondents :

The acceptance is tacit when the heirs perform an act which necessarily implies an intention to accept, there is no evidence to that effect here.

As to the express acceptance relied on, we submit that the conduct of the appellant showed such deceit and bad faith as to preclude him from reaping any benefit resulting from the signatures of the respondents to the deed of cession in question.

The learned counsel then commented on the evidence and cited *Laurent* (1); *Demolombe* (2); *Pothier* (3); *Dalloz* (4); *Bedarride, De la Fraude* (5); and arts 984, 991, C. C. L. C.

RITCHIE, C. J. :—

The right of the appellant to recover in this action depends upon the acceptance of the sucession of *C. P. A. Boucher* by respondents.

I think the Superior Court and the majority of the Court of Queen's Bench were justified in coming to the conclusion that the heirs of *C. P. A. Boucher* were imposed on by the appellant in obtaining from them, for a nominal consideration, equal to $7.14 to each of the heirs, the passing of the deed of assignment of April 2, 1872, sixteen days after the death (16th March, 1872,) of the said *C. P. A. Boucher*, imposing liabilities and burthens out of all reason in comparison with the consideration proposed to be paid, by establishing thereby their acceptance of the succession of their father, which he well knew to be insolvent, and thereby making them responsible for his debts, of which appellant now claims to be a creditor to the extent of $2,079, the appellant well knowing, as the evidence establishes, that the

(1) 9 vol. p. 250, No. 296.
(2) 14 vol. Nos. 537, 538.
(3) Vente. No. 236.
(4) 41 vol. Vo. Succession, No. 250.
(5) 1 vol. Nos. 94, 97.

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heirs were entirely ignorant of such being the effect of their so passing the said deed; and likewise well knowing from the notary who prepared the deed, that if they were aware of such being its effect they would not sign the said deed; the appellant knowing all which, and the youth and inexperience of the heirs, adopted means to keep them in ignorance by securing the services of a notary resident in another parish and passing by his own notary in the parish in which all parties resided, and to whom he had applied in the first instance to prepare the deed, and who actually prepared it, but who evidently would not pass it without explaining to the heirs its nature and effect, which, if done, would, as the said notary intimated to the appellant, prevent the heirs from executing it. The conduct of the notary is to be applauded, as the conduct of this appellant in his endeavors to obtain an advantage by means of the ignorance and the keeping in ignorance of these heirs is to be reprobated.

It appears to me to be the duty of a notary to explain to an illiterate grantor, if he has reason to believe he does not understand the legal and equitable obligations imposed by a deed and consequent on its execution, its nature and effect, more particularly so, when the deed is prepared by him at the instance and by the instruction of the vendee, and such party is especially benefited by the deed by its ulterior and indirect effect; and if such a vendee purposely withdraws the passing of such a deed by a grantor so situate from the notary who prepares it, because he knows he will not pass it without informing the grantor of circumstances within his knowledge, which would, if known to him, prevent his executing it; or if, without ascertaining that the grantor so situate fully understands its legal effect, to avoid and prevent the grantor receiving explanations

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and information relative thereto, and procures a strange nôtary ignorant of the circumstances, rendering its execution so disastrous to the grantor, such as in this case, (the insolvency of a succession) to pass the deed with unquestionably the sole view that the grantor may be kept in ignorance of the consequences, and thereby of imposing burthens on this illiterate and ignorant grantor for his benefit, the party so acting is, in my opinion, guilty of such bad faith as to preclude him from reaping the benefit resulting from the execution of such a deed, as if it had been *bond fide* executed with the knowledge of its effects and full intention that such effects should result therefrom.

In this case it is clear from the testimony of the notary *Galipeau* that the sole object of the appellant in getting the heirs to sign the act of cession, was to fix them with the debts of their father; that he was informed and well knew that if they knew that such would be the effect they would not execute the instrument, and he purposely, by changing the notary, prevented them from obtaining such information, but availing himself of their ignorance, knowingly practised on such ignorance, and obtained the deed which he could not otherwise have done had he acted in good faith and permitted the notary who drew the deed to explain its nature and effect to those illiterate people, which it was his duty to do. It was not reticence alone, it was in this case, not simply a *suppressio veri* on appellant's part, but by his acts he prevented the heirs from obtaining the information from a legitimate source, showing a determination to keep them in ignorance, and to take advantage of that ignorance, and so gain an advantage over them. Therefore I think he obtained the deed in bad faith, and this alleged acceptance having been the result of the evil practices and artifices of the appellant, amounting to fraud, is therefore null

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and of no effect, and cannot be relied on by the appellant to burthen these children for his benefit with the debts of their insolvent father.

Having got rid of the effect of the deed of cession I think the children did no other act whereby they can be held to have accepted the succession of their late father; in the acts and matters relied on, they only acted as the agents of their mother and in obedience to her orders.

STRONG, J., concurred with *Fournier*, J., in dismissing the appeal.

FOURNIER, J.:—

Les Intimés sont poursuivis en cette cause comme les héritiers de leur père, feu le Dr *Boucher*, pour la somme de $2,079.00 que l'appelant prétend lui être due en vertu de divers titres cités en sa déclaration.

Le Dr *Boucher* n'a laissé que fort peu de choses dans sa succession, une vente judiciaire de ses biens ayant eu lieu peu de temps avant sa mort, arrivée le 17 mars 1872. Il possédait, comme grevé de substitution, certains biens dont, à sa mort, la propriété revenait à ses enfants. Lors de son décès, il était reconnu comme insolvable.

Sa veuve, dame *Suzanne Salmon*, et ses enfants ont continué de demeurer dans la maison qu'occupait le Dr *Boucher* lors de son décès. Il n'a été fait d'inventaire de sa succession qu'à la mort de son épouse, arrivée le 10 avril 1877.

L'appelant prétend qu'ils sont devenus ses débiteurs pour avoir le 2 avril 1872, pris la qualité d'héritiers de leur père, dans un acte de cession d'un droit de réméré appartenant à sa succession; et aussi pour s'être, en diverses circonstances, immiscés dans les affaires de la succession, sans avoir fait d'inventaire.

Les intimés ont nié formellement toutes les allégа-

tions de la demande, et spécialement la qualité d'héritiers que leur attribue l'appelant. Ils ont allégué qu'au contraire ils avaient renoncé à la succession de leur père, par acte devant *J. O. Chalut*, notaire, le 23 mai 1877. Quant à l'acte de cession du 2 avril 1872, dans lequel ils paraissent avoir pris la qualité d'héritiers, ils allèguent qu'il a été consenti par eux sans aucune cause ni considération ; que le dit acte a été obtenu par des moyens de dol et de fraude pratiqués contre eux par l'appelant, et ils en demandent l'annulation.

L'action du demandeur a été renvoyée par la Cour Supérieure, et ce jugement a été confirmé par la majorité de la Cour du Banc de le Reine. C'est de ce dernier jugement dont l'appelant se plaint.

Les Intimés soutiennent le jugement qui leur a donné gain de cause, et prétendent, de plus, qu'il n'y en a pas d'appel à cette cour. Le montant de la demande est de $2,079.00, mais dans ce montant est comprise une somme pour intérêts qui, à la face même de la déclaration, sont prescrits et pour lesquels l'appelant n'a certainement pas droit d'action. Cette somme, disent les Intimés, doit être déduite de la demande, à laquelle elle n'a été ajoutée que pour rendre la cause appelable, en en portant le montant à une somme excédant $2,000. Les intimés n'ont point plaidé en droit à cette partie de la demande, et aucun jugement séparé n'a été rendu sur cette partie de la demande, qui a été renvoyée *in toto* par les deux cours. Le jugement dont se plaint l'appelant est le renvoi d'une demande de $2,079.00. Il a donc droit d'en appeler. Il est vrai qu'à l'argument l'appelant est forcé d'admettre qu'une partie de sa demande n'est pas fondée, mais il n'en a pas réduit le montant par aucun acte formel. Il a droit au jugement de la cour sur cette partie comme sur le surplus de sa demande.

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Cette cour a admis dans plusieurs circonstances que c'est le montant de la demande qui sert de bâse pour déterminer le droit d'appel et non pas celui du jugement. La cause ayant été rendue appelable par le montant demandé dans les conclusions, il faudrait pour lui faire perdre ce caractère, une réduction de cette demande soit par un acte de procédure de la part du demandeur, soit par un jugement passé en forme de chose jugée. Aucune de ces circonstances ne se rencontrant dans le cas actuelle, le demandeur a droit d'appeler du jugement qui a renvoyé sa demande. Voir à ce sujet *Bioche* (1) :

No. 138. Demandes réduites. Si la demande originaire a été réduite pendant l'instance, ce sont les dernières conclusions qui fixent la compétence, quant au ressort.

Ce principe est confirmé par une longue suite d'arrêts cités au même endroit.

No. 139. Toutefois la réduction des conclusions du demandeur ne rend l'appel non recevable qu'autant que les conclusions rectificatives ont été prises en présence du défendeur : autrement ce serait lui enlever un moyen de recours contre lequel il a dû compter.

Sur le mérite, les faits de la cause donne lieu aux deux questions suivantes : 1o. Est-ce par le dol et la fraude que l'Appelant a obtenu des Intimés la déclaration d'héritiers qu'ils ont faite dans l'acte de cession du 2 avril 1872? 2o. Les autres faits d'immixtion dans les affaires de la succession reprochés aux Intimés constituent-ils, dans les circonstances où ils ont été accomplis, une acceptation de la succession de leur père?

En examinant la preuve on est d'abord frappé par l'empressement que l'appelant a mis à faire faire l'acte du 2 avril 1877. La loi donnait aux intimés un délai de trois mois pour faire procéder à un inventaire des biens délaissés par le Dr *Boucher*, et en outre un délai de quarante jours après l'inventaire terminé, pour prendre une décision sur l'acceptation ou la renonciation à cette succession.

(1) Vo Appel, p. 341.

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L'appelant, qui a eu bien des transactions avec le Dr *Boucher* et qui paraissait au fait de ses affaires, savait que celui-ci avait un droit de réméré sur une certaine terre vendue à *Lafrenière* et *Ratelle*. Il fit préparer un transport de ce droit en sa faveur par le notaire *Galipeau*. Ce transport préparé d'avance et à l'insu des Intimés contenait la déclaration d'hérédité sur laquelle l'Appelant bâse sa demande d'une condamnation contre les Intimés. Il avait un grand intérêt à faire compromettre ainsi les intimés qui sont propriétaires de certains biens qu'ils tiennent de leur grand-père à titre de substitution. Il savait que la succession de leur père était insolvable et qu'il courrait le risque de perdre sa créance, pour partie du moins, s'il ne parvenait à s'assurer un recours personnel contre les Intimés en leur faisant prendre la qualité d'héritiers. C'est ce qu'il a réussi à faire d'une manière qu'il a pu croire habile mais qui n'est que malhonnête et ne peut en conséquence lui assurer aucun avantage.

Le notaire *Galipeau* après avoir préparé le projet d'acte d'acceptation, le remit à l'appelant. Comprenant les graves conséquences qu'auraient cette acceptation pour les intimés, il déclara qu'il n'aimait pas à l'exécuter lui-même, persuadé que si les Intimés en comprenaient les conséquences, ils refuseraient leur consentement. Le témoignage de *Galipeau* à ce sujet mérite d'être cité tant par rapport à son importance sur la question de dol que pour la doctrine extraordinaire qu'il expose sur la nature de ses devoirs envers les parties qui passent des actes devant lui. Il est nécessaire de s'élever contre la fausse doctrine qu'il a énoncée à cet égard.

Au sujet de la passation de cet acte voici ce qu'il dit :

C'est moi qui avais alors l'habitude de faire les actes du demandeur ; j'étais alors et je suis encore le notaire qu'il emploie ; je réside

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dans le village de *Maskinongé*, comme le demandeur lui-même, à une distance de quelques arpents.

Il n'y avait pas longtemps alors que feu *Charles Paphenus Anaclet Boucher* était mort ; je ne me rappelle pas si l'inventaire des biens de la succession du dit feu *Charles Paphenus Anaclet Boucher* était alors fait ; dans tous les cas la succession de feu *C. P. A. Boucher* passait alors pour insolvable, d'après la renommée ; c'était l'opinion générale dans la paroisse.

Je crois bien que le demandeur savait alors que la succession de feu *Charles Paphenus Anaclet Boucher* passait pour être insolvable. Je suis d'opinion que la plus grande partie des propriétés immobilières délaissées par le dit feu *Charles Paphenus Anaclet Boucher*, à son décès, n'appartenaient pas à ce dernier, mais était substituée à ses enfants.

Q. Le demandeur en cette cause ne vous a-t-il pas dit ou donné à entendre qu'il savait alors que la dite succession était insolvable et que le dit bien était substitué aux enfants ?

R. Dans le temps, je ne me rappelle pas qu'il m'en ait parlé ; mais il n'avait pas besoin de m'en parler, il savait dans le temps, que je connaissais ces choses. Il le savait comme moi ; c'était chose connue.

Q. Quand le demandeur vous a demandé de préparer le dit acte de cession de droit de réméré, désirait-il que le dit acte fût fait et reçu par vous ou par un autre notaire ?

R. Il désirait qu'il fût reçu par moi.

Q. Pourquoi n'avez-vous pas vous-même fait et reçu le dit acte ?

R. J'ai préparé l'acte, et quand il a été préparé, j'ai dit au demandeur que je n'aimais pas à recevoir cet acte-là parce que je connaissais la responsabilité qu'encourraient les vendeurs, en se portant héritiers de leur père, et la dite dame veuve *Suzanne Salmon*, en acceptant la communauté, et que j'étais d'opinion qu'il y avait ignorance de droit de la part des vendeurs, vû que je considérais la dite succession comme parfaitement insolvable.

Q. Avez-vous dit alors au demandeur la raison pour laquelle vous ne vouliez pas recevoir le dit acte ?

R. Je crois avoir dit alors au demandeur que je n'aimais pas à recevoir cet acte, parce que les défendeurs ne connaissaient pas la portée ou la responsabilité qu'ils assumaient en signant cet acte.

Q. N'est-il pas vrai que l'intention du demandeur, en faisant faire cet acte, était de faire faire acte d'héritiers aux défendeurs ? Le demandeur ne vous l'a-t-il pas dit ou fait entendre ?

R. Je sais que le demandeur savait que les défendeurs, en signant le dit acte de cession, se portaient héritiers de leur père et se ren-

daient responsables des dettes de sa succession, et je suis d'opinion que cette connaissance a dû le déterminer à faire la transaction qu'on lui offrait ; j'avais dit moi-même au demandeur, qu'en signant cet acte, les défendeurs se portaient héritiers, et je l'avais dit à d'autres aussi.

Q. Le demandeur ne vous a-t-il pas dit ou donné à entendre qu'il désirait faire consentir cet acte par les défendeurs, afin qu'ils devinssent responsables des dettes de leur père ?

R. Le demandeur m'a demandé si les défendeurs, en signant cet acte, se rendaient responsables des dettes de leur père ; je lui ai dit que oui ; il m'a demandé si c'était bien certain, je lui ai répondu que c'était en loi ; je ne sais pas si le demandeur a dit d'autres choses, mais je suis sous l'impression que c'est en grande partie ce qui l'a déterminé à faire faire cet acte de cession ; je l'ai compris ainsi.

Q. Quand vous recevez des actes d'une importance aussi grande que celle du dit acte de cession, n'avez-vous pas l'habitude et ne considérez-vous pas qu'il est de votre devoir de prévenir les parties ou de leur expliquer la nature ou les conséquences de tels actes ?

R. J'ai l'habitude d'expliquer la nature et les conséquences de l'acte que je reçois aux parties ; et je regarde cette habitude comme une bonne pratique, mais je ne crois pas que le notaire soit obligé en loi de le faire, quand on ne lui demande pas d'explications.

L'extrait suivant du témoignage de l'appelant fait aussi voir qu'il savait que les Intimés n'auraient pas signé l'acte en question s'ils eussent cru se rendre par cela responsables des dettes de la succession de leur père :

R. Le dit *C. P. A. Boucher*, lors de son décès, ne passait pas pour solvable, vu les dettes contractées par lui et sa famille ; mais, suivant moi, lorsqu'il avait besoin de quelqne chose, ou d'un petit montant, on ne lui refusait pas.

Q. Le dit *L. E. Galipeault* ne vous a-t-il pas dit, après avoir préparé le dit acte de cession, qu'il était prêt à le recevoir, pourvu que, suivant son habitude, il en expliquât la nature et les conséquences aux défendeurs ?

R. Il m'a dit qu'il ne voulait pas recevoir le dit acte parce qu'il croyait que, par le consentement du dit acte, les défendeurs se portaient héritiers, et qu'il croyait que si les défendeurs savaient qu'en signant cet acte, ils devenaient responsables des dettes de leur père, ils ne signeraient pas cet acte. Le dit *L. E. Galipeault* ne voulant pas recevoir le dit acte, j'ai envoyé chercher le notaire *Fusey*.

Q. N'est-il pas vrai que vous étiez alors et que vous êtes encore

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sous l'impression que les défendeurs n'auraient pas signé le dit acte, s'ils avaient cru en le signant, se rendre responsables des dettes de leur père ?

R. Je crois que les défendeurs n'auraient pas signé le dit acte, s'ils eussent pensé, en le signant, se rendre responsables des dettes de la succession de leur père, vu qu'ils contestent cette action aujourd'hui.

Lors de la passation du dit acte, j'étais aussi sous cette impression.

Ces deux témoignages font une preuve positive et complète que ce n'est que par erreur que les Intimés ont donné leur consentement à cet acte, et par suite de ses menées frauduleuses pour les empêcher d'être informés sur la nature des conséquences de cet acte. Après ce que lui avait dit le notaire *Galipeault*, qu'il ne pouvait exécuter cet acte sans prévenir les Intimés de ses conséquences, n'était-ce pas un dol de sa part de taire cette circonstance et, pour l'empêcher d'arriver à la connaissance des Intimés, d'aller chercher un notaire étranger pour exécuter cet acte tout préparé d'avance. La bonne foi obligeait l'Appelant à ne dissimuler aucune des circonstances qu'il admettait lui-même comme devant nécessairement détourner les Intimés de faire cet acte, s'ils en étaient informés. Mais on dit que les Intimés devaient eux-mêmes connaître les conséquences d'un pareil acte, qu'ils sont tenus de savoir la loi, et que d'ailleurs ils étaient bien avisés par un monsieur *Shiller*, ami de la famille. On prétend même que c'est lui qui a suggéré la cession de ces droits de réméré dans l'intérêt de la famille.

Il n'est pas douteux que si les Intimés eussent d'eux-mêmes et sans aucune démarche frauduleuse de la part de l'Appelant fait cet acte d'acceptation, il eût été suffisant pour les lier envers l'appelant. C'eût été alors un acte de leur propre volonté dont ils auraient dû calculer la portée. D'ailleurs laissés à eux-mêmes, ils auraient probablement employé pour le règlement de la succes-

sion, un notaire qui les aurait instruits de leurs droits et de leurs devoirs à l'égard de cette succession. L'Appelant ne leur a pas même donné le temps de la réflexion, ils avaient trois mois pour proceder à ce règlement, et c'est quinze jours après la mort de leur père qu'il leur prépare le piège dans lequel il les a fait tomber. Il était si pressé d'assurer sa créance qu'il n'a pas plus respecté les convenances que la bonne foi.

Il n'y a absolument rien dans la preuve pour faire voir que les Intimés connaissaient la portée de l'acte d'acceptation. L'Appelant, pour repousser l'accusation de fraude prétend qu'il a été sollicité par un nommé *Télesphore Shiller*, de la part de la mère des Intimés pour faire l'acquisition de ce droit de réméré. De cela, il n'y a point de preuve. Lui seul en parle dans son témoignage, et d'après la loi de la province de *Québec*, tout ce que la partie interrogée comme témoin dit en sa faveur ne fait aucune preuve pour elle. Ce fait ne peut être pris comme prouvé. D'ailleurs, s'il était vrai que cette suggestion fut venue de *Shiller* cette circonstance donnerait-elle plus de valeur au fait ? *Shiller* était un respectable cultivateur illettré, quoique paraissant avoir une certaine expérience des affaires. Mais il n'est pas prouvé qu'il était mieux informé que les Intimés au sujet des conséquences d'un acte de la nature de celui dont il s'agit. *Shiller* étant décédé avant l'enquête, les Intimés n'ont pu avoir sa version de ce fait pour l'opposer à celle de l'Appelant. On y aurait peut-être vu que la suggestion avait été au contraire faite par celui qui avait intérêt à faire compromettre les Intimés.

Le fait d'avoir évité d'employer M. *Galipeault*, le notaire de la paroisse, parce qu'il aurait prévenu les Intimés, démontrait bien l'intention de dol qui animait l'Appelant dans toutes ses démarches. La réquisition des services du notaire *Fusey*, étranger à la paroisse et qui vient présenter aux Intimés un acte de cette impor-

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tance, préparé d'avance par un autre notaire, sans en donner un mot d'explication, sont aussi des circonstances qui démontrent le dol de l'Appelant.

La conduite des notaires dans cette circonstance ne doit pas être passée sous silence. La doctrine de l'un qui dit qu'il n'est pas obligé, quoiqu'il le fasse assez souvent, d'expliquer aux parties la nature et les conséquences des actes qu'il reçoit, et le fait de l'autre qui reçoit cet acte d'acceptation d'héritiers, sans s'inquiéter des prétentions des parties intéressées, sans s'être assuré de la nature de l'acte qu'elles veulent faire, méritent une égale réprobation. Tous deux ont agi contre la loi; mais le plus coupable est sans doute celui qui, connaissant parfaitement les intentions de l'Appelant de commettre un acte de dol, n'a rien dit ni rien fait pour l'empêcher. L'autre, en exécutant cet acte préparé d'avance, peut prétendre qu'il était sous l'impression que les parties s'étaient complètement expliquées avant son arrivée. Cette explication qui paraît assez bien prouvée peut servir à l'excuser de participation à la fraude commise par l'Appelant; mais il n'en a pas moins manqué à son devoir professionnel en ne s'assurant pas par lui-même de la nature des conventions auxquelles il devait donner la sanction de l'authenticité. Les devoirs du notaire ainsi compris et pratiqués en feraient une institution dangereuse au lieu de cette sorte de magistrature si utile à la société en général. Quel danger n'y aurait-il pas pour les gens illéttrés à passer des actes devant des notaires qui se croiraient plus tôt les conseils d'une parties que les arbitres impartiaux des deux contractants? Quelques autorités à ce sujet ne seront pas sans utilité, en faisant voir que la loi réprouve la conduite des deux notaires relativement à la passation de l'acte d'acceptation.

Il est peu de fonctions plus importantes, (disait le rapporteur à la tribune du Conseil des Cinq Cents, que celles des notaires. Dépositai-

res des plus grands intérêts, régulateurs des volontés des contractants, quand ils semblent n'en être que les rédacteurs, interprètes des lois que l'artifice, la mauvaise foi et des combinaisons d'orgueil tendent toujours à éluder, les notaires exercent une espèce de judicature d'autant plus douce qu'elle ne paraît presque jamais, ou ne paraît qu'en flattant les intérêts des deux parties. Ce qu'ils écrivent, fait loi pour les contractants, et si les lois particulières sont en harmonie avec les lois générales, et ne blessent point les mœurs et l'honnêteté publique, ce grand bien est leur ouvrage.

Ces idées ont été partagées par le Conseil d'Etat. On peut en juger par la manière dont s'est expliqué l'Orateur du gouvernement M. *Riel*, dans l'exposé des motifs de la loi. Après avoir parlé de l'institution des justices de paix, des tribunaux civils et des ministres du culte, il a ajouté :

Une quatrième institution est nécessaire, et à côté des fonctionnaires qui concilient et qui jugent les différends, la tranquillité appelle d'autres fonctionnaires, qui, conseils désintéressés des parties, aussi bien que rédacteurs impartiaux de leur volonté, leur faisant connaître toute l'étendue des obligations qu'elles contractent, rédigeant ces engagements avec clarté, leur donnant le caractère d'un acte authentique et la forme d'engagement en dernier ressort, perpétuant leur souvenir, et conservant leur dépôt avec fidélité, empêchent les différends de naître entre les hommes de bonne foi, et enlèvent aux hommes cupides, avec l'espoir du succès, l'envie d'exercer une injuste contestation. Ces conseils désintéressés, ces rédacteurs impartiaux, cette espèce *de juges volontaires* qui obligent volontairement les parties contractantes, sont les notaires. Cette institution est le notariat.

En ouvrant son parfait notaire (1), il y aurait trouvé les règles suivantes qui n'ont pas cessé d'être obligatoire pour la profession :

III. Après s'être assuré de l'identité et de la capacité des parties le notaire doit se faire instruire par chacune d'elles de toutes leurs intentions et examiner quelles sont les solennités requises par les lois pour la validité de l'acte dont il s'agit.

Comme il est choisi par les parties pour être l'interprète fidèle de leurs volontés, son principal soin doit être de les bien pénétrer, afin de pouvoir mettre leurs intérêts et leurs intentions dans tout leur

(1) 1 vol. p. 44, au titre " Devoirs des notaires, etc.," au parag. III.

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jour ; car ce n'est que par ce moyen qu'il peut éviter dans ses actes les équivoques et les incertitudes qui sont ordinairement la source des contestations.

En effet, la plupart des procès tirent leur origine des ambiguités que les notaires laissent échapper dans leurs actes. Peut-être n'en doit-on pas toujours accuser la mauvaise foi ou l'ignorance du notaire ; mais au moins on ne peut le disculper d'avoir eu peu d'attention à bien comprendre les intentions des parties, ou à les rédiger exactement.

Toutes les circonstances qui entourent la passation de cet acte, prises ensemble, justifient l'allégation de dol et fraude et suffisent pour en faire déclarer la nullité.

Indépendamment de cet acte d'acceptation, l'appelant prétend que les Intimés ont fait divers actes d'héritiers qui ont l'effet de les rendre responsables de toutes les dettes de la succession de leur père.

A ne considérer que les parties de témoignages citées par l'appelant, cette preuve serait sans doute suffisante pour faire déclarer que les Intimés ont pris la qualité d'héritiers. Ainsi *Charles Boucher* dit que les Intimés ont vendu trois chevaux et trois ou quatre voitures appartenant à leur père ; qu'après la mort de leur père ils ont continué de vivre en commun avec leur mère. *Victoire Boucher* dit qu'elle a collecté à la demande de sa mère des rentes et des dettes pour services professionnelles dues à la succession du Dr *Boucher*. Sans doute que si ces actes n'étaient ou contredits ou expliqués, ils constitueraient une acceptation de la succession.

Mais il n'en peut être ainsi lorsque l'on considère le témoignage dans son ensemble. Le nommé *Charles Boucher* qui parle de la vente des chevaux ajoute dans ses transquestions, que c'est le notaire *Chalut* qui a fait cette vente ; mais il ne peut dire si c'est avant ou après l'inventaire que cette vente a été faite. Il se rappelle ensuite que c'est après la mort de sa mère que cette vente a eu lieu et qu'elle a été faite par le notaire *Chalut* qui avait présidé à l'inventaire.

C'est après avoir fait cet inventaire que le dit notaire *Chalut* a vendu les dits chevaux. Le dit notaire *Chalut* a tout vendu à la fois, les animaux et le roulant, savoir: vaches, cochons, poules, voitures et autres effets mentionnés dans mon examen en chef. Tous les dits effets ont été vendus par le notaire *Chalut*.

Le même témoin jure "qu'il n'a eu aucun argent de cette vente; qu'il n'a jamais eu aucun des effets appartenant à feu le Dr *Boucher*, ni retiré aucun des argents de sa succession, ni retiré aucune des créances qui lui a été due."

Un autre des Intimés, *François Boucher*, dit :

Je n'ai jamais rien pris, ni profité du roulant ni des biens, savoir: des chevaux, vaches, voitures, ménage et autres effets délaissés par le dit feu *Charles Paphenus A. Boucher*, à son décès. Tous les biens délaissés par le dit feu *Charles Paphenus A. Boucher*, à son décès ont été vendus par le dit notaire *Chalut*, comme susdit.

Q. Avez-vous ou quelques-uns des Défendeurs retiré quelques-uns des argents provenant de la dite vente ainsi faite par le dit notaire *Chalut*?

R. Non, on n'a jamais retiré rien.

Q. Avez-vous jamais reçu, pris ou eu quelques-uns des biens délaissés par le dit feu *Charles Paphenus A. Boucher*, à son décès?

R. *Non, jamais.*

Q. Avez-vous fait quelqu'acte quelconque d'acceptation de la succession du dit feu *Charles Paphenus A. Boucher*?

R, Non, jamais.

Quant aux collections de dettes on voit d'après le témoignage de *Victoire Boucher*, qu'elles ont été faites par elle, à la demande de sa mère qui était en communauté de biens avec feu son mari. Elle aussi jure qu'elle ne s'est rien appropriée de la succession, comme on peut s'en assurer par ses réponses aux questions suivantes :

Q. Jurez-vous positivement que tout ce que vous avez reçu et retiré, soit pour rentes constituées ou seigneuriales, soit en comptes de médecine ou autrement était reçu et retiré pour votre *mère* pour son bénéfice et avantage et en son nom, à sa réquisition spéciale?

Objecté à cette question comme illégale.

R. Oui.

Q. Jurez-vous positivement que vous n'auriez jamais signé l'acte

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dé cession produit en cette cause, si vous eussiez pensé qu'il vous portait héritier de votre père ?

Objecté à la question comme illégale.

Objection réservée par les parties.

R. Oui, parce que mon père n'avait *que des dettes*, il n'avait rien, Les rentes perçues durant l'année suivant la mort de mon père ont été employées pour payer les dettes de mon père et pour vivre."

D'après ces témoignages, on voit que la preuve sur laquelle se reposait l'Appelant pour rétablir des faits d'acceptation d'hérédité est positivement contredite.

Ce qui a pu être touché des biens de la succession en question l'a été par Madame *Boucher* qui était en communauté de biens avec son défunt mari. Elle est sans doute devenue, par ces actes, responsable comme commune en biens; mais ses enfants ayant renoncé à sa succession, ne peuvent être responsables de l'acceptation qu'elle a faite de la communauté de biens qui avait existé entre elle et son mari.

Après un examen attentif des faits de cette cause, je suis d'opinion que la Cour Supérieure et la Cour du Banc de la Reine les ont correctement appréciés. La décision de cette Cour repose entièrement sur les questions de faits. Ces dernières étant résolues en faveur des Intimés, l'application des principes de droit développés par l'honorable juge *Tessier*, dans l'opinion duquel je concours, ne souffre aucune difficulté. Pour ces motifs, je suis d'avis que l'appel doit être renvoyé avec dépens.

HENRY, J.:

I am sorry to differ from my learned brethren with regard to the question under consideration. The circumstances are simply confined to a few points. These parties, who are in succession to the father, knowing that there was a mortgage on the property, and that they had a right of pre-emption, voluntarily went to *Ayotte* and offered to sell to him their right of pre-

emption in the mortgaged premises for a certain sum, which he accepted. That is the transaction. What fraud, then, was there in *Ayotte*? There is no evidence that he acted in the slightest degree in any way to influence them to make that proposition to him. But, it is said, "Oh, he knew that if they did that it would subsequently make them bound for the debts of the succession."

Now, I have seen no case, and I have read no law, which throws the responsibility on *Ayotte* of telling them that, nor do I know of any rule of law that required the notary to tell them that. When a party goes to a notary, asking him to write a certain document for which a certain consideration is to be paid, what right has the notary to inquire whether the parties understand it or not? It must be presumed they did. But we are told that *Ayotte* is a very cunning man, and the others are ignorant. If we lay down propositions founded on an assumption of that kind, where are we, as judges, to draw the line? It appears to me that it is our business to administer the law, and I think that when there is no fraud proved, we are not to try and make it out from some thing that is very, very obscure. I think fraud is a defence that is necessary not only to be pleaded, but fully proved. In this case the defence set up is fraud. I have read over the evidence, and although I have no doubt that *Ayotte* was well aware of the consequences to these people of their own act, the question comes: "Was he, in the first place, the party that suggested it? Did he, by any fraudulent profession or inducement of any kind, bring these parties to make that voluntary offer?" I can see no evidence of the kind. Then, can they come in and complain afterwards that what they volunteered to do, somebody did not come forward and tell them, "If you do that certain consequences will arise." I do not wish to carry out a doctrine of that

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kind. I am very sorry to differ from my learned brethren, but if we open the door, because these people are alleged to be ignorant, and did not know any better, and decide that some person ought to have instructed them, we must apply that doctrine to other cases. We might say the merchant, who enters into a transaction, does not know the consequences of his act, and that if he knew that the consequences of signing a document would be so and so, he would not sign it, and that the notary ought to enlighten him. I say it is totally impracticable to carry out such a doctrine in all its bearings, and, therefore, it cannot be applicable in any case. I can see no fraud on the part of *Ayotte*; if so, the legal consequences, as I take it, ought to follow the act, The legal consequences are that these parties bound themselves to the debts of the succession. If they did so, it is a misfortune. They were not over-reached or induced to do so they were the moving parties, and if the notary that was first employed in the place had any scruple about it, knowing the circumstances, and would not undertake to do it, and *Ayotte* went to another notary, was there any obligation on the part of the second notary that he should tell the parties, not the immediate nature of the transaction, not whether they were selling the equity of the redemption for a certain sum—that is not disputed—but because he did not trace out the legal results of that into other matters connected with the estate, a thing which he was not bound to think of; nor is it to be presumed, without evidence, that he knew the estate of *Boucher* was insolvent, or that by signing this document these parties made themselves liable for the debts of their father.

There is further evidence that these people acted under their mother—but she was not entitled to he whole of the succession. If she sold property belonging to the succession of *Boucher* that would not, I take it, make them answerable as well as their mother, but here

they were themselves actors and it will not do for one party, who does wrong, to say, "I did it by the instruction of some other party." Taking that view, I think these parties rendered themselves liable for the debts of the succession.

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I think therefore the appeal ought to be allowed.

TASCHEREAU and GWYNNE, JJ., concurred in dismissing the appeal.

Appeal dismissed with costs.

Solicitors for appellant: *Turcotte & Paquin.*

Solicitors for respondent: *Hould & Grenier.*

THE ANCHOR MARINE INSURANCE COMPANY..... APPELLANTS;

AND

JOHN KEITH..... RESPONDENT.

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*Oct. 26.
1884
*Jan'y 16.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Marine policy—Voyage policy—Mortgagee who assigns as collateral security has an insurable interest—Total loss—Right to recover—Notice of abandonment by mortgagee—Constructive total loss.

While the barque "*Charley*" was at *Cochin* on or about the 12th April, 1879, the master entered into a charter party for a voyage to *Colombo*, and thence to *New York* by way of *Alippee*. The vessel sailed on the 22nd April, 1879, and arrived at *Colombo*, which place she left on 13th May, and while on her way to *Alippee* she struck hard on a reef and was damaged and put back to *Colombo*. The vessel was so damaged, that the master cabled to the ship's husband at *New York* on the 23rd May, and in reply received orders to exhaust all available means and do the best he could for all concerned. The repairs needed were extensive and it was impossible to get them done there, and *Bombay*, 1,000 miles

*PRESENT—Sir W. J. Ritchie, Knt., C.J., and Strong, Fournier, Henry and Gwynne, JJ.

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distant, was the nearest port. After proper surveys and cargo discharged, on the 10th June the vessel was stripped and the master sold the materials in lots at auction.

On the 21st May, the respondent, a mortgagee of $\frac{44}{64}$ in the vessel, which he had assigned to the Bank of *Nova Scotia* by endorsement on the mortgage, as a collateral security for a pre-existing debt to the Bank of *Nova Scotia*, being aware of the charter from *Cochin* to *New York*, insured his interest with the appellant company. The nature of the risk being thus described in the policy: "Upon the body, &c., of the good ship or vessel called the barque *Charley* beginning the adventure (the said vessel being warranted by the insured to be then in safety,) at and from *Cochin viâ Colombo* and *Alippee* to *New York*." To an action on the policy for a total loss—the defendants pleaded *inter alia* 1st—that the plaintiff was not interested; 2nd, that the ship was not lost by the perils insured against; 3rd, concealment. A consent verdict for $3,206 for plaintiff was taken subject to the opinion of the court upon points reserved to be stated in a rule *nisi*, and upon the understanding and agreement that everything which could be settled by a jury, should upon the evidence given be presumed to be found for the plaintiff.

Held,—1st. That this was a voyage policy, and that the warranty of safety referred entirely to the commencement of the voyage and not to the time of the insurance.

2nd. That the fact of the plaintiff having assigned his interest as a collateral security to a creditor, did not divest him of all interest so as to dis-entitle him to recover.

3rd. That the vessel in this case being so injured that she could not be taken to a port at which the necessary repairs could be executed, the mortgagee was entitled to recover for an actual total loss, and no notice of abandonment was necessary.

Per *Strong*, J., that a mortgagee upon giving due notice of abandonment is not precluded from recovering for a constructive total loss.

APPEAL from a judgment of the Supreme Court of *Nova Scotia* discharging a rule *nisi* for a new trial.

The facts of the case sufficiently appear in the head note and judgments hereafter given.

To a declaration as for a total loss upon a marine voyage policy upon the barque "*Charley*," alleged to have been executed by the defendants, they pleaded among other pleas,—

1st. That the plaintiff was not interested in the said ship, as alleged.

2nd. That the said ship was not lost by the perils insured against or any of them, as alleged.

3rd. That they were induced to make the policy by the fraud of the plaintiff.

4th. That at the time of making the policy the plaintiff and his agents wrongfully concealed from the defendants a fact then known to the plaintiff and his agents, and unknown to the defendants, and material to the risk—that is to say, that the said ship was then lost or had sustained serious damage.

5th. That at the time of the making of the said policy the plaintiff and his agents wrongfully concealed from the defendants a fact then known to the plaintiff and material to the risk—that is to say, that notice of the loss of the said ship or the damage she had sustained on said voyage had been published in one or more public newspapers in *England* two or three days previously, and,

6th. That at the time of the making the said policy the plaintiff and his agents wrongfully concealed from the defendants a fact then known to the plaintiff and his agents and unknown to the defendants, and material to the risk—that is to say, that the said ship had been previously reported as lost or seriously injured on said voyage

Issue having been joined on these pleas the case went down for trial before Mr. Justice *Weatherbe* and a jury in November, 1881, and, upon the close of the evidence, a verdict at the suggestion of the counsel of the defendants was taken for the plaintiff for $3,206.80, subject to the opinion of the court upon points reserved, to be stated in a rule *nisi* to be taken out, and upon the understanding and agreement that everything which

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could be settled by a jury should, upon the evidence given, be presumed to be found for the plaintiff.

In pursuance of this agreement a rule *nisi* was obtained by the defendants in the following terms, namely, on hearing read the minutes of trial it is ordered that the verdict or judgment given herein for the plaintiff be set aside with costs and a new trial granted on the following grounds:

Because no sufficient interest is proved to entitle the plaintiff to recover the amount of the verdict.

Because the notice of abandonment was too late and insufficient.

Because no total loss was proved.

Because the vessel being only partially damaged could not under the terms of the policy be condemned at *Colombo*, a safe port, without notice to the underwriters, which was not given.

Because the declaration is not sufficient to enable the plaintiff to recover for a loss which happened before the application was made and insurance effected.

Because of the improper reception of evidence as to abandonment and of secondary evidence as to notice of abandonment and its contents.

Because the judge should not have allowed the declaration to be amended on the trial alleging interest in the Bank of *Nova Scotia*, unless cause to the contrary be shewn, &c., &c. Upon the argument of this rule *nisi* the court discharged the rule, thus maintaining the verdict, and it is from the rule and judgment discharging the rule *nisi* that this appeal was taken.

Mr. *Maclennan*, Q.C., for appellants.

Mr. *Graham*, Q.C., and Mr. *Gormully*, for respondent.

The points of argument are fully noticed in the judgments.

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RITCHIE, C, J.:

I had some doubts whether the evidence made it clear that there was a total loss, but all the facts have been submitted to a jury, and found in favour of the plaintiff, establishing that there was a total loss, and I am therefore not prepared to differ from the rest of the Court in the conclusion that there was an actual total loss, and this gets rid of any discussion as to the abandonment and notice.

STRONG, J.:

The nature of the risk is thus described in the policy:

Upon the body, tackle, apparel and other furniture of the good ship or vessel called the barque "*Charley*," beginning the adventure (the said vessel being warranted by the insured to be then in safety) at and from *Cochin* via *Colombo* and *Allippee* to *New York*.

It is first said that the words "lost or not lost" are not inserted in the policy, and that the warranty of safety has reference, not to the commencement of the voyage, but to the date of the policy, the 22nd May, 1879, when the loss had actually occurred. I think it very clear, as clear, indeed, as words can make it, that this was a voyage policy, and that the warranty of safety refers only to the commencement of the voyage, and not to the time of the insurance.

Concealment is not proved, and any objection to the verdict on that ground is distinctly precluded by the very terms of the agreement between counsel, on which the consent verdict was taken This stipulation was noted by the learned judge as follows:

A verdict is taken by plaintiff for the amount of $3206.80, interest from the first April, 1880, subject to the opinion of the court on questions reserved in the rule *nisi*. The verdict, by consent, is taken at the suggestion of the defendant's counsel, and I state before it is taken, that everything that a jury could settle on the evidence, must be presumed to be for the plaintiff.

The fact of concealment would be a question for the

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jury, and we must, therefore consider the case as though there had been an express finding in the plaintiff's favor on that ground, in which case it could not be pretended that the verdict was against the weight of evidence. Further, the verdict was to be subject only to the points reserved in the rule *nisi* which, according to the *Nova Scotia* practice, was, of course, moved for immediately after the trial, and this is not mentioned.

The question of the action not having been brought in due time is not raised by the pleadings, was not taken at the trial, and is also excluded by the terms of the agreement pursuant to which the consent verdict was given, as it is not comprised in the rule *nisi*.

Then, it appears, that the plaintiff had an interest as mortgagee of shares to secure $8,000. The mortgage was made by *Barteaux*, and it must be presumed that the registrar would not have registered the mortgage unless *Barteaux*, the mortgagor, appeared on the registry to be the owner of all the shares comprised in the mortgage. And this would probably appear if the registry was fully set out. Again, it cannot be denied, that *Barteaux* was owner of 30 shares, which, in any event, the mortgage includes, so that the objection becomes one only to the amount of the verdict, and is excluded by the terms of the consent, no objection to the amount of the verdict being taken in the rule.

There is nothing in the objection, that secondary evidence of the notice of abandonment was not admissible because there was no notice to produce; secondary proof of a notice is a well known exception to the rule requiring secondary evidence (1), and there is no reason why it should not apply to notices of abandonment as well as to notices to quit and a variety of other similar documents.

(1) Steven's Dig. of Law of Evidence, 84.

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Then, I am of opinion, that notice of abandonment was given with sufficient promptitude. The plaintiff first heard of the disaster from seeing it in a newspaper, and within a week he gave the notice. Allowing for the lapse of a reasonable time for making enquiries, this was in sufficient time. Moreover, it would, under proper directions, have been a question for the jury if the point had been raised at the trial; and under the agreement that every thing which a jury could settle on the evidence must be presumed to be for the plaintiff, the defendants are again concluded from raising this question. The point that the notice of abandonment was insufficient, because there was no transfer, must also share the fate of those which have already been disposed of. As shown in the case of *Kaultenback* v. *McKenzie* (1), by the present Master of the Rolls, the abandonment is a totally different thing from the notice of abandonment The cession of the property in consequence of the abandonment operates, it is said, without a word being spoken as necessary incident of the abandonment. This is so laid down in the text writers where numerous authorities are cited in support of it. It will be enough to refer to *Arnold* on Insurance (2), where I find the following statement of the law:

> If notice of abandonment has been duly given, a deed of cession or formal cession or formal transfer is unnecessary to enable the assured to perfect his abandonment and recover as for a total loss.

The assignment to the bank, if absolute in form, was either absolutely void under the statute, in which case it could have no effect at all, or it was merely by way of mortgage as a collateral security for a pre-existing debt. It, however, very clearly appears upon its face to have been of the latter character, and this being so, I am at a loss to conceive what possible effect it could have on

(1) 3 C. P. D. 467; see also per Blackburn, J., in *Rankin* v. *Potter*, 6 H. L. C. 118.

(2) 5 Ed., p. 918.

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the plaintiff's right to recover. No direct authority is produced showing that such a sub-mortgage is to be considered as so divesting the mortgagee of all interest as to dis-entitle him to recover. Practically he still retains the same interest which he had before the transfer, as the security held by his creditor is still for his benefit, since, if it is realized, he must receive credit for the proceeds and in that way pay his debt. He, therefore, retains his original interest unimpaired. No English authority can be cited for such a position. In the case of fire insurance a mortgage by the insured after the policy will not, in the absence, of course, of a special condition, be considered such a transfer of interest as to prevent a recovery, and I see no reason why it should have that effect in marine insurance which would also apply to fire insurance.

Lastly, it is said that in no case can a mortgagee recover for a constructive total loss. The first answer to this is, that the loss here was not a constructive loss at all, but an actual total loss. The ship was taken to the harbour of *Colombo* where it was found that there was no dry dock, and where she could not, for very sufficient reasons given by the captain, be beached, for the purposes of repair, and she was in such a condition that she could not be taken to another port for repair. This is the substance of the evidence of the master, and the appellants are debarred by the terms of the consent verdict from disputing the facts. In *Barker* v. *Janson* (1), *Willes*, J., says:

> If a ship is so injured that it cannot sail without repairs, and cannot be taken to a port at which the necessary repairs can be executed, there is an actual total loss, for that has ceased to be a ship which never can be used for the purposes of a ship; but if it can be taken to a port and repaired, though at an expense far exceeding its value, it has not ceased to be a ship, and unless there is notice of abandonment there is not even a constructive total loss.

(1) L. R. 3 C. P. 303.

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The case first put exactly describes the condition of this ship as she lay in the harbour of *Colombo*, no appliances for repair were within reach, and there it was impossible, even temporarily, to stop the leak so as to enable her to reach a port where repairs could be effected. It was, therefore, a case of actual total loss, and if there are authorities to show, which however I deny, that a mortgagee cannot recover for a constructive total loss, they do not apply to the facts of this case. I can find, however, no authority for holding that a mortgagee is precluded from recovering as for a constructive total loss upon giving due notice of abandonment; and upon principle I can see no reasonable reason for such rule. It is true that a bottomry bond holder cannot recover for a constructive total loss; but for this a reason is given which does not apply to the case of a mortgage (1). If, however the case of *Kaultenback* v. *MacKenzie* (2), is to be considered as overruling the opinion of *Willes*, J in *Barker* v *Janson*, and restoring Lord *Campbell's* doctrine in *Knight* v. *Faith* (3) (which I must be presumptuous enough to doubt, considering what has been said in some of the cases in the House of Lords) which was that whenever the subject-matter remained in specie, notice of abondonment was necessary, not for the purpose of declaring the election of the assured, for in such a case there can be no room for a choice, but to enable the underwriters to look after their interests in the property, the plaintiff is, I consider, still entitled to recover as having given a sufficient notice of abandonment. The appeal should be dismissed with costs.

FOURNIER, J., concurred.

(1) See Arnould on Insurance, p. 1015.

(2) 3 C. P. D. 467.

(3) 15 Q. B. 649.

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HENRY, J.:—

There are five leading points to be considered in dealing with the issues in this case:— 1st, as to the insurable interest in the respondent when the policy was issued; 2nd, the state of the ship when sold; 3rd, as to the notice of abandonment; 4th, as to the allegation of concealment; 5th, as to the warranty contained in the policy.

As to the first point, the respondent on the 31st of October, 1877, became a mortgagee of $\frac{46}{64}$ shares in the vessel insured, and the mortgage to him was duly registered on the 10th of the following month. On the 28th of October, 1878, the respondent assigned the mortgage to the bank of *Nova Scotia* by endorsement on the mortgage as follows:

> I, the within named *John Keith*, of *Windsor*, in consideration of the bank of *Nova Scotia* giving me time on a debt of $3,016.90 now owing to them by me on a draft drawn by me on *C. W. Barteaux*, *New York*, and due to-day, do hereby transfer to them the benefit of the within written security.

What then was the effect of that assignment? Did it transfer absolutely the whole interest in the mortgage? I am of the opinion it did not, and that the latter retained a valid insurable interest in the vessel to the amount greater than the amount insured. In the first place the only transfer recognized and provided for by the Merchants' Shipping Act is where the whole interest is sold and transferred. Here it is patent on the face of the assignment that it was made only as collateral security for the payment by the respondent of the amount of the dishonoured draft. The consideration is not alleged to have been in the shape of a sum paid, or to be paid, by the bank, but solely on account of the bank giving time for the payment of the draft. The bank took, no doubt, an equitable interest in the mortgage capable of enforcement, but not such as to divest wholly the interest of the assignor, who, in my

opinion, retained the legal title to the mortgaged shares. By law the bank was prohibited from taking or holding any mortgage of a ship, otherwise than as additional security for debts due them. Besides when we find the respondents' mortgage was $10,000, it would, indeed, be impossible, without evidence of the fact, to conclude, that for the time given him to pay the amount of the draft he agreed and intended to give a bonus to the bank of nearly $7,000. I have therefore no hesitation in deciding that the respondent had a valid insurable interest to an amount beyond that covered by the policy when it was issued.

The claim and verdict being for a total loss, the state of the ship when sold is most important to be considered. If she was at the time capable of being repaired, and there were the means at hand where she was of having the necessary repairs made, or if she could have been removed to another available port or place for that purpose, an actual total loss had not taken place, but, under the circumstances, if she could have been repaired the owner was bound to have that done, unless the repairs would cost as much, or more, than she would be worth when repaired. In the latter case, however, it would be but a constructive total loss and a notice of abandonment duly given would be necessary to entitle the insured to recover as for a total loss. It has been satisfactorily made to appear, by the evidence in this case, that when the ship returned to *Colombo* after having sustained the injuries spoken of on her voyage to *Allippee*, she was unseaworthy. At *Colombo* she could not be repaired so as to go to sea. At that place there were neither ship carpenters or shipyards, nor any other of the necessary means for repairing. It appears that *Bombay* was the nearest available port for getting her repaired, but it is distant

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about 1,000 miles from *Colombo*, and in the state she was in it was impossible to take her there.

The master, after having the damages inspected by two boards of surveyors, and acting by their advice, sold the vessel and materials, the latter in lots, and the hull, after having been stripped, separately. The purchaser of it immediately broke her up and got what was available out of her. I have no doubt that the master (who owned two shares of the vessel uninsured) did the best he could, under the circumstances, for all concerned, and the fact that the purchaser of the hull made no attempt to repair it, is corroborative evidence of the contention that the repair of the vessel was impracticable. If, then, the ship could not be repaired where she was, and could not be removed for repairs to another port, the loss becomes, in my opinion, an actual total loss. The law, as I view it, is well expressed by *Willes*, J., in *Barker* v. *Janson* (1). He says:

> If a ship is so injured that it cannot sail without repairs and cannot be taken to a port at which the necessary repairs can be executed there is an actual total loss, for that has ceased to be a ship, which never can be used for the purposes of a ship.

The ship at *Colombo* had therefore ceased to be a ship at the time the respondent first heard of her having been injured.

I consider that no notice of abandonment was therefore necessary and I need not discuss the question raised as to that given by the respondent.

There is not the slightest evidence of any concealment by the respondent personally of anything within his knowledge when he effected the insurance in question. But it is contended that the knowledge of the master affected him, and, as the master knew of the damage done to the vessel before that time, that know-

(1) L. R. 3 C. P. 305.

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ledge must be imputed to the respondent as mortgagee of the shares in her.

I know of no case wherein such has been decided, nor would I expect to find one. The master is no doubt the agent for many purposes of the owner, and in certain cases is expected and required in the ordinary course of business to communicate immediately with him, and, if he do not, and the owner is in ignorance of circumstances that he had a right to expect to be communicated to him by the master effects insurance, the policy becomes liable to forfeiture on the ground of concealment. The mere mortgagee of shares in a ship has nothing to do in ordinary cases with the employment or conduct of the master. He is in no wise his servant. Although the owner of a ship executes a mortgage of her he is no less the owner, and, subject to the rights of the mortgagee, can act the part of a full owner in every other respect. There exists a privity between him and the master, but none between the latter and a mortgagee of whom in many cases he never heard. If the law held one mortgagee affected by the knowledge of the master, the doctrine would apply to twenty mortgagees, if there were so many, and of whom the master knows nothing. After a vessel leaves her home port on a lengthened voyage, it may be for two or three years, how is the master to know of the mortgages and assignments that may be subsequently made? To require every mortgagee or assignee to find out and notify a master of his interest would, if not wholly impracticable, at least create difficulties that would hamper trade, by throwing embarrassing responsibilities on such mortgagees or assignees, and making them answerable for parties they may not know, and without the slightest privity of contract or knowledge otherwise having existed. It is the duty of the master to communicate with his owner, but he is under no obligation to communicate with a mortgagee. The

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latter pays him nothing for his services, and he has no claim upon him to furnish information as to the ship, her movements or condition. It would be unreasonable and inequitable to hold the mortgagee answerable for the knowledge of the master thousands of miles distant.

The next point is as to the warranty contained in the policy. The policy was issued on the 21st of May, 1879, and was "for $4,000 on the ship, tackle, apparel, and other furniture, beginning the adventure (the said vessel being warranted by the insured to be then in safety) at and from *Cochin via Colombo* and *Allippee* to *New York*." The policy insured against all perils, losses or misfortunes that have or shall come to the hurt of the vessel. What then is the substance of the warranty. In answer to the printed questions submitted for answers to the respondent, before the policy was issued, he said the vessel was then on the *Malabar* coast and to sail on the 10th of April the previous month. The evidence shows that the vessel sailed from *Rangoon* for *Cochin* in February, 1879; although not specially shown, she was no doubt at *Cochin* on the 10th of April, for about the 12th of that month the master chartered her for the voyage mentioned in the policy. She was then safe, and sailed from there under the charter for *Colombo* on the 22nd of April. She arrived at the latter, took in some cargo and sailed on her voyage to *Allippee* on the 13th May, and on the 17th ran on a reef and received the damage which made it necessary for her to return to *Colombo*. When the policy was issued the risk reverted back to the date of sailing from *Cochin*, and if she was then safe the words in the policy "all perils, losses or misfortunes that have or shall come to the hurt, &c., of the vessel cover a loss before the issue of the policy as well as a subsequent one. The appellants charged and got paid for the whole risk from *Cochin via Colombo* and *Allippee* to *New York*, and their insurance was co-

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extensive. The policy expressly provides for insurance against any loss that had previously been sustained after the commencement of the voyage, and therefore must necessarily cover that sustained on the 17th of May and subsequently. The warranty of the safety of the vessel, as I read it and the application and answers to the printed questions, does not apply to the 21st of May, when the policy was issued, but to the safety of the vessel at *Cochin*, from whence to commence the voyage as expected on the tenth of April.

A contention was raised at the argument that the respondent was not entitled to recover, because the suit was not commenced within twelve months from the time of the depositing of his claim.

That is a defence that must be pleaded, and there is no plea of that kind on the record. No such issue was raised, and none can be considered. Besides, no such objection is included in the rule *nisi* to set aside the verdict, and we cannot consider grounds of objection not contained in it.

For the reasons given, I am of opinion the appeal should be dismissed, and the judgment of the court below confirmed with costs.

GWYNNE, J.:—

The question before us upon this appeal is whether the verdict, which was taken by consent at the trial, subject to the opinion of the court as above stated, should be set aside and a verdict entered for the plaintiff, or a non-suit upon any of the objections stated in the rule, and first as to the interest of the plaintiff in the subject of the insurance and his right to recover under the policy, the injury which caused the subsequent loss of the vessel having been received before the policy was executed.

The plaintiff's interest is as mortgagee of $\frac{46}{64}$ parts or

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shares of the vessel insured, under a mortgage executed by one *Barteaux*, the then owner of those shares, dated the 31st October, 1877, and entered on the ship's registry on the 10th November, 1877. One *Robinson*, who was himself the owner of $\frac{2}{64}$ shares in the vessel, took charge of her in October, 1874, at *Kingsport*, *Nova Scotia*, where she was built, and continued in charge of her as master from thence continually until her loss in 1878, during all which time, so far as appears in the evidence, she may have been at sea and abroad. *Barteaux*, who mortgaged his $\frac{46}{64}$ shares to the plaintiff in 1877, always acted as managing owner and ship's husband. In December, 1878, she was at *Rangoon*, from whence she sailed for *Cochin* in February, 1879. While at *Cochin*, and on or about the 12th of April, 1879, the master entered into a charter party with her for a voyage to *Colombo*, in the island of *Ceylon*, and thence to *New York* via *Allippee*. She sailed from *Cochin* under this charter on the 22nd April, 1879, and arrived at *Colombo*, which place she left on the 13th May, and while on her way to *Allipee* she struck hard upon a reef on the 17th May. While thumping on the reef she unshipped her rudder and part of her keel came up. Having sounded the pumps and found four and a half feet of water in the well, the master, after consultation with his officers, decided, as the best course, to put back to *Colombo*, which was the nearest and safest port to get to. They arrived there (constantly pumping all the way) on the 19th May; the water was then gaining two feet per hour. Evidence, which was not contradicted, establishes that the vessel's bottom could not be examined until the cargo should be discharged, and this could not be done in consequence of the south west monsoon having burst on the 19th May, and the heavy sea which was running.

The cargo was got out as fast as possible, but no part

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could be taken out until the 24th or 25th May, and in the mean time, on the 23rd May, the master cabled to the ship's husband at *New York* as to what was to be done, and in reply received orders from him that when the master should have exhausted all available means to take care of the vessel, he should do then the best he could for all concerned. As soon as the cargo was got out the master had the bottom surveyed, and found the end of the stern post exposed and other injuries of such a nature that it was physically impossible to put to sea again, unless the vessel should undergo very extensive repairs, which repairs it was impossible to get made at *Colombo*, there being neither ship yards nor ship carpenters there, nor any wharf to heave her down to, nor any blocks to put her on. *Bombay* was the nearest port at which the vessel could have been repaired, and it was 1,000 miles off; after the cargo had been completely discharged, and on or about the 10th June, the master had a second survey made by two ship masters and a carpenter of one of the ships there, and a third survey by two ship masters, and, after consultation with them, he, in concurrence with them under their advice, came to the conclusion that, as he could not take the vessel to a port where she could have been repaired, the best thing he could do was to strip her and make the best he could of her materials. This he accordingly did. He stripped the vessel and sold the materials in lots at auction, and the hull in like manner, separately, the purchaser of which proceeded to break it up as the only thing which could have been done with it. On the 20th May in *Lloyd's* List and Commercial Daily Chronicle, published in *London, England*, there appeared the following information as transmitted from *Colombo* on the 19th May :—

Charley British barque bound hence for *Allippee* struck the ground

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northwardly of *Cormorin* and has put back leaky, cargo damaged, but to what extent not yet ascertained.

On the 21st of May the plaintiff who resides at *Windsor, Nova Scotia*, being aware of the charter from *Cochin* to *New York* but having no reason whatever to think the vessel was in trouble, unless the knowledge of the master constituted notice to the plaintiff (a point hereafter to be referred to) made application to the agent of the defendant at *Halifax* for the policy now sued upon, wherein he informed the defendants that the voyage he wanted the insurance for was from *Cochin via Colombo* and *Allippee* to *New York*, and, in reply to questions therein as to where the vessel then was, and when ready to sail, replied to the former that she was on the *Malabar* coast, and to the latter, the 10th April; thereupon the policy now sued upon was issued—being for $4,000:

> Upon the body, tackle, apparel and other furniture of the good ship or vessel called the barque *Charley*, beginning the adventure (the said vessel being warranted by the insured to be then in safety) at and from *Cochin via Colombo* and *Allippee* to *New York*.

The said vessel, tackle, &c, valued at $20,000, and the perils to which the defendants are made liable are stated in the policy to be among others:

> All perils, losses or misfortunes that have or shall come to the hurt of the vessel subject to the conditions and provisions contained in or referred to by clauses in this policy.

Now, it is contended that this policy is for a voyage thereafter to be commenced from *Cochin*, where, as is contended, the plaintiff warranted the vessel to be then, on the 21st May, in safety, and that the words "lost or not lost" not being inserted the defendants are not liable, but upon reference to the application, which may be looked to as explanatory of the intention of the parties, it sufficiently appears that the defendants were

informed that the voyage for which the plaintiff wanted to effect insurance was expected to have commenced on the 10th April, and the warranty must be read as applying to the beginning of the adventure upon her sailing from *Cochin* on such contemplated voyage. The statement in the policy that it is intended to cover "all perils, &c, &c, that have, or *shall* come, to the hurt of the vessel, &c., supports this view. The plaintiff, therefore, in the absence of any knowledge then possessed by him of the injury which the vessel had sustained, is entitled to recover, notwithstanding the absence from the policy of the words "lost or not lost."

It was contended further, that as it appeared that the plaintiff had assigned his mortgage to the *Bank of Nova Scotia* on the 21st of October, 1878, the absolute legal interest in the $\frac{46}{64}$ shares mortgaged to the plaintiff became, by force of sec. 73 of the Merchants' Shipping Act of 1854, vested in the bank, and that the plaintiff therefore had no interest on the 22nd May, 1879, when the policy was executed. This contention was well answered, as it appears to me, by the judgment appealed from. The transfer of the mortgage to the bank is in these words:

> I, the within named *John Keith*, of *Windsor*, in consideration of *The Bank of Nova Scotia* giving me time on a debt of $3,016.90, now owing to them by me on a draft drawn by me on *C. W. Barteaux*, *New York*, and due to-day, do hereby transfer to them the benefit of the within written security. In witness, &c."

By the Dominion statute 34 *Vic.*, ch. 5, the bank could not take, or hold, any mortgage of any ship, or other vessel, otherwise than by way of additional security for debts contracted to the bank in the course of its business. When, then, the plaintiff, in consideration of the bank giving to him time for the payment of a draft for $3,016.90 then due, transferred to the bank "the benefit" of the mortgage held by the plaintiff on *Barteaux*'s $\frac{46}{64}$th.

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shares in the vessel, which was a security for payment to the plaintiff of $10,000, together with an arrear of interest thereon at the rate of 7 per cent. from the 31st of October, 1877, all that can be held to have passed to the bank was in the nature of a mortgage, that is to say, an equitable interest in, or lien upon, the $10,000 secured by the mortgage as security that the plaintiff's debt to them of $3,016.90 should be paid, and the only way by which the bank could acquire the absolute legal title to the property mortgaged, namely, the $\frac{46}{64}$th. shares in the vessel, would be under the provisions of the 41st and 43rd secs. of 34 *Vic.*, ch. 5, taken together, "by obtaining a release of the equity of redemption in the property mortgaged, or by foreclosure in a Court of Equity, or by any other means whereby an equity of redemption can by law be barred." Such transfer by the plaintiff, operating therefore merely in the nature of a derivative mortgage, was not such a transfer as is contemplated in the 73rd section of the Merchants' Shipping Act, which section contemplates such an absolute legal transfer of a mortgage of a vessel, or of shares therein, as would entitle the transferee to be entered upon the registry of the vessel as the mortgagee of the vessel, or of the shares therein, under the original mortgage, and as the legal owner of such vessel, or shares, to the limited extent defined in the 70th section, and the result is that, notwithstanding the execution by the plaintiff of the instrument endorsed upon the mortgage, he still retained, under the provisions of the 70th and 71st sections of the Merchant's Shipping Act, the legal interest in the shares mortgaged to him by *Barteaux*, and he must be held to have still retained such interest when the policy was executed, and entitled to effect the insurance contained therein, notwithstanding, that the bank had an equitable interest in the plaintiff's

mortgage and a lien upon the monies to be realised thereunder.

As to the issues joined upon the pleas averring concealment by the plaintiff, at the time of his effecting the insurance, of facts alleged to have been known to him and unknown to the defendants and material to the risk—namely, that the vessel was then lost, or had sustained serious injury, and that notice of the damage which she had sustained had previously been published in one or more public newspapers in *England* two or three days previously, and that the vessel had been reported as lost or seriously injured on her said voyage, the evidence shows that the plaintiff had no actual knowledge of any of those matters, and that he had no reason to believe she had been in any trouble whatever.

All that appears to have been published in any newspapers relating to the vessel was the information published in *Lloyd's* list on the 20th May—namely, "that she had struck the ground and had put back leaky, and that the cargo was damaged, but to what extent had not yet been ascertained;" but the plaintiff had no knowledge of such publication. It was contended, however, by the learned counsel for the defendants, that the knowledge of the master was the knowledge of the plaintiff, and it was upon such constructive knowledge solely that the contention for the defendants in support of their pleas was rested.

That the master is the agent of the owners of a vessel there can be no doubt, and *Gladstone* v. *King* (1), cited and followed in *Proudfoot* v. *Montefiore* (2), decides that the knowledge of the master as to any injury sustained by the vessel when under his charge is impliedly the knowledge of the owners; the foundation of that doctrine, however, is that the master, being appointed by the owners, the relation of principal and agent has

(1) 1 M. & S. 35.

(2) L. R. 2 Q. B. 520.

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been established between them. The principle as laid down in *Proudfoot* v. *Montefiore*, is that—

> If an agent, whose duty it is in the ordinary course of business to communicate information to his principal as to the state of a ship or cargo, omits to discharge such duty, and the owner, in the absence of information as to any fact material to be communicated to the underwriter, effects an insurance, such insurance will be void on the ground of concealment or misrepresentation. The insurer is entitled to assume, as the basis of the contract between him and the assured, that the latter will communicate to him every material fact of which the assured has, or, in the ordinary course of business, ought to have, knowledge, and that the latter will take the necessary measures, by the employment of competent and honest agents to obtain, through the ordinary channels of intelligence in use in the mercantile world, all due information as to the subject-matter of the insurance.

No case has been cited which establishes that the registered owner of shares in a vessel who, as such owner, had taken part in the appointment of the master, and between whom and the master the relation therefore of principal and agent exists, by executing (in the absence, it may be, of the master with the vessel on a voyage) a mortgage of the whole, or of some part, of his shares, to a person of whose existence even the master may be ignorant, constitutes the relation of principal and agent to exist between the mortgagee and the master, so as to make the neglect of the master to communicate to the mortgagee (of whose status as mortgagee, and of whose existence even, he may be ignorant) such matter within his knowledge as it would be his duty to communicate to his principals such a breach of his duty as to subject the mortgagee to the consequences of such neglect, and that it could in law and reason be said, on the principle upon which *Gladstone* v. *King* and *Proudfoot* v. *Montefiore* were decided, that the knowledge of the master was impliedly the knowledge of the (to him) unknown mortgagee. In the absence of any decision in support of such a contention, I must

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say that so to hold, would be, as it appears to me, to do violence to, to the extent of ignoring, the principle which is the foundation of the decisions in *Gladstone* v. *King* and *Proudfoot* v. *Montefiore*, and is not warranted by any thing in the Merchants' Shipping Act, upon the provisions of which act the contention is rested, for, although true it is that that act makes the mortgagee of shares in a vessel the owner of such shares for the purpose of realizing his mortgage debt by sale of the shares, or so much thereof as might be necessary, and of giving a good and absolute title to the purchaser, yet, for all other purposes, the mortgagor continues to be the owner of the shares mortgaged. By the 70th section of the Act it is specially provided that

> A mortgagee, shall not by reason of his mortgage, be deemed to be the owner of a ship or any share therein, nor shall the mortgagor have ceased to be the owner of such mortgaged ship or share, except in so far as may be necessary for making such ship or share available as a security for the mortgage debt.

So that the act gives no countenance, as it appears to me, to the contention that the plaintiff, by taking a mortgage upon *Barteaux'* shares became the owner of such shares so as to create between himself and the master appointed by *Barteaux* and his co-owners the relation of principal and agent. The issues joined, therefore, upon the pleas averring concealment by the plaintiff of material facts known to him and unknown to the defendants could be found in favor of the defendants solely in the event of actual previous knowledge of the matters alleged to have been concealed being brought home to the plaintiff, in which the evidence wholly fails.

The issue joined upon the plea denying the loss of the vessel by any of the perils insured against, raises the question whether the loss was an actual total loss, or only a constructive total loss, which latter could only be perfected by notice of abandonment in due

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time after the receipt, by the plaintiff, of information that the vessel had suffered the damage which caused the loss. If the loss was an actual total loss the plaintiff would, so far as the issue raising that point is concerned, be entitled to recover without any notice of abandonment, and we shall be relieved from the necessity of determining the objection taken that the notice given was too late and insufficient.

Now, upon the evidence we must take it to be established, that the first information which the plaintiff had of any injury having been sustained by the vessel was upon the 3rd or 5th of June, 1879, and that the extent of such information was that contained in *Lloyd's* List, as published in *London, England*, on the 25th May, 1879, as above extracted.

The proper conclusion to arrive at on the evidence, I think also, is, that, although it may not have been until upon or after the 10th June that the master became aware of the full extent of the injury which the vessel had sustained, and that it was of such a nature that it was utterly impossible to have repairs made at *Colombo*, so as to enable the vessel to proceed to a place where the repairs could have been made, and that it was a physical impossibility, under the circumstances, in her then condition to have taken her to a place where she could have been repaired, she had nevertheless, on the 3rd of June completely lost her character of a ship or vessel, and had became to all intents and purposes as complete a wreck as if she had been broken into pieces, and become, as it has been called, a congeries of planks, by the perils insured against. This, as it seems to me, is the dictate of sound sense, nor is authority wanting in support of it. *Willes*, J., in *Barker* v. *Janson* (1), lays it down distinctly. He there says:

> If a ship is so injured that it cannot sail without repairs and can-

(1) L. R. 3 C. P. 305.

not be taken to a port at which the necessary repairs can be executed there is an actual total loss, for that has ceased to be a ship which never can be used for the purposes of a ship.

The evidence would have justified a jury in finding that upon the 3rd of June, 1879, when first the plaintiff became aware of the vessel having met with any injury, it was a physical impossibility to take her again to sea without previously undergoing repairs, and that it was not possible that the necessary repairs to fit her to go to sea should be executed at *Colombo*, where there were no appliances whatever, or shipwrights, and that, therefore, she was not capable of being again used as a ship, and that she was not saleable as such, and that the master, in selling, as he did, the materials of which she was composed in parcels, did the best that under the circumstances could be done with her, and that he acted *bonâ fide* and honestly for the benefit of all concerned, and without any knowledge of the vessel being insured by the plaintiff. Under the agreement upon which the verdict for the plaintiff was taken, we must treat as found by the jury everything which upon the evidence could properly have been found by them. Under these circumstances and upon the authority of *Milles* v. *Fletcher* (1); *Idle* v. *Royal Exchange Assurance Co.* (2); *Cambridge* v. *Anderton* (3); approved in *Roux* v. *Salvador* (4); *Robertson* v. *Clark* (5); and of *Willes*, J., in *Barker* v. *Janson* (6), the plaintiff is, in my opinion, entitled to recover as for an actual total loss without any notice of abandonment.

A further point was taken before us—namely, that by a clause in the policy it is provided that—

No suit or action of any kind for the recovery of any claim upon, under, or by virtue of, this policy, shall be sustainable in any court of law or chancery, unless such suit or action shall be commenced within

(1) 1 Doug. 231.
(2) 8 Taunt. 755.
(3) 2 B. & C. 697.
(4) 3 Bing. N. C. 288.
(5) 1 Bing. 445.
(6) L. R. 3 C. P. 303.

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the term of twelve months next after claim for loss or damage shall be deposited at the office of the company, and in case any such suit or action shall be commenced against the company after the expiration of twelve months next after claim for loss or damage shall be deposited as aforesaid, the lapse of time shall be taken to be conclusive evidence against the validity of the claim thereby so attempted to be enforced.

In answer to this objection, it is sufficient to say that there is no plea upon the record under which the objection is open, nor was it suggested at the trial, nor in the rule *nisi* taken out in pursuance of the agreement upon which the verdict was taken, and therefore it is not open to the defendants to make the objection upon this appeal; but, independently of this, there does not appear in the case any real foundation for the objection. The claim for loss or damage referred to in the above clause must be taken to be the same as is comprehended in the terms of the 6th paragraph of the policy as printed in the appeal case, by which it is provided that—

> All losses and damages which shall happen to the aforesaid ship or vessel, &c., shall be paid within sixty days after proof made and exhibited of such at the office of the company.

And the twelve months within which the action must be brought for non-payment of such loss, must begin to run only from the deposit of such proof of claim at the office of the company. Now, the office of the company appears to be at *Toronto*, and there is no evidence whatever to show when the plaintiff's "claim for loss or damage was deposited at the office of the company;" so that it is impossible to say when the twelve months began to run, if ever.

For the above reasons I am of opinion that the appeal should be dismissed with costs, and that the plaintiff is entitled to retain his verdict.

Appeal dismissed with costs.

Solicitors for appellants: *J. N. & T. Ritchie.*

Solicitors for respondent: *Meagher, Chisholm & Ritchie.*

THE WARDEN AND COUNCIL OF THE TOWN OF DARTMOUTH. ... } APPELLANTS;

AND

HER MAJESTY THE QUEEN ..... RESPONDENT.

1882
*Nov. 7.
1883
*April 28.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Mandamus, Rule nisi for—County School Rates for 1873-78—*Rev. Stat., ch.* 32, *sec.* 52, *N. S.*

A mandamus was applied for at the instance of the sessions for the county of *Halifax*, to compel the warden and council of the town of *Dartmouth* to assess, on the property of the town liable for assessment, the sum of $16,976 for its proportion of county school rates for the years 1873-78, under sec. 52 of the Educational Act, R.S.N.S., ch. 38.

The Supreme Court of *Nova Scotia*, without determining whether the required assessment was possible and was obligatory when the writ was issued, made the rule *nisi* for a mandamus absolute, leaving these questions to be determined on the return of the writ. On appeal to the Supreme Court of Canada, it was

Held (*Strong* and *Gwynne*, JJ., dissenting) that the granting of the writ in this case was in the discretion of the court below, and the exercise of that discretion cannot at present be questioned.

Per *Ritchie*, C. J.: That the town of *Dartmouth* is not, but that the city of *Halifax* is, exempted by ch. 32 R. S. N. S. from contribution to the county school rates.

APPEAL from a judgment of the Supreme Court of *Nova Scotia* making absolute a rule *nisi* for a writ of mandamus against the appellants.

The proceedings in the above matter were commenced by a rule *nisi*, taken out at the instance of the sessions for the county of *Halifax*, for a writ of mandamus to compel the warden and council of the town of *Dartmouth* to forthwith assess upon the property within the said town liable to assessment, the sum of fifteen thousand nine hundred and seventy-six dollars, for

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

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school purposes, and collect the same and pay it over to the treasurer of the county of *Halifax*.

After argument of said rule *nisi*, the Chief Justice, in March, A.D. 1880, delivered the judgment of the court, *James*, J., dissenting.

Subsequently, in the month of April, A.D. 1881, the Chief Justice delivered a further and final judgment of the court, making absolute the rule for mandamus, *James*, J., dissenting.

From this rule the appellants instituted the present appeal.

The facts of the case and the arguments of counsel are fully set forth in 3 *Russell* and *Chesley* Reports (1), and in *Russell* and *Geldert's* Reports (2).

Mr. *Rigby*, Q.C., and Mr. *Thompson*, Q.C., for appellants.

Mr. *Gormully* for respondent.

RITCHIE, C.J.:

This matter came before the Supreme Court of *Nova Scotia* on a rule *nisi* for a mandamus to the town council of *Dartmouth*, at the instance of the sessions for the county of *Halifax*, to compel the town council to assess for school rates on the town $15,976, and to pay the same over to the treasurer for the county of *Halifax*. On 4th April, 1881, the Chief Justice delivered the judgment of the Supreme Court of *Nova Scotia*, making the rule absolute. The sessions claimed to base their proceedings on sections 52 and 54 of chap. 32 rev. stat. of *N. S.*, "Of Public Instruction."

In *Nova Scotia*, outside of the city of *Halifax*, the management of the public instruction of the country is by the instrumentality of commissioners of schools and trustees, and the mode of support is thus provided for by sections 41, 42, 44 and 45:

(1) P. 147. (2) P. 402.

There shall be paid annually from the provincial treasury for common schools throughout the province, the sum of one hundred and seventeen thousand dollars; out of which sum there shall be paid to the city of *Halifax* seven thousand five hundred dollars. After deducting such sum of seven thousand five hundred dollars, the balance shall be distributed between the several counties of the province, according to the grand total number of day's attendance made by all the pupils in the public common schools throughout the province. If in the distribution of the before named annual grants, the result shall exhibit, for any county, a sum less than the provincial grant for the corresponding term of 1872, less the special grant to poor sections, the council of public instruction is authorized to grant to such county such additional sum as may be requisite to make the sum total equal to the provincial grant for the corresponding term of 1872—less the special grant to poor sections—provided always, that when such extra or supplementary aid is given, the decrease in the attendance shall not be more than 10 per cent. of the grand total day's attendance for the county for the corresponding term of 1872. The distribution of the moneys payable under the authority of this chapter, to the respective counties, for common schools, shall be made semi-annually through the inspectors, to the respective teachers and assistants lawfully employed by trustees, according to the number of days the schools have been in session, and the grade of license held.

Then we have section 52 which gives rise to the controversy in this case. It is as follows:—

52. The clerk of the peace in each county, except as hereinafter provided in relation to the city of *Halifax*, shall add to the sum annually voted for general county purposes at the general sessions, a sum sufficient, after deducting costs of collection and probable loss, to yield an amount equal to thirty cents for every inhabitant of the county, according to the last census preceding the issue of the county rate-roll; and the sum so added shall form and be a portion of the county rates. One-half the sum thus raised shall be paid semi-annually by the county treasurer, upon the order of the Board or boards of school commissioners for the county.

And sec. 53 provides:—

53. One-half of the amount provided to be raised annually, as aforesaid, shall, at the close of each half year, be apportioned to the trustees of schools conducted in accordance with this chapter, to be applied to the payment of teachers' salaries; and each school shall be entitled to participate therein, according to the average number

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of pupils in attendance and not the length of time in operation, but shall receive no allowance for being in session more than the prescribed number of days in any one half year.

And section 54 provides, when a majority of ratepayers of any section determine that an extra sum over and above the sum provided by the province and county is required, how same shall be raised.

The regulations with respect to public instruction in the city of *Halifax* are quite distinct from and independent of the rest of the province. Section 81 provides :—

The City of *Halifax* shall be one school section, and there shall continue to be thirteen commissioners of schools for such city, appointed (seven by the Governor in Council, and six by the City council) under the provisions of sec. 1 of chapter 9, of the Acts of 1868, as modified by chapter 27 of the Acts of 1869, and the thirteen commissioners thus appointed shall constitute a board of school commissioners for the city of *Halifax*, and such board shall be a body corporate, and may exercise all the powers and perform all the duties of trustees of public schools in and for the city.

Section 85 provides how vacancies shall be filled.

Section 86 prescribes the duties of the board of commissioners :

86. The board of commissioners shall take all necessary steps to provide sufficient school accommodation, and shall furnish annually to the superintendent of education a report of their proceedings under this chapter; also, returns of all schools subject to their control, and a statement of the appropriation of all moneys received and expended by them under the provisions of this chapter.

Section 87 provides that the board of commissioners may aid any city school, provided it be a freeschool :

87. The board of commissioners are authorized to co-operate with the governing body of any city school, on such terms as the board shall seem right and proper, so that the benefit of such schools may be as general as circumstances will permit, and the board may make such allowance to any such school out of the funds under their control as shall be deemed just and equitable, but no public funds shall be granted by them in support of any school, unless the same be a free school.

Section 88 provides for the assessment of the sum required by the commissioners for school purposes:

88. On request of the board of commissioners specifying the amount required in addition to the sums provided from the provincial treasury, for the yearly support and maintenance of the schools under their charge, the city council shall be authorized and are hereby required to add a sum sufficient, after deducting costs of collection and probable loss, to yield the amount so specified by the board, to the general assessment of the city, to be levied and collected from the inhabitants thereof, and from property lying within the county, the owners whereof reside in the city; and, on the payment of the required fee, the city assessors shall furnish to the trustees of *Dartmouth*, or other school section, and the clerk of the peace for the county shall furnish to the city assessors, the information necessary in order to give effect to this provision. Any person who may have been assessed, both in the city and in *Dartmouth*, or any of the school sections in the county, in respect of such property, shall be entitled to receive back the amount paid by him either in the city or in *Dartmouth*, or other school sections, as the case may be, in accordance with the foregoing construction of the law. The sum so assessed shall be paid quarterly by the city treasurer to the board, upon the written order of the chairman or vice-chairman. Provided, however, that the commissioners shall not have power to assess the city for any greater sum than sixty thousand dollars in any one year, without the consent of the Governor in Council, given at the request of such commissioners.

Section 89 defines the objects to be provided for out of assessment:

89. The objects to be provided for by the board of commissioners out of the sum so assessed shall be the salaries of teachers and assistants, and of the secretary of the board, the leasing of lands and buildings for school purposes, the repairing and improving of grounds and buildings, the cleaning, fuel and insurance of school houses, the purchase of prescribed school books, the interest payable on debentures issued by the board, and all other expenses required in the due execution of the different powers and trusts vested in the board by this chapter.

Sections 90 and 91 give the board power to borrow money for sites and buildings, and to issue debentures.

Section 98 provides for payment over by city treasurer of all moneys assessed to board, as follows:

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98. All moneys assessed on the city of *Halifax* for educational purposes, and in the hands of the city treasurer, shall be paid over by him to the commissioners of schools for the city of *Halifax* at the time and in the manner hereinbefore provided.

And section 100 provides as follows:—

100. The provisions of this chapter, except as hereinafter specified, shall apply to the city of *Halifax*, provided that the pupils of any ward shall be entitled to school privileges in any other ward.

The contention on behalf of the town of *Dartmouth* is, that that town is exempt from the tax of 30 cents a head, and that, if liable, *Halifax* is not exempt but equally liable, and if so, the amount *Dartmouth* would be entitled to receive would be more than she would have to contribute.

With the justice or injustice, policy or impolicy, of exempting or making *Dartmouth* liable, we have nothing to do. These are considerations with which the Legislature alone has to deal. All we have to do is to ascertain and determine the true construction and meaning of the Acts which have been passed by the Legislature of *Nova Scotia* in reference to this matter.

On the 22nd March, 1880, Chief Justice *Young* delivered the judgment of the Supreme Court, affirming the liability of *Dartmouth* to contribute a sum equal to 30 cents a head, and, after giving a decided opinion on this point, with a view to the Legislature dealing with the matter and reconciling what the court seemed to consider the apparent contradiction in the Act fixing this liability on the town of *Dartmouth*, and the Act providing that the sum to be voted for the estimates, including ordinary and extraordinary expenses, should not exceed in any year the sum of $15,000, the court suspended, in the meantime, its final determination on the rule.

Mr. Justice *James*, who dissented from this judgment and put forward very strongly the injustice and wrong

that would be inflicted on *Dartmouth*, if the burthen of the 30 cents a head was imposed on that town and *Halifax* was exempt therefrom, after referring to matters unquestionably for legislative rather than judicial considerations, says:

I shall now briefly consider the question whether the town of *Dartmouth* is liable in law for the amount claimed, or any part of it, which is, in fact, the main point in this case. This question has been so fully discussed by the learned Chief Justice in an opinion which, so far as it defines the natural construction of the statutes, I entirely concur, that not many words will be necessary from me on that point. There can be no doubt that the framers of the *Dartmouth* Act of incorporation intended and expected that their town would be exmpted, as the city was supposed to be. There are several features of the Act which indicate that that was their intention. But was that the intention of the Legislature, as expressed in the Act of incorporation? In considering the question, I think I am bound to require that any language that would exempt one locality from the payment of a tax imposed upon the whole of the rest of the Province, with at most but one exception, should be clear and explicit; but I find no clear and explicit words in the statute to this effect. On the contrary, I find, in sections 36 and 37, language which appears to me totally inconsistent with such contention, keeping in mind that the schools at each section are to be supported from these sources, viz:—the provincial grant, the county assessment and the local assessment. I observe that section 36 is as follows:—After the passing of this Act the town shall be set off as a separate school section and the town shall have the expenditure of all school rates raised within its limits for the schools of the town, as also of all Government and school grants for such a town, which grants shall be paid to the town.

He then proceeds:

Here we find the three sources of educational income clearly, as I consider, specified in detail, viz:—1. Local assessment; 2. Government grants; 3. School grants. And the two latter grants are to be "paid to the town." Now we know, of course, that the second of these—the Government grant—means the grant out of the provincial treasury. But what is the third—the school grant—if not the share allotted to the town out of the county assessment? I can conceive of no other meaning for the words, and therefore the town is to receive and expend its proportion of the county assessment. It is not contended that the town is to receive a proportion of this fund without contributing to it. That would be taxing the poorer districts of the

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county to assist the richer. And I am sure the people of *Dartmouth* have no such desire, and would never ask such a thing, and their counsel have raised no such contention at the argument. All they ask and all their counsel have contended for is, that if the city of *Halifax* is exempt, *Dartmouth* should also be exempt, and this they are in all justice and equity bound to insist upon, not only in their own behalf, but in behalf of the rest of the county, who, like themselves, are unjustly taxed to subserve the interests of the city of *Halifax*. It is clearly the interest of *Dartmouth* that neither should be exempt.

Again, in section 37, I find that for the two adjoining districts, included in the town for school purposes by this section, the council shall be paid the proportion of Government school grants payable in such districts, and to impose and levy the county school assessment and all school assessments in such districts, and collect the same in the same manner as if such districts formed part of the town. I find nothing in the Act to counteract these explicit statements. I can only say that if the framers of the Act intended, as I have no doubt they did, to exempt the town from the county assessments, they have made a most unfortunate use of the English language. I hope the town will no longer persist in an expensive and hopeless contention in the courts of law to escape this assessment, which the city and *Dartmouth* ought both to be willing to bear, but look to the Legislature to remedy in another way the severe taxation inflicted on them by the law, and which they are quite unable to bear.

He then says:

It is indispensable, in my view of the law and facts, that I should decide, so far as I am able, upon the arguments presented to us, whether the city of *Halifax* is exempt or not.

While I think he has very clearly established his first proposition as to the liability of *Dartmouth*, I think he has failed to show that *Halifax* is not exempt.

If the effect of a law exempting *Halifax* has all the obnoxious characteristics which Mr. Justice *James* attributes to such an enactment, viz., injustice and inconsistency, and being unfair, partial and oppressive, and violating the first principles of natural justice and perpetrating a moral wrong, these are considerations most proper to be brought to the notice of the Legislature, and would, we may readily assume, be duly dealt

with by the Legislature; but it is just possible that that body might have discovered good reason for coming to the conclusion that, without being open to any of those grave imputations, it was quite compatible with sound policy and honest and just legislation that, while *Dartmouth* was not, *Halifax* should be exempt, as is to be inferred was the view of the rest of the court. The brother judges of Mr. Justice *James* agreed with the Chief Justice, that suspending their final decision on the rule *nisi* for a mandamus was, under the circumstances, the course which met the necessity of the case, and Mr. Justice *James* adds:

> The matter will doubtless now be brought before the Legislature by one or other of the parties concerned, and it will then be judged on the principles of right and justice. Our duty is to expound the law. If the law is unjust we cannot alter it; but those who make the laws have not only the power, but it is their solemn duty to amend them, if they are unjust or inequitable, as I am satisfied the law on this question now is, if the construction which has heretofore been put upon it is correct.

The matter came again before the court on the 4th of April, 1881. The Chief Justice delivered the judgment of the court as follows:

> The controversy in this case has been twice before us, and judgments pronounced as they are reported in 3 *Russell & Chesley*, 187, and 1 *Russell & Geldert*, 402.
>
> The demand by the sessions, and now by the municipality of *Halifax*, is for the accumulated amounts of school rates for five years, being in all the sum of $15,976, as set out in the rule *nisi* for a *mandamus* granted 1st February, 1879.
>
> Upon full enquiry the court declared that, in their opinion, the law was entirely with the sessions, and that the town of *Dartmouth* was liable for this large sum. But in consideration of the delay and of an Act passed in 1877 at the instance of the defendants without reference to this liability, having given a decided opinion on the main question, and desiring that the Legislature should have an opportunity to deal with it, we suspended in the meantime our final determination on the rule.
>
> The counsel for the plaintiffs have now informed us that no legis-

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lative action has been had in the matter, and they apply for a final judgment. The objections to this form of proceeding were argued at large, and I need not repeat the cases and authorities cited in our last judgment.

There is here a right we have determined, and these are parties applying who have a real interest in the subject-matter and are acting *bonâ fide*.

Whether the required assessment is possible and was obligatory when the writ issued, are questions which may arise on the return.

As the matter stands, we have no choice, and, in pursuance of our views, we make the rule absolute with costs.

This, as has been intimated, will be appealed from. If not, it is to be understood that the word "forthwith" in the mandatory clause is used in the qualified sense in the treatise by *Tapping* 328.

Mr. Justice *James* remained of the same opinion which is reported in 1 *Russell & Geldert*, 417, and thought the rule *nisi* for a writ of *mandamus* should be discharged. The rule *nisi* for a *mandamus* was made absolute, and from this the present appeal.

It seems to me abundantly clear that the city of *Halifax* is neither to contribute to nor participate in the fund to be raised under section 52; that no meaning whatsoever can be attached to the words in that section, "except as hereinafter provided in relation to the city of *Halifax*," or to the words in section 100 "the provisions of this chapter, except as hereinafter specified, shall apply to the city of *Halifax*," unless they mean that section 52 is not to apply to the city of *Halifax*; nor with section 98, which clearly indicates that all monies assessed in the city of *Halifax* for educational purposes are to be paid over by the city treasurer to the commissioners of schools for the city of *Halifax*, to be appropriated by them, not for the support of schools outside of the city of *Halifax*, but to the yearly support and maintenance of the schools under their charge.

To hold that the city of *Halifax* is not exempt would, in my opinion, be flying in the face of the express words of the statute and the necessary inference which arises

therefrom, and from the scope and apparent policy in relation to the city of *Halifax* and the province generally, and still more so against the well known rule that when ever it is sought to impose a rate, the burthen lies on those seeking to enforce it, to show that the words used by the Legislature are clear and unambiguous in order to charge the subject; and that taxing acts must be construed strictly. Supposing we could look on the effect of the exemption of *Halifax* in the light so strongly represented by Mr. Justice *James*, the wording and whole frame of this statute too plainly show that the Legislature intended to exempt the city of *Halifax*. Where the words are perfectly clear, we ought not, as said by *Brett*, L. J., in *Rabbits* v. *Cox* (1), "to construe a plain enactment so as to make it suit our views of what is just and right," and more especially so with a view to the imposition of a burthen. In *Ingram* v. *Drinkwater* (1), in the judgment of the court it is said:

> The cases of *Reg.* v. *Neville* and *Colebrooke* v. *Tickell* show clearly that when it is sought to impose a rate the burden lies on those seeking to enforce it, to show that the words used by the Legislature are clear and unambiguous in order to charge the subject.

In the present case, instead of any such words being in the statute, there are, on the contrary, clear and unambiguous words exempting the city of *Halifax*.

Then, as to the exemption of *Dartmouth*. After what has been said in the court below, it is scarcely necessary to add more. By the Act incorporating the town of *Dartmouth*, sec 36 provides:

> After the passing of this Act the town shall be set off into a separate school section, and the town shall have the expenditure of all school rates raised within its limits for the schools of the town, as also of all Government and school grants for such schools, which grants shall be paid to the town.
>
> Sec. 37. For all school purposes the district lying between the

(1) 3 Q. B. D. 314, affirmed 3 App. Cases 473.

(2) 32 L. T. N. S. 746.

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northern boundary of the town and the lands of the British Government, and the district lying between the southern boundary of the town and *Herbert's* brook shall form part of the "town of *Dartmouth*," and the town shall be entitled to receive and be paid the proportion of the Government school grants payable in respect of such districts, and to impose and levy the county school assessments and all school taxes on such districts, and collect the same, in the same manner as if such districts formed part of such town.

It would seem, from the express words of these sections, that though the jurisdiction in reference to the support and regulation of the public schools was transferred to the town council, the mode of supporting the schools has not changed. The funds were to come from the same sources, viz., the Government grant, the share of the county schools assessments which they are "to impose and levy," and the school taxes in districts named. Had there been any intention that this should he changed the expenditure of school grants and imposition and levying of the county school assessments would not have been provided for, and if the exemption had been contemplated would the legislature not have provided for such exemption by express words, as was done in the case of *Halifax*? *Dartmouth* having been liable to this assessment before and up to the time of its incorporation, I can find nothing in the Act of incorporation relieving it from the burthen, but, on other hand, express words and necessary implication, to my mind, clearly establish the contrary, and, therefore, we must follow the general rule of construction, that so far as is possible effect must be given to every word of a statute. If we exempt *Dartmouth* we must not only depart from the plain words of the statute, but we must eliminate language from it as pointed out by Mr. Justice *James*, too clear to be misunderstood, and even then we can find no words from which any express intention to exempt is indicated, but are left simply to an inference to be drawn from

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the fact of the school limits of *Dartmouth* having been extended to take in certain portions outside of the limits of the town for school purposes, and on the strength of this repeal the law as it originally stood.

A writ of *mandamus* is a prerogative writ and not a writ of right, and the granting of it is, in that sense, discretionary. The exercise of this discretion cannot be questioned, but the grant of a peremptory *mandamus* is a decision upon a right, declaring what is and what is not lawful to be done, and such decision is subject to review

See *Reg.* v. *All Saints* (1).

The general rule upon which the court acts in making the rule absolute and granting the writ is, that if the affidavits raise questions of disputed facts it will grant the writ in order that those questions may be tried, or if there be questions of law which ought to be put in a more solemn train for inquiry, a similar course will be pursued; but if the arguments on both sides disclose that there is no dispute as to the facts, and the court has no doubt in point of law, it will not make the rule absolute. Wherever there is a fair doubt, either upon matter of fact or of law, the court will make the rule absolute in order that it may be fairly discussed on the return.

This is not a *mandamus* peremptory. If the town of *Dartmouth* think they can show any good and sufficient cause why the whole of the amount now claimed should not be levied, it will be quite open to them to return any such matter of law or fact, or both, as they may be advised will sustain such a contention, and have the same discussed and settled on the return.

I am of opinion that the present appeal should be dismissed.

STRONG, J.:

I am of opinion that a *mandamus* should not have been granted before the recovery of a judgment by the

(1) 1 App. Cases 611.

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county, and that on this ground the writ should have been refused; and consequently this appeal ought to be allowed.

FOURNIER, J.:

I concur in the opinion that the appeal should be dismissed on the ground that the parties will be able to urge their objections on the merits. I express no opinion as to whether *Dartmouth* is exempt from the operation of the School Act.

HENRY, J.:

I have arrived at the conclusion that the mandamus is not peremptory, but merely in the nature of a rule *nisi*, calling upon the parties to show cause why a peremptory mandamus should not issue. I am inclined to the opinion that *Dartmouth* was not exempt from the operation of the School Act in the same way as the city of *Halifax* was, but that matter has not yet been fully decided by the court below, and I therefore give no positive opinion upon the point. I think, under the circumstances, the appeal should be dismissed.

GWYNNE, J.:

The appeal in this case must, in my opinion, be allowed with costs. Assuming the contention upon the part of the authorities of the county of *Halifax*, upon whose behalf the rule to show cause why a writ of mandamus should not issue was applied for, to be correct—namely, that the Act incorporating the town of *Dartmouth* does not relieve the ratepayers of that municipality from payment of the county rate for school purposes imposed by sec. 52 of ch. 32 of 4th series of revised statutes, then the liability remains imposed and is enforceable under the provisions of the latter Act, unless the Act incorporating the town makes some other provision for imposing and levying

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the rate. If the above chapter 32 is the only Act governing the imposition and levying the rate, then it is apparent that the town of *Dartmouth*, in its corporate capacity, has nothing to do with the matter. The Act itself determines the amount of the rate by a mode of calculation which the clerk of the peace is required to make, and to enter the amount so determined on the county roll, which is every year placed in the hands of collectors authorized and required to collect the rate as part of the county rate payable by the respective ratepayers of each year; but the contention is, that although the chapter 32, since the incorporation of the town, still remains in force and affects the ratepayers therein, casting upon them still the obligation to pay county school rate, as imposed by section 52, which rate the clerk of the peace is still authorized and required to calculate and determine, instead of his adding it to the county roll to be collected as part of the county rate, as it was before the Act of incorporation, he must now communicate the amount of the rate, (as required to be paid by the ratepayers of *Dartmouth*), to the Warden and council of the town, who, as is further contended, are bound under ss. 28 and 42 of their Act, to vote, assess and collect the rate from the ratepayers of the town and to pay it over to the treasurer of the county of *Halifax*.

The Act itself makes no express declaration that such was the intent of the legislature, but it is argued that this intention is the fair and proper inference to be implied from what the Act does say. There is, in my judgment, much force in the contention, that on the contrary, the effect of the Act incorporating the town is to exempt the ratepayers therein from all liability under sec. 52 of ch. 32, above referred to. Sec. 27 of the Act places the public schools under the jurisdiction of the corporation. Sec. 28 imposes upon the council

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the burthen, among others, of voting, assessing, collecting, receiving, appropriating and paying whatever monies are required for school rates. This section would seem to impose upon the corporation the whole burthen of themselves assessing and raising all monies required for school purposes, and to invest the council with the discretionary power of themselves determining what sums should be necessary and required to be levied from the ratepayers for school purposes, and of appropriating such sums in such manner as to them in their discretion should seem fit. It certainly seems questionable whether the 28th section is open to the construction that the legislature, by the language there used, intended to impose upon the council the duty of assessing and collecting a sum conclusively determined by the clerk of the peace of the county of *Halifax*, under sec. 52 of ch. 32, which the council could have no power of altering, and whether it contemplated the council going through the form of voting and assessing that sum under the provisions of the 28th and 42nd secs. of their Act of incorportion, in order to collect the rate and to hand it over to the county treasurer. The Act says nothing as to the clerk of the peace of the county communicating to the warden and council of *Dartmouth* the amount required by the county authorities from the ratepayers of *Dartmouth* for county school purposes; nor is there any provision in the Act requiring the town council to pay over any sum for such purpose to the county treasurer. The omission to insert provision for that purpose does certainly seem strange, if, as is contended, the intention of the legislature, in so far as this particular rate is concerned, was merely to make an alteration in the manner in which the amount, when determined by the clerk of the peace of the county, should be levied within the limits of the town. Then, again, by the

37th section, it is enacted specially that the town shall impose upon and levy from an outlying district specified in the Act outside the limits of the town, and for school purposes, placed under the jurisdiction of the town, the amount of county school assessment on such district which, before the Act of incorporation, was imposed and levied under sec. 52 of ch. 32, and paid to the county treasurer; and it is asked, with much apparent force, what would be the meaning of this section if a county school rate be still payable to the county treasurer under ch. 32, sec. 52, by the ratepayers of the town, who have imposed upon them the whole burthen of maintaining the schools in that outlying district, and who, in consideration of such burthen, are empowered to impose upon and levy from the ratepayers of such district the county school assessment, by section 52, formerly payable by such ratepayers to the county treasurer?

Then again, section 36 makes the town a separate school section, and to it is given the expenditure for the schools of the town of all school rates raised within its limits.

I must say that there is, as it appears to me, much force in the argument that the true effect of the Act of incorporation, according to a sound construction, is to exempt the ratepayers of the town from all liability to pay the amount formerly imposed by sec. 52 of ch. 32; but in the view which I take, it is unnecessary to determine that point for the purpose of the present appeal, for whatever may be the correct construction of the Act upon this point, the Act makes no difference as to the persons liable, if any be, to pay the rate, namely, the ratepayers of the town, in each year. They are the proper persons to pay the expense of providing public instruction in each year for the children of the inhabitants, and sec. 42 clearly shows the intention of

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the Legislature to have been that all rates required for each year shall be imposed and levied within the year. Nothing can be clearer than the 42nd section upon this point. The propriety and justice of making the ratepayers of each year the sole persons liable to contribute to the expenses attending public instruction in that year, except in so far as such expense is provided for by public grant, is apparent; while, on the contrary, nothing could be more unjust than to compel the ratepayers of 1882, who may be totally different persons from those, for example, of 1874, to pay the school rates of 1874, the benefit of which was wholly enjoyed by the children of the ratepayers of that year. It would be contrary to the principle which governs courts of justice in ordering the issue of writs of mandamus, if this court should sustain the order made, in the circumstances of the present case, whether the ratepayers of the town of *Dartmouth* are or are not, by the Act of incorporation, relieved from the liability which had been imposed by sec. 52 of ch. 32. That point will arise if the liability should be sought to be enforced within the year in which it is claimed to have accrued. At present I, express no decided opinion upon the point, but for the reasons stated, this appeal must, I think, be allowed. The Supreme Court Act, sec. 23, gives an appeal in this case, at its present stage, and no object can be served in calling upon the appellants to raise, by a return to the writ of *mandamus*, a point which it is competent for the court to decide now and which, in my judgment, it ought in the exercise of a sound discretion to decide by refusing to sanction the issuing of the writ for the single reason above stated.

Appeal dismissed with costs.

Solicitors for appellants: *Foster & Foster.*

Solicitors for respondent: *J. N. & F. Ritchie.*

ARTHUR SEWELL, *et al.*, (PLAINTIFFS)., APPELLANTS; 1883

AND *May 9, 10, 11.

THE BRITISH COLUMBIA TOWING AND TRANSPORTATION COMPANY (LIMITED), AND THE MOODYVILLE SAW MILL COMPANY (LIMITED), (DEFENDANTS)..... RESPONDENTS. 1884 *Jan. 16.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Contract of towage, liability under—Sea damage—Joinder of defendants—Right of a saw mill company to let to hire a steam tug—Liability limited—25 and 26 (Imp.) ch. 63—31 Vic. ch. 58, sec. 12—Motion for judgment—Findings of jury not against weight of evidence—Practice.

The *B. C. T. Co.* entered into contract of towage with *S.* to tow the ship *Thrasher* from *Royal Roads* to *Nanaimo*, there to load with coal, and when loaded to tow her back to sea. After the ship was towed to *Nanaimo*, under arrangement between the *B. C. T. Co.* and the *M. S. Co.*, the remainder of the engagement was undertaken between the two companies, and the *M. S. Co.'s* tug boat, *Etta White*, and the *B. C. T. Co.'s* tug, *Beaver*, proceeded to tow the *Thrasher* out of *Nanaimo* on her way to sea, the *Etta White* being the foremost tug. Whilst thus in tow the ship was dragged on a reef, and became a complete wreck. The night of the accident was light and clear, the tugs did not steer according to the course prescribed by the charts and sailing directions; and there was on the other side of the course they were steering upwards of ten miles open sea free from all dangers of navigation, and the ship was lost at a spot which was plainly indicated by the sailing directions, although there was evidence that the reef was unknown. The ship had no pilot, and those aboard were strangers to the coast.

In an action for damages for negligently towing the ship, and so causing her destruction,

Held,—(1.) That as the tugs had not observed those proper and

* PRESENT—Sir W. J. Ritchie, C.J., and Strong, Fournier, Henry and Taschereau JJ.

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reasonable precautions in adopting and keeping the courses to be steered, which a prudent navigator would have observed, and the accident was the result of their omission to do so, the owners of the tugs were jointly and severally liable, (*Taschereau*, J., dissenting as to the liability of the *M. S. Co.*, and holding that the *B. C. T. Co.* were alone liable).

2. That under the *British Columbia* Judicature Act the action was maintainable in its present form by joining both companies as defendants.

3. That as there was nothing in the *M. S. Co.'s* charter or act of incorporation to prevent their purchasing and owning a steam tug, and as the use of such a vessel was incidental to their business, they had a perfect right to let the tug to hire for such purposes as it was used for in the present case.

4. That as the tugs in question were not registered as British ships at the time of the accident their owners were not entitled to have their liability limited under 25 and 26 *Vic.* (Imp.) ch. 63.

5. That the limited liability under section 12 of 31 *Vic.* ch. 58 (D.) does not apply to cases other than those of collision.

6. This case coming before the Court below on motion for judgment under the order which governs the practices in such cases, and which is identical with English Order 40, Rule 10, of the orders of 1875, the Court could give judgment, finally determining all questions in dispute, although the jury may not have found on them all, but does not enable the Court to dispose of a case contrary to the finding of a jury. In case the Court consider particular findings to be against evidence, all that can be done is to award a new trial, either generally or partially under the powers conferred by the rule similar to the English Order 39, Rule 40. The Supreme Court of *Canada*, giving the judgment that the Court below ought to have given, was in this case in a position to give judgment upon the evidence at large, there being no findings by the jury interposing any obstacle to their so doing, and therefore a judgment should be entered against both defendants for $80,000 and costs.

APPEAL from the judgment of the Supreme Court of *Brtish Columbia*, sitting as an Appeal Court, rendered and pronounced on the 19th April, 1882, and by which the appeal of the present appellants from the judgment of the Supreme Court of *British Columbia* rendered in

this cause, in favor of the defendants, on the 11th July, 1882, was dismissed.

This was an action for recovery of damages ($80,000) for negligently towing the plaintiffs' ship on a reef, during the performance of a towage engagement, and so causing her destruction.

The following, as disclosed by the evidence and pleadings, are the material facts of the case.

The plaintiffs were strangers, owners of the ship *The Thrasher*, an American ship registered at *Bath*, *Maine*, *U. S.*, of which one R. *Bosworth* was the master. The defendants were towing companies, carrying on business for hire in the navigable waters of *British Columbia*.

On the 22nd day of May, 1880, a contract of tonnage was entered into between the plaintiffs and the defendants, the Towing Co., to tow the plaintiff's ship, *Thrasher*, from *Royal Roads* to *Nanaimo*, there to load with coal, and when loaded to tow her back to sea.

After the ship was towed to *Nanaimo*, the agent of the Towing Company sent the *Beaver*, belonging to the *Towing Company* to the captain of the *Thrasher*, to tow her to *Cape Flattery*. The *Beaver* not having sufficient power, the agent supplemented that power by sending another towing steamer, the *Etta White*, belonging to the *Moodyville Saw Mill Co.*

The *Thrasher's* captain, and those on board were strangers to the coast, and had no pilot, having paid the half forfeit required by law, as the tugs knew. The captain of the *Beaver* had been acting and was then holding a certificate as a licensed pilot in the navigable waters of *British Columbia*, though at the time and in the contract under consideration he was not acting or receiving remuneration as a pilot, but was solely the servant of the defendants, *The Towing and Transportation Co.*; and the master of the *Etta White*

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held a pilot's certificate for the district of *Nanaimo*, though then not acting or receiving remuneration as a pilot, but simply and solely as the servant of the said defendants.

About seven o'clock on the evening of the 14th July the *Thrasher* passed her hawser to the *Beaver*, and the *Etta White*, leading, passed her hawser to the *Beaver*. The *Thrasher's* hawser was made fast to her port-bow and the hawser from the *Beaver* to the *Etta White*, was made fast to the starboard bow of the *Beaver*, these arrangements being made by the tugs. The two tugs and ship being thus attached, the Captain of the *Thasher* gave orders for the tugs to start.

The weather was calm and clear and a bright sky overhead.

No direction of any kind, except a general one to tow to the point of destination, was given from the tow to the tugs.

A safe course is laid down on the chart and the "*Vancouver Island* Pilot," or Sailing Directions.

Whilst thus in tow, the ship (which was laden with coal and drew some twenty-five feet of water) was dragged on a rock some distance outside of the limits of what was known at the time and laid down on the charts as *Gabriola* reef, and became a complete wreck.

The respondents severed in their defence.

By their plea, the *Towing Co.*, respondents, in effect, contended that the loss of the ship was not attributable to any negligence, carelessness, or unskilfulness of the tugs, that, on the contrary, the loss was caused by the carelessness and want of skill of the master of the ship, for whom the company are in no way responsible; that, moreover, the master of the *Thrasher* was responsible for the course, direction and navigation of the said tugs; that the rock in question was, an unknown rock, not laid down on any authorized chart, and

that the accident was inevitable; and that, under any circumstances, the appellants' claim must be limited to $38.92 per ton of the gross tonnage of the *Beaver*, which, without making any deduction for engine room was 159.12 tons.

The respondents, *The Moodyville Saw Mill Co.* by their defence, contended that the tow in sailing without a pilot had contributed to the negligence, and that the master of the *Thrasher* had been guilty of great negligence and carelessness in consequence of the *Thrasher* not following the course steered by the tug next to her, to wit—the *Beaver*, and that the course taken by the *Etta White* was in accordance with the sailing directions of the *Vancouver Island* pilot, and that they were not to blame for the unknown dangers of the seas and navigation. By way of alternative defence they, also, pleaded that by the law of *Canada*, which regulates and governs the law of ships and shipping navigating Canadian waters, the owners of any ship (where any loss or damage is by reason of the improper navigation of such ships, caused to any other ship or boat) shall not be answerable in respect of loss or damage to ships, boats, goods, merchandise, or other things, to an aggregate amount exceeding $38.92 for each ton of the ship's registered tonnage, where such loss or damage occurs without their actual fault or privity, and without in any way admitting that they are responsible for the alleged loss of the *Thrasher*, the respondents claim that the said loss alleged occurred without their actual fault or privity, and that the amount of damages, if any, recoverable against the respondents must be limited to $38.92 per ton of the registered tonnage of the said tug; that the gross registered tonnage of the said tug is 97.35 tons without any deduction for engine room.

The trial was had before the Hon. Chief Justice *Beg-*

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bie, assisted by a special jury. The Judge charged the jury and left to them the following questions:—

Q.—Did the defendants, or either, and which of them, at any time contract to tow the *Thrasher* from *Nanaimo* to *Fuca Straits* without a pilot engaged as such by the *Thrasher*? A.—There was no contract made by either of the defendants to tow the *Thrasher* from *Nanaimo* to the *Straits of Fuca* without a pilot, neither was there any direct stipulation in the contract which was made between Captain *Bosworth* and (the agent) Mr. *Saunders*, of the *British Columbia Towing and Transportation Co.*, that the vessel should take a pilot.

Q.—What was the magnetic compass course taken by the tugs from *Entrance Island*? A.—The magnetic compass course taken by the tugs was about due east from *Entrance Island*, which course was changed by the *Etta White* some ten minutes before the *Thrasher* struck.

Q.—Was any specific compass course (or any other course) given by the tow to the tugs, either by the captain or other officer? A.—No course of any kind was given by the tow to either of the tugs by Captain *Bosworth* or any of his officers.

Q.—At what time did the captain of the *Thrasher* go to bed? A.—We are of opinion that Captain *Bosworth* left the deck about a quarter to nine o'clock.

Q.—Did the captain of the *Thrasher* direct his steersman to neglect the *Beaver's* course? A.—Captain *Bosworth* did instruct his steersman not to follow the course of the *Beaver* but that of the *Etta White*.

Q.—Was there any current and in what direction? Would it have been probably noticed and allowed for by a competent pilot on board the tow or either of the tugs? A.—There was some current setting in shore and we are of opinion that same would have been noticed and allowed for by a competent pilot either on board the tow or either of the tugs.

Q.—Was the *Thrasher Rock* a generally well-known rock previous to the accident? A.—We are of opinion that the *Thrasher Rock* was not generally well-known prior to the accident.

Q.—Did the captain of the *Thrasher* follow a reasonably direct course after the tugs? A.—We are of opinion that the captain of the *Thrasher* did follow a reasonably direct course after the *Etta White* but not after the *Beaver*.

Q.—Did the accident take place with the actual privity of either of the defendants? A.—The accident did not take place with the actual privity of either of the defendants.

Q.—Did Captain *Bosworth* take proper and what precautions as captain of a tow should, such as to take notice of the rate and real direction of the progress? A.—We are of opinion that Captain *Bosworth*, as captain of a tow, did not take proper precautions as to noticing rates of speed and real direction of his vessel's progress.

Q.—At the time of the stranding what was the value of the *Thrasher*, of the cargo of freight; if no evidence, say so? A.—There is no evidence to show the value of either ship, cargo or freight at the time of stranding.

The following were the additional questions submitted by counsel at the trial as questions to be put by the judge, but rejected:—

"Was there any negligence or want of common care and caution on the part of the ship without which the accident would not have happened, and if so, what was such negligence, or want of common care or caution?

"Notwithstanding any such negligenceor want of care and caution on the part of the tow, could the tugs by the exercise of skill on their part, have avoided the neglect or carelessness of the ship?

On the 4th and 7th days of July, 1881, the plaintiffs,

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pursuant to notice, duly applied to the Chief Justice to enter judgment for the plaintiffs for $80,000, but on the 11th day of July, 1881, the Chief Justice, upon such motion, directed judgment to be entered for the defendants, and the following is such judgment:

"The action having on the 26th, 27th and 28th days of June, A. D. 1881, been tried before the Honorable Sir *Matthew Baillie Begbie*, Knight, Chief Justice of the Supreme Court of *British Columbia*, and a special jury of *Victoria*, and the jury having been discharged without finding a verdict expressly either for the plaintiffs or defendants, but having answered certain questions put to them by the judge as appears by the certificate of the registrar, and now upon this day motion is made to His Lordship the Chief Justice, on behalf of the plaintiffs (pursuant to notice duly given in that behalf) to enter final judgment in favor of the plaintiffs for the sum of seventy-five thousand dollars and cost of suit,, and the said motion having been debated by the council on both sides, his lordship did adjudge that judgment should be entered for the defendants with cost of suit. Therefore it is adjudged that final judgment be entered for the defendants, and that the plaintiffs do pay the defendants their cost of suit, to be taxed by the registrar."

From this judgment the appellants appealed to the full court, which confirmed the judgment unanimously so far as it concerned the *Moodyville Saw Mill Co.*, but the hon. Mr. Justice *Gray* dissenting so far as it freed from liability the *British Columbia Towing Co.*

Mr. *Davie* for appellants:

We submit this court can direct judgment to be entered according to the merits of the case, as it has before it all materials necessary for finally determining the questions in dispute. See Rules 294 and 298 of the Supreme

Court of *British Columbia*, under Judicature Act—the same as English Order 40, Rule 101, and *Hamilton* v. *Johnson* (1). The Chief Justice and the majority of the court below, although there is abundant evidence of negligence on the part of the tugs, have laid down the rule of law to be that in all cases of towage, the tow must direct the course, and that the tugs are not responsible. If this is admitted, then it would be useless to have a new trial, but, we think, the true proposition is that where no express orders, other than a general direction, are given from the tow, the tug has the general direction of the course, and is bound to tow the ship in a safe and prudent course. *Smith* v. *St. Lawrence Tow Boat Co.* (2); *The Robert Dixon* (3); *McLachlan* on Shipping (4); and cases there cited.

We ask the court to do here what the Court below should have done. We do not ask for a new trial. Mr. Justice *Gray*, in his judgment sums up what we contend for (5).

We ask the court to supplement the findings of the jury. There are sufficient materials before the court to enter a judgment according to the merits of the case. There is uncontradicted evidence of the value of the ship at the time of stranding.

The employment of a tug is a contract which implies the exercise of diligence, care, and reasonable skill in the fulfilment of the engagement. Although there is no implied warranty to bring the tow to the point of

(1) 5 Q. B. D. 263.
(2) L. R. 5, P. C. 308.
(3) 42 L., T., N. S. 344; S. C., L. R., 5, P. D. 54.
(4) 3d. Ed. 286 *et seq.*
(5) Page 67 of the case:—
"Before referring to the law on "the question of negligence in "such a case, it is important to ex- "amine the ground on which the "Chief Justice claims that he may "supplement the finding of the "jury and by drawing his own con- "clusions from the evidence as- "sumed as a fact proved that "which the jury have not found, "and thus render complete that "which the jury left incomplete. "It is to be borne in mind that on "this trial the jury gave no ver-

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destination at all hazards and under all circumstances, she engages to use her best endeavors for that purpose, and should only be prevented by *vis major* or by accidents not contemplated, which render the performance of the contract impossible. The *Minnehaha* (1) ; the *Julia* (2) ; the *Galatea* (3) ; *Spraight* v. *Tedcastle* (4) ; *McLachlan* on Merchant Shipping (5) ; the *Margaret* (6).

The tug is bound to have local knowledge of the place where she is towing : she is bound to know the proper channel : the state of the tides : all recognized impediments and dangers of the way, and not voluntarily to deviate from a recognized and safe channel, much less to proceed in a course where there may be, and, as the results proves, is danger ; or when there is a well known course which she may pursue of unquestionable safety. The *Energy* (7) ; the *Lady Pike* (8) ; the *Express* (9) ; the *Trojan* (10) ; the *Niagara* (11) ; the

"dict. When a distinct verdict is "given the law presumes much in "itsfavor and the court will sup- "port it unless and until it be ma- "nifestly shown that it was errone- "ous, but when no verdict has "been given such presumptions "do not exist. The reason is "obvious. The jury are supposed "to be intelligent men, practically "acquainted with subjects of the "enquiry before them, and to "bring to the consideration of "such subjects practical business "intelligence and experience.The "judge's duty is to guide them as "to the law. The jury's duty "under that guidance to find the "fact. The new rules, however, "seem intended to provide for an "omission of the kind that took "place on this occasion, when the "court having all the materials "before it, can supplement the "finding of the jury on points es- "sential to the case (on which "points the jury have expressed "no opinion) by conclusions not "inconsistent with their findings "on points on which they have "expressed opinion. In no case, "however, it seems to me should "the conclusions of the court on "facts not pronounced upon by "the jury, be inconsistent with the "conclusions of the jury on the "facts on which they have pro- "nounced. Such inconsistency "would be a conflict of finding as "to facts and form ground for a "new trial, whereas when consis- "tent they afford ground for judg- "ment.

(1) 30 L, J. Ad. N.S. 211.
(2) Lush, Ad. 224.
(3) Swab. Ad. 349.
(4) L. R., 6 App. Cases 217.
(5) 3rd ed., 286, and seq.
(6) 4 Otto (U. S. Sup. C.) 494.
(7) 3 L. R. 2 Ad. 48.
(8) 21 Wall. 1.
(9) 3 Cliff. 462.
(10) 8 Ben. 493.
(11) 6 Ben. 469.

steamer *Webb* (1); the *Brazos* (2); the *C. F. Ackerman* (3); the *Favorite* (4).

The above authorities show that for any breach of duty on the part of the tug, she is responsible in damages to the tow, should damage ensue.

The tug is bound to keep a look-out for tow and tug. The *Jane Bacon* (5).

The mere fact of an accident happening throws the onus upon the tugs of showing that the accident was not caused by their negligence, or that the tow contributed to the disaster, and *a fortiori* is this so when the tug is admittedly towing out of the usual course, has no look-out, and has not recognized the tides. Little short of *vis major*, or inevitable accident, could excuse the tugs, even if no actual negligence could be proved against them, but when ignorance and unskilfulness is once proved against the tugs, the defence of inevitable accident, or *vis major* is set up in vain.

The *Lady Pyke* (6); The steamboat *Deer* (7).

And every doubt as to the performance of the duty and the effect of non-performance should be resolved against the vessel sought to be inculpated, until she vindicates herself by testimony conclusive to the contrary. The *Ariadne* (8).

The allegation and finding that the rock on which the ship struck was unknown does not help the respondents. They were admittedly out of the course, in a locality stigmatized in the sailing directions as dangerous ground, and the question is, not whether or not the rock was known, but is whether they could have exercised ordinary care and have been where they were. Not observing the force of the current, which the jury

(1) 14 Wall. 406.
(2) 14 Blatchford 446.
(3) 8 Benedict, 496.
(4) 5 Sawyer 226.
(5) 27 W. R. 35.
(6) 21 Wall. 1.
(7) 4 Benedict, 352.
(8) 13 Wall. 475.

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find would have been observed and allowed for by a competent pilot, is conclusive evidence of negligence.

The defence set up in paragraph fourteen of the statement of defence of the *Towing Co.*, and in paragraph five of the statement of defence of the *Sawmill Co.*, alleging a sudden change of course on the part of the ship, and of her improperly following the foremost tug at a particular moment, instead of the tug next her, is unsupported by the evidence.

Now as to *Moodyville Saw Mill Co.'s* liability.

The *Moodyville Saw Mill Co.*, although not parties to the contract, had a duty imposed upon them, the same as that which resulted from the contract, and are liable in damages for the breach of such duty, and under the Judicature Act, sub-sec. 7 of sec. 2, rules 17 & 16, and sub-sec. 7 of sec. 2, both parties can be joined in the action.

See *MacLennan's* work on Judicature (1); See, also, *Martin* v. *Great Indian Peninsular Ry. Co.* (2); *Foulkes* v. *Met. Ry. Co.* (3).

Then, as the defence of limited liability, I contend it cannot be maintained.

The loss of the ship occurred before the statute 43 *Vic.*, ch. 29, *D*, came into operation. The accident did not happen within the body of the county. There is no proof that the tugs were registered.

The defendants, if they had wished to limit their liability, should have pleaded the Imperial Statute 25 and 26 *Vic.*, ch. 63, sec. 54.

Liability must be admitted and money paid into court before the relief given by the statute can be invoked.

Hill v. *Andus* (4); *James* v. *London, S. & W. Ry. Co.*

(1) Pp. 140, 142.
(2) L. R. 3 Ex. 9.
(3) 5 C. P. D. 157.
(4) 1 K. & J. 263.

(1); *The Amalia* (2); *The Normandy* (3); *Georgian Bay Transportation Co.* v. *Fisher* (4); *Prehn* v. *Bailey* (5).

It is also objected that the defence does not show the tugs to have been registered.

Mr. *Robinson*, Q.C., follows for appellants:

The law as to the relative duties of tug and tow as applicable to the facts of this case, is well laid down in *Spaight* v. *Tedcastle* (6), and the decision of this case must depend upon the answer to the question, who was responsible for the course taken in this case? And if, as the evidence clearly establishes, respondents choose to contract to tow this vessel and, without orders being given by the tow, and none being asked by the tugs, take a wrong course they are responsible.

[The learned counsel then reviewed the evidence, contending that these tugs were guilty of negligence, and that the tow had not been guilty of any contributory negligence.

The following cases were also referred to the tug *Ackerman*, "The *Robert Dixon*" (7).]

As to the liability of the *Moodyville S. M. Co.*, I do not think the question can present any difficulty under the recent decisions. The question is, if sued alone would they be liable? If so, because they are sued with another company, are they less liable? As to their liability I refer to the steamboat *Deer* (8); *Heaven* v. *Pender* (9); and *Hooper* v. *L. & N. W. Ry. Co.* (10). See also *Leslie* v. *Can. Cen. Ry. Co.* (11). The liability of both is identical, and we are claiming for the same sum, and we ask for one payment. There is no objection taken here except as to misjoinder, and under the new Judi-

(1) L. R. 7 Ex. 187.
(2) 1 Moore, P. C. N. S. 471.
(3) L. R. 3 A. & E. 152, 157.
(4) 5 Ont. App. 383.
(5) L. R. 6 P. D. 127.
(6) L. R. 6 App. Cases 217.
(7) 8 Benn. 496; 42 L. T. N. S. 344.
(8) 4 Benn. 352.
(9) 9 Q. B. D. 302. S. C. in Appeal, 11 Q. B. D. 503.
(10) 43 L. T. N. S. 570.
(11) 44 U. C. G. B. 21.

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cature Act this objection can no longer be entertained if both are liable. Separate trials can be granted by a judge when it is found more convenient, but here there is no pretence that it was inconvenient.

As regards the limited liability under the Dominion statute, it is sufficient to say it is confined to cases of collision.

Mr. *Bethune*, Q.C., for respondents, *British Columbia Towing Co.*:

As to the relative duty of tug and tow:—

In a case of towage the tug is the moving power, but it is under the control of the master or pilot of the vessel in tow. The *Duke of Sussex* (1); The *Christina* (2); The *Energy* (3); The *Sinquasi* (4); *Smith* v. *The St. Lawrence Tow Boat Co.* (5); The *Cleadon* (6); The *Aracan* (7).

Where no directions are given by the vessel in tow, the rule is, that the tug shall direct the course, and, under such circumstances, it is the duty of the tow to follow directly in the course of the tug. *Smith* v. *The St. Lawrence Tow Boat Co.* (8); The *Stranger* (9), a case somewhat similar to this; The *Jane Beacon* (10).

Even if the tug be to blame for the course taken by it, the tow cannot recover when any misconduct or unskilfulness on her part contributed to the accident. The *Julia* (11); *Smith* v. *The St. Lawrence Tow Boat Co.* (12).

[The learned counsel then referred to the cases cited by counsel for appellant, and argued they were distinguishable on the facts of the present case.]

Then, as to negligence, I contend that we followed

(1) 1 W. Robinson, 270.
(2) 3 W. Robinson, 27.
(3) 3 A. & E. 48.
(4) 5 P. D. 241.
(5) L. R. 5 P. C. Cases, 313.
(6) 14 Moore, P. C., 97.
(7) L. R. 6 P. C. Cases, 127, 132.
(8) L. R. 5 P. C. Cases, 313.
(9) 24 L. T., 364.
(10) 27 W. R. 35.
(11) 14 Moore P. C. 210.
(12) L. R. 5 P. C. Cases, 313 & 314.

the proper course, and it has been so found by the jury.

The steamers steered a proper course from the outset and far beyond or outside the limits of danger shown by the chart, and they were unaware of the sagging of the vessels.

The rock in question, also, is about a mile beyond the danger limit shown on the chart, and was at the time not generally known and was certainly wholly unknown to any one on board the steamers.

In the present instance, the tow was guilty of gross negligence,—by sailing without a pilot, by the master leaving the deck and going to bed, at least an hour before the ship struck; by the failure of the tow to steer directly after the tug (the *Beaver*,) and unskilfully steering after the *Etta White*, which was towing the *Beaver*, thereby causing the three vessels to sag towards the shore, by the failure of those on board the tow, who noticed the sagging at least an hour before the accident, but failed to warn the tugs or direct them in any way to alter their course, by persisting in steering on the *Etta White*, even after she had altered her course from E. to E.S.E. (the *Beaver* still running due east), and thereby placing the tow about fifty feet nearer shore than the *Beaver*, her tug, and thereby, in fact, bringing about the accident which occurred; there being deep water between the sunken rock (then covered by eleven feet of water) on which she struck and her tug.

As to question of procedure, the learned counsel argued that if the court were of opinion that certain facts ought to have been found by the jury, then there should be a new trial.

The clause in the Act cannot be interpreted so as to give to a court the power of a re-trial before a judge.

Mr. *L. N. Benjamin*, for respondents, *The Moodyville Saw Mill Company*:

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The statement of claim alleges a contract with *Saunders'* as agents for the *Tow Boat Company* to tow safely. The appellants elect to sue the *Tow Boat Company* as principals, and not the agent. The *Saw Mill Company* was only the servant of the *Tow Boat Company*; in order to make the *Saw Mill Company* liable on these pleadings, as no contract is alleged with them, it is necessary to show expressly the creation of a duty, and the breach of it which appellants fail to do. *Dutton* v. *Powley* (1); *Winterbottom* v. *Wright* (2).

Moreover, the Company were not authorized to tow vessels for hire, and their doing so was *ultra vires* of their corporation. *Morawetz* on Corporations (3).

The liability of owners of ships or steamers, for damages occasioned without their actual fault or privity is limited to the sum of $38.92 per ton of gross tonnage of steamers. 31 *Vic.* (*Canada*), ch. 58, sec. 12, and extended to *British Columbia* by 35 *Vic.*, ch. 38, sec. 1. The *Obey* (4); *Spirit of Ocean* (5). See also 25 and 26 *Vic.* (Imperial), ch. 63, sec. 54, sub-sec. 4, Merchants' Shipping Act of 1862.

That the limitation applies to tugs. See *Beta* (6); *Franconia* (7); *Clara Killam* (8); *Wahlberg et al* v. *Young et al* (9); *MacLachlan* on Shipping (10).

As to the course, the evidence shows that the steamers steered a proper course from the outset and one far beyond and outside the limits of danger shown by the chart, and were unaware of the sagging above referred to.

The rock in question also is about a mile beyond the danger limit shown on the chart, and was at the time

(1) 30 L. J. Q. B. 169.
(2) 10 M. & W. 109.
(3) See 189, 209.
(4) 1 L. R. A. & E. 102.
(5) 34 L. J. A. D. 74.
(6) L. R. 2 P. C. 447.
(7) 2 P. D. 160.
(8) 3 L. R. A. & E. 161.
(9) 45 L. J. C. P. D. 783.
(10) 3 ed. N. 304.

not generally known, and was certainly wholly unknown to any one on board the steamers.

Mr. *Robinson*, Q. C., in reply.

RITCHIE, C.J.:—

I have given this case very careful consideration, and I entirely agree with Mr. Justice *Gray* in the conclusion at which he has arrived in, if I may be permitted to say, his very able and exhaustive analysis of the facts of this case, and as my views are in precise accordance with the judgment which will be delivered by my brother *Strong*, I shall therefore content myself with simply saying that I entirely concur in every word that he has written, both with reference to the facts and the law in this case.

STRONG, J. (1):—

The first question which is presented for decision in this case requires us to determine what was the duty of the defendants implied in the engagement which they entered into to tow the plaintiff's ship. I am of opinion that the answer to this question may be given in a very few words, by saying that the authorities establish tha the defendants were bound to use reasonable care and skill in the performance of their undertaking - and that this applies to both the defendants—as well to the company who were the owners of the *Etta White*, as to the *British Columbia Towing & Transportation Co.*, who were the parties with whom Captain *Bosworth* made the contract for towage. The reasons for applying this rule to the owners of the *Etta White* I will state hereafter.

In the face of the decisions in the cases of the *Julia*

(1) This judgment is not prefaced with any statement of the facts for the reason that it was intended to follow a judgment of the Chief Justice, in which the facts were stated.

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(1), and in that of *Spaight* v. *Tedcastle* (2), it is difficult to see how there can be any doubt as to the duties of a tug under circumstances like those in evidence here. In the former case Lord *Kingsdown* lays it down that:

> The law implies an engagement that each vessel would perform its duty in completing the contract, that proper skill and diligence would be used on board of each, and that neither vessel by neglect or misconduct would create unnecessary risk to the other, or increase any risk which would be incidental to the service undertaken.

In *Spaight* v. *Tedcastle*, Lord *Blackburn* refers to this case of the *Julia* with approval, saying that "it accurately and clearly states the law."

The judgment of the Supreme Court of the *United States* in the case of the steamer *Webb* (3) states the law as applicable to American waters in the same terms; it says:

> The contract requires no more than that he who undertakes to tow shall carry out his undertaking with that degree of caution and skill which prudent navigators usually employ in similar services.

Having thus ascertained the duty which was incumbent on the defendants, and for the present assuming that it applies equally to both tugs, as well to the *Etta White*, whose owners made no contract with the plaintiffs, as to the *Beaver*, we have next to consider if this duty was sufficiently performed. It is said on behalf of the defendants that there was contributory negligence on the part of the plaintiffs, which, according to well understood principles, disentitles them to maintain the action. The negligence thus attributed to the plaintiffs consists, it is said, in their omission to take a pilot, and in the officers in charge of the plaintiffs' ship not having themselves been sufficiently vigilant in seeing that the tugs steered the proper course. These objections are directly answered by what was

(1) 14 Moo. P. C. 210. (2) 6 App. Cases 217.
(3) 14 Wall. 406.

said by Lord *Blackburn* in the case of *Spaight* v. *Tedcastle*, and by the principle of the well known case of *Davies* v. *Mann* (1). If the proximate cause of the loss of the ship was the negligent steering of the tugs, it is no defence to the action within the rule as to contributory negligence, that if the plaintiffs had done something which they might, and, perhaps, ought to have done, but omitted to do, the accident would have been avoided. In *Davies* v. *Mann*, if the donkey had not been negligently left by its owners on the highway, it would not have been killed, but this was considered not to be decisive, the question being if the killing of the animal would have been avoided if the defendants had used reasonable care, which the law made it incumbent on them to use. Applying that doctrine here, the question must be, would the loss of the vessel have been altogether avoided, if the tugs had observed those proper and reasonable precautions in adopting and keeping the courses to be steered which a prudent navigator would have observed. If it could be shown that those in charge of the vessel were in any way responsible for the course taken by the tugs, that would have taken this case out of the principle of the cases cited, but it does not suffice to show that, apart altogether from any concurrence in the neglect of duty by the tugs, the captain of the ship might, if he had not omitted to take a pilot, have been able to guard himself from the consequences of the defendants' negligence. In order to constitute con-contributory negligence, there must be a neglect on the part of the person suffering the injury contributing to that which is the proximate cause of the accident. In *Spaight* v. *Tedcastle*, Mr. Justice *Blackburn* says:

> Be it that there was negligence in the ship, and those for whom the ship was responsible, in letting her get so dangerously near the

(1) 10 M. & W. 546.

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bank before the helm was ported, as complete as the negligence of those who in *Davies* v. *Mann* left the fettered donkey dangerously rolling in the road, it forms no defence to an action against the persons who, by want of proper care, have injured the ship.

This is, I conceive, exactly applicable to the present case, and reduces the enquiries to these: Did the defendants exercise due care and take all reasonable precautions in ascertaining the proper course to steer and in adhering to it? And if they did not, was the accident the result of their omissions so to do? This is a question of fact on the evidence, to which, as it appears to me, there can be only one answer.

The tugs did not steer according to the course prescribed by the charts and sailing directions, and the accident immediately resulted from their omissions in these respects. After what has been said by the Chief Justice and by Mr. Justice *Gray* in his judgment in the court below, where the evidence bearing on this point has been most ably examined and analyzed, I do not purpose to take up time by further reviewing it. An observation is made in the judgment in the case of the *Webb* already referred to, that—

> There may be cases in which the result is a safe criterion by which to judge of the character of the act which has caused it.

And in the present case, when we consider the condition of the weather, the fact that the night was light and clear; that there was on the other side upwards of ten miles of open sea free from all dangers of navigation; that the line of danger within which tugs should not have steered was clearly marked in the charts and pointed out by the sailing directions, the mere fact that the ship was lost at a spot which was plainly indicated by the sailing directions as a place where it was not safe to take her, by itself and without any inquiry into the course actually steered, demonstrates,

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at least *primâ facie*, that the accident was the result of negligence.

The burden thus being shifted on to the defendants to show some excuse for this, can it be said that they have exonerated themselves? Have they shown anything like *vis major*, or any other causes for such a result except such as could not easily have been met with proper management? Do they show that any conduct or neglect of the ship's officers contributed to their neglect to steer the proper course? Granting that they originally laid out the proper course to be steered, but that the effect of the steering of the ship or the currents, or both together, was such as to carry them off the course, how can this make any difference, if these were causes which with reasonable care would have been observed, and being observed could easily have been neutralized. If there had been a narrow channel, with dangerous ground on both sides, the case might have been different, but here the tugs had on one side many miles of safe water, open sea. They could easily have avoided all danger if they had seen it, and but for very gross neglect of the ordinary precautions of a prudent navigator, they must have seen it. With these general observations on the evidence, and adopting what has just been said by the Chief Justice here, and by Mr. Justice *Gray* in the court below, I come to the conclusion that the immediate and sole cause of the accident was the negligence of the defendants.

It was held by Mr. Justice *Gray* in the court below, and was argued here by the learned counsel who appeared for the owners of the *Etta White*, that as there was no contract with their company, the plaintiffs had no right of action against them. I am unable to agrée to this. True it is that there was no privity of contract; but the law, as I understand it, implies a

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duty, in cases like the present, on the part of those who undertake to perform services which involve the persons or property of others being placed in their power and control, that they will execute their employment with due and reasonable care. The case of a railway traveller who having purchased a ticket from company A., entitling him to be carried to a point beyond the line of company A, on that of company B., is entitled to make the latter company, with whom he has no contract, responsible to him for not exercising reasonable care is, as it seems to me, a sufficient analogy to show the liability of the owners of the *Etta White*, in the present case; and the late case of *Heaven* v. *Pender* (1), in the English court of appeal, also establishes this doctrine to its fullest extent.

That the action can be maintained under the *British Columbia* judicature act in its present form, by joining both the companies as defendants, is beyond doubt. The English supreme court rules of 1875, order 16, rule 3, of which the *British Columbia* rule is a transcript, provides that:

> All persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally, or in the alternative.

The only remedy for a mis-joinder, if, indeed, such a term is now applicable, is by an application to strike out one of the defendants. It suffices to say that the case has proceeded to trial without any such order being made. It would seem, moreover that the present case is an eminently proper one for the application of the rule, since the evidence is common to the case of both the defendants, and, therefore, that the present is just such a joinder of defendants as the rule was intended to authorize.

It was contended at the bar on the argument here

(1) 11 Q. B. D. 503.

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that the *Moodyville* Saw Mill Co., the owners of the *Etta White*, were not liable, because the contract which they entered into with the *British Columbia* Towing & Transportation Co. to tow the *Thrasher*, was *ultra vires* of the first mentioned company. I cannot assent to this proposition. It is not shown the *Saw Mill Co.* had not under their charter or act of incorporation power to purchase and own a steam tug; in the absence of anything appearing to the contrary, it is to be presumed that they had the power, and the nature of the business which they were incorporated to carry on, as is well known, warrants the inference that the possession of such a vessel was, if not necessary, useful and usual in towing logs and rafts and thus incidental to their business. And if there was nothing *ultra vires* in the acquiring and holding the property in such a steamer, surely it could not be *ultra vires* that the company should, when they had no occasion for its use themselves, make it profitable by letting it to hire for such purposes as it was used for in the present case. If this question had arisen in an action by the *Saw Mill Co.* against the Towing Co. to recover the compensation agreed to be paid by the latter to the former company for the services rendered by the *Etta White*, the question would have been precisely the same as that which arose in the Queen's Bench Div., *England*, in the case of *The London & North Western Ry. Co.* v. *Price* (1), where it was held that a contract to pay a railway company a specific charge for using the plaintiffs' weighing machine for weighing the defendants coals was not *ultra vires*, upon the principle that the weighing machine being incidental to the business of the railway company as carriers, they had a perfect right to allow not only the persons from whom they carried coals, but also the public at large, to have the occasional

(1) 11 Q. B. Div. 485.

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use of the machine, and were entitled to make a fair charge for the use of it.

And if the saw mill company could have recovered the amount agreed upon for the hire of the vessel, the vessel must have been lawfully employed in the service in the course of which this accident happened, and if lawfully employed, the law will imply the usual obligations, already observed upon, as to the duty arising towards third persons, for whose benefit the service was to be performed, though not actually parties to the contract, to use due diligence and reasonable care in the performance of the undertaking.

The defendants also insist upon the benefit of the statutory defence of limited liability which they have pleaded in their statement of defence. The English Act, 25 & 26 *Vic.*, ch. 63 (The Merchant Shipping Act Amendment, 1862) cannot apply, for the tugs were not foreign ships, neither were they as British ships within the condition which is indispensable to entitle the owners to the benefit of the provisions of the Act uniting responsibility, for they were not registered as British ships (1). Indeed, it is evident from the terms in which the defence is pleaded, the claim being that the liability should be limited to $38.92, the amount to which the recovery is restricted by the Canadian Act, that the latter, and not the Imperial, statute was meant to be set up by the defendants. The Canadian Act is the 31st *Vic.*, ch. 58, the 12th section of which provides for the limitation of liability in the same terms as those employed in section 54 of the English Act, but the 11th and 12th clauses of the Canadian Act are prefaced with a heading in these words: "Duty of Masters—Liability of owners as to collision." The 11th section does not relate to the liability of owners, but prescribes the duties of masters of ships in case of collision, and the

(1) See The Andalusia, 3 Prob. Div. 182.

words "liability of owners as to collision" must therefore have been intended to relate to the 12th section only, which we must read as if it had the heading or preamble "liability of owners in case of collision," and the plaintiffs therefore contend that it confines the operation of this 12th section to cases of collision. The provisions of the 12th section are none of them such that any repugnancy would be caused if the words by "collision with another ship," or equivalent expressions were to be interpolated in each of them; and this being so, and having regard to the decisions as to the effect of headings of this kind in the cases of *Bryan* v. *Child* (1); *Hammersmith Rwy. Co.* v. *Brand* (2); *Lang* v. *Kerr* (3), and other cases which are collected in the note in *Maxwell* on Statutes (4), I cannot see my way to holding that this restricted liability applies to cases other than those of collision. Further, the preamble to the statute itself, which sets forth its object to be to enact certain rules of navigation and regulations for "preventing collisions," shows that the scope of the act itself was much more confined than the English Act and was only intended to ensure careful navigation and to prevent cases of collision. I do not see that we can apply the restricted liability in the present case, and the plaintiffs must, therefore, be entitled to the full amount of damages which they have proved, and which I think have been properly estimated by Mr. Justice *Gray* at the sum of $80,000.

This case came before the court below on a motion for judgment according to the new practice under the English Judicature Act lately introduced in *British Columbia*. The *British Columbia* order which governs the practice in such cases is identical with the original

(1) 5 Exch. 368.
(2) L. R. 4 H. L. 171.
(3) 3 App. Cases 529.
(4) 2nd Edition 65.

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English Order 40, Rule 108, of the orders of 1875. This enables the court to give judgment finally determining all questions in dispute, although the jury may not have found on them all. I take it, however, that it does not enable the court to dispose of a case contrary to the finding of the jury, but that in case the court consider a particular finding to be against evidence, all that can be done is to award a new trial, either generally or partially under the powers conferred by the rule similar to the English Order 39, Rule 40. There has, however, here been no finding by the jury which interposes an obstacle of this kind. The finding that the *Thrasher Rock* "was not generally well known prior to the accident," is not inconsistent with a decision by the court that on the whole evidence the defendants are proved to have been guilty of negligence in not steering a proper course, and adhering to the sailing rules and otherwise taking proper precautions.

The finding that there was no evidence of damages, when the value of the ship is distinctly stated in the evidence of Captain *Bosworth*, is something difficult to understand. By this I do not understand that the jury found that there was actually no damage, or that they discredit the evidence of *Bosworth*, but that no evidence of damage had been offered, which was incorrect and must have been an oversight. It was not, however, as I understood the counsel, insisted that there should be a new trial merely for the purpose of ascertaining the damages which may, therefore, be fixed at Mr. Justice *Gray's* estimation. This court, giving the judgment that the court below ought to have given, is, therefore, in a position to give judgment upon the evidence at large; and the result, in my opinion, must be that a judgment be entered for the plaintiffs against both defendants for $80,000 and costs, and that the plaintiffs also have the costs of this appeal.

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FOURNIER, J.:—

I am of opinion that this appeal should be allowed with costs against both companies.

HENRY, J.:

I had very little difficulty at the argument of this case in coming to the conclusion that the plaintiff is entitled to recover in this action, not only against the company with whom he made the contract, but also against the company who came in to assist the other one in its performance. It is a clear proposition that when a party undertakes to aid in the performance of a contract entered into by another, he assumes the responsibility of performing his part of it, either singly or jointly with the original contractor; and if he fails in the proper performance of that duty, and the contract is not properly carried out through the negligence or improper performance of either or both the parties, the other party is entitled to recover against both. Now, the facts here are very clear, and there is no difficulty in ascertaining what they are. The party who undertook to convey this vessel by a tug from one place to another, says: "Although the vessel was lost, you should have put on board a pilot, and as none was put on board we are not answerable." Now, in order to sustain that proposition, it was necessary that the party so asserting should show that it was a part of the contract, either expressed or necessarily implied, that a pilot was to be put on board by the owners of the ship. There is no such express contract shown, and it is not necessarily implied, as I take it, that the party letting his ship to be towed from one place to another is required to have a pilot on board, or is required to put a pilot on board the leading tug, or the other tug, as the case may be, in order that the contracting party shall perform his contract properly.

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There are a great many cases where pilots are necessary, especially in going through very difficult channels and places where the owners of the tug are not supposed to be acquainted. There it might be implied as part of the contract that the owner of the ship shall provide a pilot, but it must be implied from the nature of the case.

In this case it is not expressed in the contract, and I see nothing here to warrant the implication that there was any such contract on the part of the plaintiffs. The defence on that ground, I think, entirely fails. Then, the question of negligence, on the part of the two towing tugs: they had undertaken to tow the vessel in a proper way and without negligence, and without deviation from the proper and ordinary course. I think that whether the rocks upon which this vessel was put were actually known to the parties or not, they were guilty of negligence in keeping so close to the shore. It was a turning point in the course on which they were proceeding that the ship struck, and they had eight or ten miles of sea room on the other side, where there was no danger, but they ran too close to the turning point. They could not justify such a course as that. They had no right to shorten their voyage by taking the turn too abruptly. It was their duty to take all reasonable care to avoid any possible sunken rocks near the shore. They did not do so, and therefore I think they are answerable for the damages that have been sustained.

Now, as to the amount of these damages. I think they were, under the evidence, properly assessed by the learned judge *Gray* in the court below. I think that under the circumstances, and under the law and the practice, we have the right to sustain the finding of the judge as to the amount of the damages. The evidence was clear as to the value of the ship and the cargo that

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were lost, and I think that what the jury in their answer referred to was not the amount and value of the ship and cargo, but the extra amount of damages actually sustained; but whether that was so or not, it is not necessary to be considered here, if we do not go beyond the amount of the actual value proved. I think there can be no doubt from the evidence what that amount was, and I consider it would be doing an injustice to the plaintiff, and adding more costs to the defendants, if we were to send it back for a new trial. The defendants could not expect to reduce the verdict below the actual value of the property, and it would be entailing not only additional delay but additional costs.

Under the whole circumstances, I think the appeal should be allowed, and we are entitled to give the judgment which the court below ought to have given, viz: judgment against both defendant companies for $80,000 and costs.

TASCHEREAU, J.:

I am of opinion to allow this appeal, and that judgment should be for the plaintiffs against the *British Columbia Towing and Transportation Co.* for $80,000 with costs, the said plaintiffs' action to be dismissed as against the *Moodyville Saw Mill Co.*, without costs.

Appeal allowed with costs.

Solicitor for appellants: *Théodore Davie.*

Solicitors for respondents *The British Columbia Towing Transportation Co.*: *Bethune & Bethune.*

Solicitors for respondents *The Moodyville Saw Mill Co.*: *L. N. Benjamin.*

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*Mar. 22.
1884
*Jan'y 16.

ALEXANDER McINTYRE (DEFENDANT)..APPELLANT;

AND

WILLIAM NELSON HOOD (PLAINTIFF)..RESPONDENT.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH, MANITOBA (IN EQUITY).

Property—Offer to sell—Acceptance on completion of title—Specific performance.

On the 26th of January, 1882, *McI.* wrote to *H.* as follows: "*A. McI.* agrees to take $35,000 for property known as *McM.* block. Terms—one-third cash, balance in one year at eight per cent. per annum. Open until Saturday, 28th, noon." On the same day *H.* accepted tbis offer in the following terms: "I beg to accept your offer made this morning. I will accept the property known as *McM.* block, being the property on *M.* street, for $35,000, payable one-third cash on completion of title, and balance in one year at eight per cent. You will please have papers and abstract submitted by your solicitor to *N. F. H.*, Esq., 22, *D.* block, as soon as possible, that I may get conveyance and give mortgage." On a bill for specific performance, the Court of Queen's Bench (*Man.*) decreed that *H.* was entitled to have the agreement specifically performed.

Held—(*Ritchie*, C.J., and *Fournier*, J., dissenting), that there was no binding, unconditional acceptance of the offer of sale, and therefore no completed contract of sale between the parties.

APPEAL from a judgment of the Court of Queen's Bench *Manitoba*, (equity side), dismissing an appeal from a decree made in the cause by Mr. Justice *Dubuc* in favor of the respondent.

This was a suit by the plaintiff (respondent) against the defendant (appellant) for the specific performance of an alleged contract, with compensation, on alleged defects in the subject-matter of sale.

The prayer of the bill and defendant's answer, as

*PRESENT.—Sir W. J. Ritchie, C.J., and Strong, Fournier, Henry and Gwynne, JJ.

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well as the documentary evidence relied on by the parties and the decree of Mr. Justice *Dubuc*, are given at length in the judgment of *Ritchie*, C.J., hereinafter given. A hearing of the cause, by way of appeal against Mr. Justice *Dubuc's* judgment and decree, took place before the Court of Queen's Bench (in equity), Chief Justice *Wood* and Mr. Justice *Dubuc* being present, and the court being equally divided, the appeal from the decree was dismissed with costs.

The defendant thereupon appealed to the Supreme Court of *Canada*.

Mr. *Lash*, Q.C., for appellant:

There was no subsisting contract between the parties to this suit because there is a variance between the proposition of the defendant and the alleged acceptance thereof by the plaintiff. The plaintiff, in lieu of a cash payment, proposes a delay until completion of title, and introduced a new condition, viz., a conveyance and mortgage. *Oriental Inland Steam Company* v. *Briggs* (1); *Crossley* v. *Maycock* (2); *Hussey* v. *Horne-Payne* (3).

The plaintiff was aware of the fact that the property in question was leased, and having bought with this knowledge, he cannot now object to take the property subject to such leases.

If the plaintiff is entitled to specific performance of the agreement it can only be decreed on the terms that the property is to be taken as it stands without compensation.

The defendant further submits that the decree in the court below, if any were granted in favor of the plaintiff, should have been merely one for specific performance without compensation and giving to him the costs of the suit.

(1) 4 De G. F. & J. 191. (2) L. R. 18 Eq. 180.
(3) 8 Ch. D. 670.

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Mr. *Dalton McCarthy*, Q.C., and Mr. *A. F. McIntyre* for respondent:

There was a complete contract satisfying the statute of frauds made between the appellant and respondent for the sale and purchase of the property in question by the appellant's proposal or offer of the 26th of January, 1882, and by the respondent's acceptance of the same date. The acceptance is unconditional, and the latter part of the respondent's letter of acceptance does not, as argued by the appellant, contain any proposal to vary or add any new term to the agreement between the parties, for the suggestions made are those attaching by law to the contract. *Fry* on Specific Performance (1).

The argument of the appellant that it is not an unconditional acceptance is not sustained by authority, the case of *Crossley* v. *Maycock* (2), relied upon by the appellant, is not an authority under the circumstances of this case. There were terms sought to be imposed, not usual but special. This case is more like the case of *Lewis* v. *Bras* (3), where similar words to those used here were not held to affect the unconditional nature of the acceptance, and see Lord *Cairns's* reasoning in his judgment in *Hussey* v. *Horne-Payne* (4); 2 *Dart* on V. & P. (5).

There is no new term where the acceptance merely proceeds to treat, as in this case, of the way in which the contract was to be carried out.

The respondent is not only entitled to specific performance, but is entitled to compensation as given him by the decree, because the property was leased and he had no notice. *Fry* on Specific Performance (6); *Jones* v.

(1) Sec. 280, and cases there cited.
(2) L. R. 18 Eq. 180.
(3) 26 W. R. 152.
(4) 4 App. Cases at p. 322.
(5) P. 876.
(6) 2nd. ed. sections 1222, 1223 and 1224.

Evans (1); *Canada Permanent Building and Saving Society* v. *Young* (2).

Even if he had notice of leases or tenancies. *Barker* v. *Cox* (3).

Mr. *Lash*, Q.C., in reply.

RITCHIE, C.J.:—

The plaintiff in this suit prays:

1. That the agreement may be specifically performed, or if it shall appear that the defendant is unable to wholly perform the said contract by reason of the said leases, that it may be specifically performed as far as he is able with an abatement out of the purchase money for the loss occasioned to the plaintiff by the existence of the said leases, and for that purpose that all proper directions may be given and accounts taken.

2. That it may be referred to the master of this court to enquire as to the title of the defendant to the said lands, and to fix a sum proper to be allowed the plaintiff as an abatement out of the said purchase money on account of the existence of the said leases.

3. The plaintiff hereby offers to perform the said agreement on his part, or if the same cannot be specifically performed completely by the defendant, to perform the same to the extent to which the defendant may be entitled.

4. That the defendant may be ordered to pay the plaintiff's costs.

5. That the plaintiff may have such further and other relief as the nature of the case may require.

The defendant (appellant) in answer to the plaintiff's bill in this suit claims, that at the date of the filing of the said bill there was no contract in existence between him and the plaintiff, that there was at

(1) 17 L. J. Chy. (2) 18 U. C. Chy. 566.
(3) 4 Ch. D. 464.

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no time a contract sufficient to satisfy the requirements of the Statute of Frauds, but merely a proposal made on the one hand and not accepted in the terms in which such proposal was made on the other hand.

The following correspondence took place between the parties:

Winnipeg, 26th January, 1882.

I, Alex. McIntyre, agree to take $35,000 for property known as *McMicken* block. Terms one-third cash, balance in one year at 8 per annum. Open until Saturday, 28th noon.

Witness, *W. N. Hood*, (Signed) *Alex. McIntyre.*

January 26th, 1882.

Dear Sir,

I beg to accept your offer made to me this morning. I will accept the property known as *McMicken's* block, being the property on *Main* street to the north of *Horsman's* store, on west side of it, 49 to 50 feet by 120 feet, for thirty-five thousand dollars ($35,000), payable one-third cash on completion of title, and balance in one year at 8 per cent. You will please have papers and abstract submitted by your solicitor to N. F. Hagel, Esq., 22 *Donaldson's* block, as soon as possible, that I may get conveyance and give mortgage.

Witness, *W. N. Hood*, *James A. Miller*, I am, Sir, Yours truly, *Wm. Nelson Hood.*

Alex. McIntyre, Esq., City.

Offer referred to above.

(Letter from defendant to plaintiff.)

Winnipeg, 24th February, 1882.

Wm. Nelson Hood, Esq.:

Sir, – I beg to notify you that I have been and am ready to carry out my offer, dated the 26th of January, 1882, in reference to the sale of the *McMicken* block, without any variation or qualification. And I also hereby notify you that if the terms of such offer are not complied with on or before Monday next, the 27th instant, at 12 o'clock, noon, I shall consider such offer on my part rescinded.

You will please take notice, and govern yourself accordingly.

Yours, &c., *Alex. McIntyre.*

(Cheque signed by plaintiff.)

No.——— *Winnipeg, Man.*, February 24, 1882.

To the Manager of the Imperial Bank of Canada:

Pay to *Alex. McIntyre*, or bearer, eleven thousand six hundred and sixty six and 66-100 dollars.

$11,666.66. (Signed) *W. N. Hood.*

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(Letter from plaintiff to defendant.)

Winnipeg, February 27, 1882.

DEAR SIR:—As I told you in my last of 25th, I handed your letter to Mr. *Blanchard*, your solicitor, and requesting you to call and see him about the property on *Main* street we have been in communication about.

I handed Mr. *Blanchard* a cheque on February 25th, which he holds upon satisfactory completion of title and delivery of possession.

I am, sir, yours,

Alex. McIntyre, *W. N. Hood.*
City.

(Letter from defendant to Messrs. *Bain & Blanchard.*)

Winnipeg, 2nd March, 1882.

Messrs. *Bain & Blanchard*, Barristers, *Winnipeg*:—

GENTLEMEN,—I am in receipt of yours of the 1st instant.

In reply, I beg to say I have employed Messrs. *Biggs & Wood* to look after this particular matter for me, and so told Mr. *Carey*, a clerk in your office, to inform your Mr. *Blanchard* prior to any money being paid into your hands by Mr. *Hood*, as alleged in your letter.

Yours, &c.

Alex. McIntyre.

(Letter from *Bain & Blanchard* to defendant.)

Bain & Blanchard,
Barristers, Attorneys, etc.,
Winnipeg, Manitoba.
John F. Bain, Sedley Blanchard. *Winnipeg*, 1st March, 1882.
Alex. McIntyre, Esq., City.

DEAR SIR:—Mr. *Nelson Hood* has requested us to write to you upon the subject of the sale of land by you to him. He has deposited with us a marked cheque payable to your order for the amount of the first payment. We have no instructions from you in the matter, but are informed by Mr. *Hood* that you referred him to us. Will you kindly inform us as to whether you have instructions for us?

Yours truly,

Bain & Blanchard.

The decree of Mr. Justice *Dubuc* was as follows:

This court doth declare that the agreement in the pleadings mentioned was duly entered into by the defendant, and that the plaintiff is entitled to have the said agreement specifically performed, and to compensation for the difference between the rents under the existing leases of said property and the rents which might have been obtained on renting and giving possession of the same at the beginning of May last; and also for any damages sustained by the plain-

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tiff by reason of the said agreement not being specifically performed, and doth order and decree the same accordingly.

And this court doth further order and decree, that it be referred to the Master of this court to take accounts and make inquiries as follows:

An inquiry what leases affecting the property in question were in existence at the date of the said agreement extending over the first of May last, and what compensation or abatement ought to be allowed in respect thereof.

An inquiry what damages have been sustained by the plaintiff by reason of defendant not having specifically performed the said agreement.

And this court doth further decree that the said Master do tax to the plaintiff his costs of, and incidental to, this suit and of the said reference.

And let such sum or sums as shall be allowed to the plaintiff on said inquiries, together with the amount of his said costs, be deducted for the purchase of the said lands.

And upon the plaintiff paying to the defendant the balance which shall be certified to be due to him in respect of such purchase money after such deduction as aforesaid, this court doth order and decree that the defendant do execute a proper conveyance of the said lands in the pleadings mentioned to the plaintiff, or to whom he shall appoint, such conveyance to be settled by the said Master.

And this court doth further order and decree that at the time of execution and delivery of the said conveyance, the defendant do deliver to the plaintiff, upon oath, all deeds and documents in his possession or control relating to the title of the said lands.

I think this was a good acceptance of this offer, that where a party offers to sell for a certain sum and his terms are one-third cash, balance in one year at 8 per cent. per annum, and this offer is accepted on completion of title, it becomes a concluded agreement, and that it cannot be said, in my opinion, in this case, that this acceptance is subject to any condition whatever, suspending the operation of this acceptance until anything was done which the law did not require to be done. Supposing the acceptance had been simply "I accept your offer," the contract is complete; and the purchaser, on paying or tendering the cash, is entitled

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to have the property conveyed and possession given to him, and the seller, not having stipulated for any security for the balance, it may be very questionable whether under this agreement he is entitled to demand it, not having required it by the terms of the proposal, but having on receipt of the one-third trusted to the personal security of the buyer under the agreement. But it is not necessary to discuss the question, the buyer having been willing, on the title being completed, to give a mortgage for the balance. I do not think, under such an offer and acceptance, he could, on receiving the one-third in cash, not only refuse to give the buyer a title, but also retain the possession of the property whereby he would have the use of one-third of the purchase-money and interest for a year on the balance, and likewise the possession and use of the property in addition. I think the contract contemplated, and the parties intended thereby, that the sale was to be an immediate sale as affects both parties, to take effect from the time of the making of the cash payment of one-third; that when this was paid the vendee was to have a title to the property and possession given to him, and as regards the latter part of the acceptance, asking for papers and abstracts, it was nothing more than that he might have the title investigated in the usual way by his own solicitor, that he might get the conveyance and give his mortgage, which was clearly in the interest of the vendor, as it removed any doubt as to his right to a mortgage security for the balance of the purchase money.

In the absence in the contract of any statement as to the title which is to be shown by the vendor, I think the purchaser's right to a good title is implied by law, and before he is compelled to pay the purchase money he has a right to require that a good title should be shown, or at any rate, to use plaintiff's expression, to

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"have the papers and abstracts submitted," to enable him to have the title investigated and get a conveyance and give a mortgage.

As regards the leases, I think the purchaser would be bound to take the property, subject to the leases of which he had notice, as existing in the property when the offer and acceptance was made. As to any others, if any, he might be entitled to an abatement or compensation in case the value of the property was in fact depreciated thereby.

STRONG, J.:—

I am of opinion that this appeal should be allowed and the decree of the court below reversed upon the ground that there never was any completed contract of sale between the parties. This is the first and principal reason assigned for the dissenting judgment of the late Chief Justice of *Manitoba*, and I entirely concur in the conclusion to which he came that there was not such an acceptance of the defendant's offer of the 26th of January, 1882, and the 24th February, 1882, as to constitute a binding agreement for the sale of the property in question.

The defendant's offer of the 26th January, 1882, is as follows:

Winnipeg, 26th January, 1882.

I, *Alex. McIntyre*, agree to take $35,000 for property known as the "*McMicken* block." Terms, one-third cash, balance in one year at 8 per cent. per annum. Open until Saturday, 28th noon.

Witness, *W. N. Hood* } *Alex. McIntyre.*

It is said that this offer was accepted by the letter of the plaintiff addressed and sent to the defendant on the same day, and which is in the following words:

January 26, 1882,

DEAR SIR:—I beg to accept your offer made to me this morning. I will accept the property known as "*McMicken* block," being the pro-

perty on *Main* street to the north of *Horsman* store, on the west side of it, 49 to 50 feet and 120 feet, for thirty-five thousand dollars ($35,000), payable one-third cash on completion of title and balance in one year at 8 per cent. You will please have papers and abstract submitted by your solicitor to *N. F. Hagel*, Esq, 22 *Donaldson's* block, as soon as possible, that I may get conveyance and give mortgage.

I am, sir,

Yours truly,

Wm. Nelson Hood.

Wittness:
W. N. Hood,
James A. Miller,
Alex. McIntyre,
City.

I do not consider this letter as equivalent to a simple acceptance in terms of the defendant's offer, but as containing counter proposals which are not implied in the proposition of the defendant, and to which the defendant never acceded. The offer was to sell for one-third cash, "balance in one year at 8 per cent. per annum." By his letter the plaintiff proposes that the purchase money shall be "payable one-third cash on completion of title and balance in one year at 8 per cent." These are not the same terms proffered, by the defendant. The condition precedent to the payment of the $\frac{1}{3}$ cash, that the title should be completed is a variation from the offer, and an agreement concluded on the basis of it would not be the same contract as would have been constituted by a simple acceptance of the defendant's proposition. The expression one-third cash, I construe as an elliptical form of expression for "one-third cash down at the time of acceptance of the offer." And if the proposal had been expressed in this way, there could be no doubt that the stipulation for the payment of one-third of the purchase-money would not have been subject to the condition precedent of a good title being shown, but would have been a payment in the nature of a deposit to be made immediately on the acceptance of the offer. I can attribute no other meaning to one-third cash than that just mentioned, and if this is so, it

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is manifest that the plaintiff's letter was not such an absolute and equivocal accession to the terms proposed, as to constitute an agreement between the parties according to the well understood and elementary principles of the law of contract. If there had been a simple acceptance of the defendant's offer, the plaintiff would, of course, have had a right to insist on a good title being shown before completion, this would have been an implied term of the contract, as in every case of an agreement for the sale of real property, but what I hold is, that we cannot imply that such good title was to be shown prior to the payment of the one-third of the purchase-money which was to be paid in cash.

Further, I am of opinion the concluding paragraph of the plaintiff's letter of the 26th January, asking that the abstract and papers be sent to Mr. *Hagel* that he might get conveyance and give a mortgage, also amounts to a proposal of terms neither expressed nor implied in the defendant's offer. If there had been a contract on the basis of a simple acceptance of the defendant's terms, the defendant would not have been bound to complete by a conveyance until the two-thirds (residue) of the purchase money was paid, and this payment was postponed for a year, he could not have insisted on immediate completion, and compelled the defendant to accept a mortgage as security for this deferred payment, for such a mode of carrying the contract into execution would not have been stipulated for; and in the course of some years experience in Courts of Equity, I have never heard it even seriously argued that a purchaser, the payment of whose purchase money is postponed, has, without an express provision to that effect in the contract, a right to demand immediate completion by a conveyance, on the terms of securing the deferred purchase money by mortgage. No authority for such a proposition can be found, and the ordinary practice of

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Courts of Equity is against it. I, therefore, consider the words:—"that I may get conveyance and give mortgage" read in connection with the other part of the letter, as a proposal to carry out the contract in a different manner from that which was implied in the defendant's offer and consequently in this respect again the acceptance was subject to a variation of the terms on which the defendant offered to sell.

Then on the 24th of February, 1882, the defendant wrote and sent to the plaintiff this letter:

Winnipeg, 24th February, 1882.

Wm. Nelson Hood, Esq.:

I beg to notify you that I have been and am now ready to carry out my offer, dated the 26th January, 1882, in reference to the sale of the *McMicken* block, without any variation or qualification, and I also hereby notify you that if the terms of such offer are not complied with on or before Monday next, the 27th instant, at 12 o'clock, noon, I shall consider such offer on my part rescinded. You will please take notice and govern yourself accordingly.

Yours, &c.,

Alex. McIntyre.

It is clear upon the evidence that there never was any acceptance of the original offer as repeated in this letter for two reasons. First, Mr. *Blanchard*, to whom on the 25th of February the plaintiff handed a cheque and communicated what it is contended constituted an acceptance, is not found to have been the defendant's solicitor or agent, or to have had any authority to receive the acceptance of the option, and, secondly, for the reason already mentioned as applicable to the first offer, that the cheque was, as stated in the plaintiff's own evidence, not to be handed over to the defendant "until the papers were made and everything completed to the satisfaction of my solicitor," conditions which would have rendered the contract an entirely different one from that which the defendant had proposed to enter into. That the plaintiff did not intend by his communication to Mr. *Blanchard* simply to accept the

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defendant's terms, but only proposed to pay the $11,666 upon the immediate completion of title and delivery of possession, to which the defendant had never proposed to assent is, also, evident from plaintiff's letter of the 27th of February, in which he says: "I handed Mr. *Blanchard* a cheque on the 25th which he holds upon satisfactory completion of title and delivery of possession." I do not, of course, doubt that if Mr. *Blanchard* had had authority to act for the defendant, and there had been an unqualified acceptance of the defendant's proposition, that acceptance, though verbal, would have been sufficient to constitute a contract binding on the defendant under the Statute of Frauds, but the evidence shows there never was such an acceptance. In my opinion, the decree should be reversed and the bill dismissed, with costs to appellant in both courts.

FOURNIER, J.:—

La demande en cette cause a pour objet de faire spécifiquement décréter l'exécution (*specific performance*) de la vente d'un certain terrain, situé dans la cité de *Winnipeg*, connu sous le nom de *McMicken's Block* Un décret à cet effet n'est accordé que lorsqu'il y a un contrat formellement conclu entre les parties dont il y a un écrit, avec en outre l'accomplissement des autres formalités voulues par le *Statute of Frauds*, concernant les ventes d'immeubles.

Celle dont il s'agit a été effectuée au moyen des deux écrits ci-après cités. Par le premier, *Alexandre McIntyre*, l'appelant fit à l'intimé, le 26 janvier 1882, l'offre de lui vendre la propriété en question, dans les termes suivants :—

Winnipeg, 26th January, 1882.

I, *Alex. McIntyre*, agree to take $35,000 for property known as *McMicken* Block. Terms 1-3 cash, balance in one year at 8 per annum. Open until Saturday, 28th noon.

Witness, *W. N. Hood.* (Signed,) *ALEX. McINTYRE.*

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Cette offre fut acceptée le même jour par l'intimé au moyen de la lettre suivante :—

January 26, 1882.

DEAR SIR,—I beg to accept your offer made to me this morning. I will accept the property known as *McMicken's* Block, being the property on Main street to the north of *Horsman's* store, on west side of it, 49 to 50 feet by 120, for thirty-five thousand dollars ($35,000), payable 1-3 cash on completion of title, and balance in one year at 8 per cent. You will please have papers and abstract submitted by your solicitor to *N. F. Hagel*, Esq., 22 *Donaldson's* Block, as soon as possible, that I may get conveyance and give mortgage.

Witness,
W. N. Hood,
James A. Miller.

I am, Sir,
Yours truly,
WM. NELSON HOOD.

Alex. McIntyre, Esq.
City.

Le principal moyen de défense offert par l'appelant, est une dénégation du contrat allégué, à laquelle il a ajouté comme second moyen de défense, que les formalités de la section 4 du *Statute of Frauds* n'ont pas été observées.

Hood ayant signé comme témoin à cette déclaration de *McIntyre*, on soulève la prétention que cet écrit ne contient pas de la part de ce dernier une offre légale de vendre, et que partant l'acceptation que *Hood* en a faite le 22 janvier 1882, ne peut constituer un contrat, attendu qu'il n'y aurait pas eu offre de vendre. Cet écrit, quoique dans une forme assez singulière, n'en contient pas moins un consentement (*I agree*) de prendre la somme de $35,000 pour la propriété connue sous le nom de *McMicken's Block*, ainsi que les autres conditions pour en faire une offre de vente. Il est difficile de voir quelle différence il y aurait entre les deux propositions, si au lieu de *I agree to take* $35,000, *McIntyre* avait dit *I agree to sell for* $35,000. Est-ce que dans l'un comme dans l'autre cas, il ne serait pas obligé d'effectuer la vente sur l'accomplissemen des conditions contenues dans cet écrit? Ce langage entre

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hommes d'affaires me paraît suffisant pour constituer une offre de vente. Il serait extraordinaire, pour le moins, de prétendre que *McIntyre*, qui paraît être un homme très entendu dans les affaires, avait simplement voulu par cet écrit faire une déclaration de ses intentions au sujet du *McMicken's Block*, non à quelqu'un en particulier, mais au public en général, comme une sorte d'annonce. Cet écrit a été par lui remis à *Hood* comme contenant les bases d'après lesquelles il était prêt à traiter avec lui pour sa propriété. D'ailleurs par sa lettre du 24 février, l'appelant n'a-t-il pas considéré son offre du 22 janvier comme obligatoire, et ne s'est-il pas déclaré prêt à s'y conformer ? Elle est ainsi conçue :

Winnipeg, 24th February, 1882.

Wm. Nelson Hood, Esq.

I beg to notify you that I have been and am now ready to carry out my offer dated the 26th of January, 1882, in reference to the sale of the *McMicken Block*, without any variation or qualification, and I also hereby notify you that if the terms of such offer are not complied with on or before Monday next, the 27th inst., at 12 o'clock. noon, I shall consider such offer on my part rescinded. You will please take notice, and govern yourself accordingly.

Yours, &c.,

ALEX. McINTYRE.

Après une déclaration aussi claire, peut-on encore mettre en doute son intention de faire une offre de vente qui devenait obligatoire pour lui si elle était régulièrement acceptée. En effet que manque-t-il à cette proposition, si elle est acceptée, pour en faire un contrat complet dont l'exécution puisse être ordonnée par la cour de chancellerie ? Ne contient-elle pas tous les éléments d'un contrat parfait ? La propriété qui en fait l'objet, si elle n'est décrite d'une manière bien précise et détaillée est, au moins, facile à identifier et à rendre certaine, et cela suffit pour l'accomplissement de la condition que l'objet de la vente doit être certain. Le prix en est fixé à $85,000. Les conditions de paiement

sont également bien définies, savoir :—un tiers comptant et la balance dans un an avec intérêt à 8 pour cent. Toutes les conditions requises pour qu'une cour puisse ordonner l'exécution d'un tel contrat se trouvent donc réunies dans celui dont il s'agit. Evidemment la condition de l'écrit exigé par la section 4 du *Statute of Frauds* a été satisfaite par l'offre écrite et signée par l'appelant. Il n'était pas nécessaire que l'acceptation fût par écrit, mais elle l'a été comme on le voit par l'exhibit No. 2.

L'offre ainsi faite devait demeurer ouverte jusqu'au 28 janvier à midi. Il paraît qu'elle a été immédiatement acceptée. Si l'acceptation ci-dessus citée ne contient pas quelque condition ou addition qui soit une déviation à l'offre faite, elle a dû opérer un contrat parfait entre les parties. L'appelant nie qu'elle ait pu avoir cet effet, prétendant que cette acceptation n'est pas sans condition comme elle aurait dû l'être afin de pouvoir réclamer l'exécution.

Cependant en recevant cette acceptation le jour même de son offre, l'appelant ne fit aucune objection à l'insertion des mots "on completion of title," qu'il veut maintenant faire considérer comme une nouvelle condition qui lui permet de retirer son offre. Ce n'est que le 24 février suivant qu'il a cru trouver là un moyen de se dégager du contrat opéré par l'acceptation de l'intimé, et c'est alors qu'il élève pour la première fois cette objection. En première instance devant l'honorable juge *Dubuc* elle a été rejetée ; mais en appel devant deux juges seulement de la cour du Banc de la Reine de *Manitoba* (le troisième se trouvant pour cause d'intérêt incompétent à siéger dans cette cause), l'honorable juge en chef a été d'une opinion contraire à celle de son collègue. La cour se trouvant alors également partagée, le jugement de première instance s'est trouvé confirmé. D'après l'honorable juge en chef l'acceptation aurait

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dû être simplement "*I accept your offer*," au lieu de la lettre ci-dessus, dans laquelle l'intimé, après les mots *one-third cash*, a inséré ceux-ci "*on completion of title.*" Il considère l'insertion de ces mots comme une modification de l'offre qui justifie l'appelant à en refuser l'exécution. Ce motif est-il sérieux en fait? L'appellant pouvait-il un seul instant s'imaginer que l'acheteur paierait un prix aussi élevé pour cette propriété sans avoir la certitude d'avoir un titre valable? En consentant à payer comptant, était-il nécessaire d'ajouter qu'il ne se départirait de son argent que sur l'exhibition d'un titre suffisant. Cette condition quoique non énoncée alors, est une de celles qu'il n'était pas nécessaire de formuler. Puisque l'intimé achetait et payait, il devait avoir un titre. Sans titre il n'était pas acheteur. En supposant que l'acceptation eût été telle que le voulait l'honorable juge en chef, *I accept your offer*, l'intimé aurait-il été pour cela privé, au moment du paiement, du droit de dire, "Voici mes deniers, montrez moi votre titre"? Certainement non, et si le titre exhibé n'eût pas été satisfaisant, n'aurait-il pas été justifiable de garder ses deniers. Pour avoir mis l'appelant sur ses gardes, en insérant dans son acceptation les mots *on completion of title*, il n'a fait alors que ce qu'il aurait eu le droit de faire plus tard, ce que d'ailleurs la loi présume dans le silence des parties.

Il n'est pas correct de dire d'une manière absolue qu'un contrat fait comme l'a été celui dont il s'agit, ne peut contenir aucune autre condition que celle que l'on peut trouver dans l'écrit qui en constate l'existence. Au contraire, à moins d'une déclaration expresse excluant formellement toutes conditions implicites, celles que la loi présume ordinairement, se trouvent comprises dans un tel contrat. Voici ce que dit à ce sujet "*Fry, on Specific Performance*," sec. 223:

Besides the express terms of the contract, there are others which, in the absence of any expression to the contrary, are implied by presumption (4, note). With regard to such terms, therefore, whether they be necessary terms or not, the silence of the contract does not render it incomplete.

Dans le No. suivant, 224, l'auteur va plus loin, en déclarant que dans tout contrat pour la vente d'immeubles, il y a la condition implicite de fournir un bon titre.

In every contract for the sale of land, a condition is implied for a good title (No. 8), and for the delivering up of the deeds, so that when this was prevented by the accidental destruction of the deeds subsequent to the contract, it was held that the vendor could not enforce the sale.

Dans une cause récemment décidée dans la division de la cour de chancellerie par *Fry*, J., ce principe a été confirmé.

. Il est évident d'après cette autorité que l'insertion des mots "*on completion of title*" ne peut aucunement affecter la validité de l'acceptation, puisque la loi présume l'existence de cette condition. Ce principe a été reconnu par *Fry*, J., en ces termes (1) :

Fry, J.: When the contract is silent as to the title which is to be shown by the vendor, and the purchaser's right to a good title is merely implied by law, that legal implication may be rebutted by shewing that the purchaser had notice before the contract that the vendor could not give a good title.

Il n'y a rien dans la preuve en cette cause qui puisse refuter ou contredire la présomption légale, parce qu'il n'a été aucunement question du titre ni d'objections à sa validité. Il y a eu silence absolu à cet effet. La présomption légale doit donc avoir son effet.

Ce principe a aussi été adopté par Lord *Cairns* dans la cause de *Hussey* v. *Horn-Payne*, où l'honorable Chancelier fait au sujet des mots "*subject to the title being approved by our Solicitor*," le raisonnement sui-

(1) *In re* Gloag and Miller's contract 23 Chy. Div. 327.

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vant pour démontrer que ces termes ne constituaient pas une condition modifiant le contrat (1). Réfutant l'objection que l'acceptation contenait en réalité la constitution d'un arbitre de la volonté arbitraire duquel devait dépendre l'exécution du contrat, il dit :

> I feel great difficulty in thinking that any person would have intended a term of this kind to have that operation, because, as was pointed out in the course of the argument, it would virtually reduce the agreement to that which is illusory. It would make the vendor bound by the agreement, but it would leave the purchaser perfectly free..... My Lords, I have great difficulty in thinking that any person would agree to a term which would have that operation. But it appears to me very doubtful whether the words have that meaning. I am disposed rather to look upon them,—and the case which was cited from *Ireland* would be authority, if authority were needed for that view,—I am disposed to look upon the words as meaning nothing more than a guard against its being supposed that the title was to be accepted without investigation, as meaning in fact the title must be investigated and approved of in the usual way, which would be by the Solicitor of the purchaser.....

Ce raisonnement est tout à fait applicable au cas actuel. Dans la cause de *Lewis* v. *Brass*, les mots suivants ajoutés dans l'acceptation d'une offre pour l'exécution de certains travaux, *the contract will be prepared by*, ne furent considérés que comme suggérant un mode facile de mettre à exécution les intentions des parties, et non pas comme une condition additionnelle. Les raisonnements faits par les honorables juges dans cette cause confirment la position prise par l'Intimé dans celle-ci.

Pour ces motifs, je suis d'avis que l'appel doit être renvoyé avec dépens.

HENRY, J. :

I may say, in setting out, that I entirely concur in the views expressed by my learned brother judge *Strong* and in those of the Chief Justice of *Manitoba*, on record

(1) 4 App. Cases, p. 322.

in this case. I adopt, in fact, their reasoning for the conclusions at which they have arrived. If we look at this offer we will see that it is a very bald one, terms one-third cash, and the balance in one year at 8 per cent. That offer was made on Thursday, the 26th of January, and was to remain open until the following Saturday, the 28th, at noon—that is, two days. It is very precise as to time, and the party was bound, if he wanted to purchase, to accept within the time limited. However, on the same day the party accepted that offer, and it is for us to consider whether he did accept it in its legal consequences and result. The offer that he makes in acceptance is limited to the payment of one-third cash on the completion of the title. Now, there is no such term in the offer, that it shall be one-third cash on the completion of the title, nor can it be said that that would not be a deviation from the terms of the offer; but we are told that the party had a right, before he paid his money, or any of it, to see that the title was good. But the acceptance adds something else. I admit that the party would have a right to see that the title was good, and a right to reasonable information as to that from the party selling and a reasonable time to investigate before paying his money, and possibly, under the circumstances, it might be said to apply to the first deposit That, however, is a question that is not necessary to be decided, because he says, "you will please have papers submitted as soon as possible that I may get conveyance and give mortgage."

There is nothing in the original offer that he was to get a conveyance on the payment of that money. His first duty was to tender one-third of the money as agreed upon, and he could not upon acceptance of it, say to the seller, "Give me a deed and I will give you a mortgage," when it is not mentioned in the

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agreement. If he wanted to have these as a part of the terms of the contract, it was his business to have had them inserted in the offer that he was present at the drawing up of, and became a witness to; or if he added these as terms, it was his business to see that there was an acceptance from the seller upon these added terms to form between the parties a binding contract. Now, we are told that the party had a right to get a deed and give a mortgage, but I maintain that he had no such right. There may be reasons why the party who offered to sell the property should say "no, when I am paid the whole of the money, I will give you the title." He might have said "I do not consider one-third payment sufficient security for me, if I have to wait a year for the balance." Properties were jumping up and down in *Manitoba* at the time. There was a good deal of speculation, and if the boom was over a depression was likely to take place. What right had he to say: "Mr. *McIntyre*, I will give you one-third of the purchase-money, but you must depend upon the value of the property in twelve months for the balance?" No such bargain was entered into; no such agreement was thought of or spoken of by either of the parties. I, therefore, take it, there was no valid acceptance of the offer in any way unless there was evidence of acquiescence in it afterwards by the seller, *McIntyre*. I can see no such evidence, and I have come to the conclusion, therefore, for the reasons already given at length by my brother *Strong*, and very fairly and properly put in the judgment of the learned Chief Justice, that the appeal should be dismissed with costs of both courts.

GWYNNE, J.:—

I concur in the judgment read by my Brother *Strong* and in the judgment of the late Chief Justice of

Manitoba. If I had arrived at a different conclusion I should be of opinion that the plaintiff below has shewn no case of deceit or even of with-holding of knowledge as to the nature of the tenancies to warrant any abatement from the price of the property. The objection is not that the introduction of the words "on completion of title" makes the acceptance defective, but the question is whether the defendant's offer was that he should receive the cash payment on the completion of the title or upon acceptance of the offer.

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Appeal allowed with costs.

Solicitor for appellant: *S. M. Wood.*

Solicitor for respondent: *W. B. Canavan.*

THE MERCHANTS' MARINE INSURANCE COMP'Y OF CANADA (DEFENDANTS) ..... APPELLANTS;

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*Oct. 24.
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*Jan. 16.

AND

BENJAMIN A. RUMSEY AND GEO. R. JOHNSON (PLAINTIFFS)..... RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Marine policy—Construction of—Trading voyage—Insurable Interest

The respondents (plaintiffs), by an arrangement with *M.*, who had chartered the schooner *Mabel Claire* for a trading voyage from *Nova Scotia* to *Labrador* and back, were to furnish the greater part of the cargo, and were to have complete control of all the goods put on board the vessel until it should return, when the return cargo was to be disposed of by the plaintiffs, who were to pay themselves for their advance, and pay over any balance remaining, to *S.* and others. In trad-

*PRESENT.—Sir W. J. Ritchie, C.J., and Strong, Fournier, Henry and Gwynne, JJ.

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ing on the voyage *S.* and others were not to dispose of any goods on credit, but were to bring back such goods as they could not dispose of, so as to obtain a return cargo in lieu thereof. The plaintiffs put on board the vessel at *Halifax* merchandize to an amount exceeding $6,000, and after having done so, and upon the day on which the vessel sailed from *Halifax*, effected with the appellants (defendants) the policy sued upon, and an extract from which is as follows :— "*Rumsey, Johnson & Co.* have this day effected an insurance to "the extent of $2,000 on the undermentioned property, from "*Halifax* to *Labrador* and back to *Halifax* on trading voyage. "Time not to exceed four(4)months,shipped in good order and well "conditioned on board the schooner *Mabel Claire*, whereof *Mouzar* "is master, this present voyage. Loss, if any, payable to *Rumsey*, "*Johnson & Co.* Said insurance to be subject to all the forms, "conditions, provisions and exceptions contained in the policies "of the company, copies of which are printed on the back hereof. "Description of goods insured, merchandise under deck, amount "$2,000, rate 5 per cent., premium $100 to return two (2) per cent., "if risk ends 1st October, and no loss claimed; additional insur- "ance of $5,000; warranted free from capture, seizure and deten- "tion, the consequences of any attempt thereat." Against the respondents' right to recover, it was contended that they were merely unpaid vendors and had no insurable interest, and that goods previously put on board at *Liverpool, N. S.*, were not covered by this policy, and that it was not to cover the return cargo.

Held (affirming the judgment of the court below, discharging a rule *nisi* to set aside a verdict for the plaintiffs), that the policy covered not only goods put on board at *Halifax* but all the merchandize under deck shipped in good order on board said vessel during the period mentioned in the policy.

Held, also, that there was sufficient evidence to show that the plaintiffs had an insurable interest in all the goods obtained and loaded on the vessel.

APPEAL from a judgment of the Supreme Court of *Nova Scotia* discharging a rule *nisi* to set aside a verdict of $1,871.93, rendered by *Weatherbe*, J., without a jury, in favor of the respondents. The facts and pleadings sufficiently appear in the head note and in the judgments of *Ritchie*, C.J., and *Gwynne*, J., hereinafter given.

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Mr. *Hatton*, for appellants, cited and relied on the following authorities: 1 *Arnold* on Marine Insurance (1); *Murray et al.* v. *Columbia Ins. Co.* (2); *Pugh* v. *Wylde* (3); *Outram* v. *Smith* (4); *Arnold* on Marine Insurance (5); *Bell* v. *Ansley* (6); *Cohen* v. *Hannan* (7); *Carruthers* v. *Sheddon* (8); *Powles* v. *Innes* (9); *Parsons* on Marine Insurance (10); *Graves* v. *Boston Mar. Ins. Co.* (11); *Russell* v. *New England Mar. Ins. Co.* (12); *Dumas* v. *Jones* (13); *Pearson* v. *Lord* (14); *Parsons* on Marine Insurance (15); *Arnold* on Marine Insurance (16); *Grant* v. *Paxton* (17); *Spitta* v. *Woodman* (18); *Nonnen* v. *Kettlewell* (19); *Murray et al.* v. *The Columbian Ins. Co.* (20); *Rickman* v. *Carstairs* (21); *Creighton* v. *Union Mar. Ins.* (22); *Carr et al.* v. *Sir Moses Montefiore* (23); *Joice* v. *Realm Ins. Co.* (24).

Mr. *Graham*, Q.C., on behalf of the respondents, cited and relied on the following authorities: *Columbian Ins. Co.* v. *Catlell* (25); *Parsons* on Marine Insurance (26); *Arnold* on Insurance (27); *Whitton* v. *Old Colony Co.* (28); *Hunter* v. *Leathley* (29); *Lucena* v. *Crawford* (30); *Clark* v. *Scottish, &c., Ins. Co.* (31); *Provincial Ins. Co.* v. *Leduc* (32).

(1) 4 Ed. p. 62.
(2) 11 Johnson R. 302.
(3) 2 Russ. & Ches. N. S. R. 177.
(4) 2 Russ. & Ches. N. S. R. 187.
(5) 4 Ed. p. 1062.
(6) 16 East 141.
(7) 5 Taunt. 101.
(8) 6 Taunt. 14.
(9) 11 M. & W. 10.
(10) 573 note 1.
(11) 2 Cranch 419.
(12) 4 Mass. 82.
(13) 4 Mass. 647.
(14) 6 Mass. 81.
(15) P. 49, 52 and notes.
(16) 4th ed. pp. 162, 358, 359.
(17) 1 Taunt. 463.
(18) 2 Taunt. 416.
(19) 16 East 188.
(20) 11 Johnson R. 302.
(21) 5 B. & Ad. 651.
(22) 1 James N. S. R. 195.
(23) 5 B. & S. 407.
(24) L. R. 7, Q. B. 580.
(25) 12 Wheat. 383.
(26) 1 vol. p. 245, 518.
(27) P. 380.
(28) 2 Met. 347.
(29) 10 B. & C. 858.
(30) 3 B. & P. N. R. 75.
(31) 4 Can. S. C. R. 192, 706.
(32) L. R. 6 P. C. 225, 244.

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RITCHIE, C.J.:—

This was an action brought to recover insurance on merchandise on board the schooner *Mabel Claire*, from *Halifax* to *Labrador* and back to *Halifax* on a trading voyage. The loss of the vessel being admitted, this cause was tried before Mr. Justice *Weatherbe*, without a jury, who gave a judgment or verdict for the plaintiffs for the amount of claim, $1,871.93.

A rule *nisi* was taken on special grounds to set aside the verdict with power (by consent) for the court to direct a final judgment to be entered for either party, which was argued before Justices *McDonald*, *Smith* and *Weatherbe*.

Judgment was given on the tenth day of April, 1883; the only written judgment being that of Mr. Justice *Weatherbe*, in which the other judges concurred, discharging the rule *nisi* with costs.

The following is an extract from the policy:

THE MERCHANT'S MARINE INSURANCE COMPANY OF CANADA.

(Ocean Cargo or Freight Certificate.)

HEAD OFFICE, *Montreal.* No. 18,373.

Halifax, July 13, 1878.

Rumsey, Johnson & Co. have this day effected an insurance to the extent of two thousand dollars, on the undermentioned property, from *Halifax* to *Labrador* and back to *Halifax* on trading voyage—time not to exceed four (4) months, shipped in good order and well conditioned on board the schooner *Mabel Clare* whereof *Mouzar* is master, this present voyage. Loss, if any, payable to *Rumsey, Johnson & Co.* ☞ said insurance to subject to all the forms, conditions, provisions and exceptions contained in the policies of the company, copies of which are printed on the back hereof.

J. V. Oswald,

C. J. Wylde, Agent. General Manager.

Description of goods insured, merchandize under deck, amount $2,000, rate 5 per cent., premium $100 to return two (2) per cent. if risk ends 1st October, and no loss claimed; additional insurance of five thousand (5,000) dollars, "Warranted free from capture, seizure and detention, the consequences of any attempt thereat."

Two points were raised in this case. First. Did the

policy cover only the goods laden at *Halifax*? Second. Have the respondents proved sufficient interest to entitle them to recover? As to the first point: This case seems to me abundantly clear, the policy was, in my opinion, unquestionably intended to cover, during the trading voyage from *Halifax* to *Labrador* and back, all "the merchandize under deck" on board said vessel during the period mentioned in the policy, viz., for four months from the 13th July, 1878, shipped in good order, and was not confined to the goods shipped at *Halifax* and brought back to *Halifax*. The policy dated 13th July, 1878, insures to

The extent of $2,000, on the undermentioned property, from *Halifax* to *Labrador* and back on trading voyage—Time not to exceed four months, shipped in good order and well conditioned on board the schooner *Mabel Claire*.

Then, what is the undermentioned property?

Description of goods insured, merchandize under deck, amount $2,000, rate 5 per cent., premium $100 to return two (2) if risk ends 1st October and no loss claimed.

Trading voyages are well understood. The goods are constantly shifting. The idea is simply to barter the goods taken from *Halifax* between that place and *Labrador*, and to bring back to *Halifax* the goods obtained by such bartering, and the goods insured were all merchandize under deck on the trading voyage from *Halifax* to *Labrador*, and back, irrespective of where the same may be taken on board, whether on the voyage from *Halifax* or on its return, provided they were merchandise under deck on the trading voyage. I can discover nothing what ever to limit the subject-matter of the insurance contemplated by this policy to the original cargo on board at *Halifax*. There is nothing, in my opinion, in the terms used, on the most strict construction of the language, to justify such a conclusion—if we take the nature of the voyage—"a trading

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voyage"—the termini, "*Halifax* and *Labrador* and back to *Halifax*," that it is to be an insurance on a trading voyage from *Halifax* to *Labrador* and back to *Halifax*, the object of such a voyage being for trade and barter, that is, the exchange from time to time, and from place to place during the continuance of the voyage, of the delivered cargo for a return cargo, which, from the coast between *Halifax* and *Labrador*, we may take historical, if not judicial, notice, would be a fish cargo. Then the duration of the risk—four months, the rate, 5 per cent. —everything, in my opinion, indicates that it was never intended by the parties that there was to be an insurance on a single passage from *Halifax* to *Labrador*; nor can it be supposed that it was contemplated that the cargo taken from *Halifax* would be brought back in specie as shipped there. On the contrary, the cargo brought back would be obtained by barter or sale of the outward cargo, and from this a return cargo, and therefore unless the term "and back" referred to such return cargo, it would be meaningless. "From *Halifax* to *Labrador*" fix, in my opinion, merely the termini of the trading voyage, and the subject-matter of insurance "merchandize under deck," if shipped in good order and well conditioned on such "trading voyage."

There is no language in this policy such as "beginning the adventure from the loading thereof on board at *Halifax*," or any language intimating that the policy is only to attach on goods loaded at that port, which is the terminus *a quo* of the trading voyage insured, viz., "from *Halifax* to *Labrador* and back," and the reason is very obvious; any such language would be utterly inconsistent with the nature of the voyage, the provisions contained in the policy and the object the parties must have had in view in effecting the policy. Had it been the intention of the parties that the policy should be so restricted, I cannot doubt but that unequivocal language,

so limiting it, would have been used, and in its absence, bearing in mind the character of the voyage and the terms used, the irresistible inference is that no such limitation was contemplated.

In what in principle does this differ from the constant every day practice of insuring goods or stock-in-trade in a store for a given period, where the insured reproduce the same stock. Has it ever been doubted or questioned that a policy on a stock of goods covers such after acquired and substituted goods? According to defendant's contention, the return cargo in this case would not be covered at all. It cannot be supposed that either party could have contemplated that the trading voyage would be utterly fruitless, and that the goods taken from *Halifax* would not be used for the purpose for which they were shipped, but would be brought back to *Halifax*.

In the case of *Violett* v. *Allnut* (1), plaintiff declared upon a policy of insurance at and from *Plymouth* to *Malta*, with liberty to touch at *Penzance*, or any port in the channel to the westward, for any purpose whatever, upon goods by the ship *Lion*, beginning the adventure from the loading thereof on board the said ship as above. The ship sailed from *Plymouth* and touched at *Penzance* for the purpose of loading and taking in these other goods for *Malta*. The ship was stranded. The question was, whether by the terms of the policy defendant was liable for the loss of the goods taken on board at *Penzance*, his contention being that by the terms of the policy the insurance attached only the cargo to be loaded at *Plymouth*, but the court held there was no ground for the objection.

And in *Barclay* v. *Stirling* and another (2):

The defendants being owners of the ship *Neptune*, which was loaded at *Jamaica* in September, 1814, with a cargo on freight from

(1) 3 Taunt. 419. (2) 5 M. & S. 6.

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various shippers, and was bound to *London*, effected a policy of insurance for £1,200, on the freight of the said ship, valued at £4,200, which policy the plaintiff underwrote for £500. The voyage described in the policy was, "At or from port or ports of loading in *Jamaica*, to her port or ports of discharge of the *United Kingdom*, with leave to call at all, any, or every one of the British and Foreign *West India Islands*, to seek, join and exchange convoy, beginning the adventure upon the goods from the loading thereof aboard the said ship, as aforesaid." And in a subsequent part of the policy, after the usual declaration, that it should be lawful for the ship, in that voyage, to proceed and sail to, and touch and stay at any ports whatsoever, the following words were introduced:

"And wheresoever, with leave to discharge, exchange, and take on board goods at any ports or places she may call at, or proceed to, without being deemed any deviation from, and without prejudice to this insurance."

The ship sailed from *Jamaica* on the 30th of October, 1814, with the said cargo; and on the 8th of November, in the course of her voyage, got on shore off the Island of *Cuba*. There she remained till the 18th of December, during which time part of the cargo was saved, but the greater part consisting of sugar, was washed away and lost. On the 20th December the ship reached the *Havannah*, and having received there such repairs as were necessary to enable her to proceed to *England*, took on board so much of her cargo as had been saved, and likewise a considerable quantity of fresh goods on freight, from the *Havannah* to *London*, and sailed the latter end of February, 1815.

Plaintiffs contended that it was clear from the terms of the policy, that it included freight, not only of such goods as were shipped at *Jamaica*, but also of all goods put on board at any of the *West India Islands* in the course of the voyage; for the policy contained a liberty to call at any such islands, and to discharge, exchange, and take on board goods at any place the ship might call, without being deemed a deviation, &c.

Defendants denied that the freight of the goods shipped at the *Havannah* was covered by the policy, for the policy is precise in describing the adventure to be, "at and from her ports of loading in *Jamaica*"; and that it shall begin "from the loading of the goods aboard as aforesaid," that is at *Jamaica*; and the leave given in a subsequent part of the policy to exchange and take on board goods at any places the ship might call at, was not intended to alter the adventure before described, but only to excuse a deviation. Therefore, though the loading of goods at the *Havannah* shall not avoid the

policy, by reason of the liberty contained in it, yet is it no part of the risk insured.

Lord *Ellenborough*, C.J., said:

The freight was earned in respect of goods loaded partly at *Jamaica*, and partly, owing to a mis-adventure in the voyage, at *Cuba;* and the whole has been received by the assured at the ship's port of discharge. First let us consider the freight insured. The policy runs thus: "At and from the port of loading in *Jamaica*, to her port of discharge, beginning the adventure from the loading on board the ship as aforesaid, that is, from the loading at *Jamaica*, with leave to call at all and every of the *West India Islands*." The ship being driven on the coast of *Cuba* by the accidents of the voyage, this became a part of the voyage. And without considering it as part of the voyage in the first instance, the liberty given to the assured to touch and take in goods at *Cuba*, incorporates this part of the adventure, by necessary construction, with the voyage. It is said, this liberty does no more than excuse a deviation; but the case of *Violett* v. *Allnutt* (1) shows that an intermediate port may be included within the policy, equally with the terminus *a quo* mentioned in it; and it is very material that it should be so.

Bayley, J.:

The first objection is, that this policy would only have attached on the freight of such goods as were put on board at *Jamaica*, but not elsewhere. But such a construction is contrary to the true intent of the policy; for the policy contains no words limiting it to the goods to be put on board at *Jamaica*. Tne two termini were *Jamaica*, and the ship's port of discharge in the *United Kingdom*, with leave to call at any of the *West India Islands;* and I think that any freight earned between these two termini, and within the limits of the lease specified, would have been covered by the policy. In a subsequent part of the policy, there is leave given to discharge, exchange, and take on board goods at any place the ship may call at; this was not deemed to be a deviation. Then, if the assured were to have full power to do this, how comes it that the freight of the goods thus taken on board, is not to be included in the policy?

* * * * * *

In principle and good sense, there can be no reason why this policy, which was intended to cover the freight upon the whole voyage, should not attach upon the freight of goods loaded at an intermediate port in the voyage. I therefore think the *Havannah*

(1) 3 Taunt. 419.

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freight was covered by the policy. It would be unjust to hold otherwise.

Holroyd, J.:

This is a policy not confined to freight on goods loaded at *Jamaica*, but is to be extended to goods loaded during the voyage from *Jamaica* to her ports of discharge. The leave to call at other ports, and load there, puts the freight arising from the goods loaded at the *Havannah*, upon the footing with the former freight, and brings it within the meaning of the policy. I agree with the court on the other point.

As to the second point that the plaintiffs have no insurable interest in the goods—the evidence, I may say the uncontradicted evidence on this point as to the transaction and plaintiff's interest in the goods lost is as follows:—

B. A. RUMSEY, sworn—My partner is *Johnston, Rumsey, Johnson & Co.* The schooner *Mable Claire* loaded most of cargo July, 1878. Value of cargo I think between $9000 and $10,000. Had arrangement with *Stephen C. Tupper*, to fit him out, a verbal arrangement. We were to supply most of cargo for trading voyage, we took bills of lading of it. The return cargo was to come back to us, we were to dispose of cargo and pay ourselves and pay them the balance. It was to be a trading voyage to *Newfoundland* and back.

The whole return cargo was to come back to us. This is the B. L. of cargo we put on board, only what we put on board. It is signed by the master of the schooner. (Put in and read, objected to, marked B. A. J.) Cargo was put on board by *Weir Brothers* and others which we paid for but it is not in this B. L. *Tupper* put in some of the cargo himself. The whole of it, including what *Tupper* put in was insured by us and was subject to the arrangement I have spoken of.

G. R. JOHNSON.—Partner in *R. J. & Co.* I made arrangements with *Tupper*. He wanted supplies for trading voyage to *Labrador*. Had chartered new schooner *Mable Claire*. He wanted us to supply. He applied to me at *Liverpool, N. S.*, through a friend of his who offered to give him a certain amount towards his supplies, and that as security to us he would allow that portion to go as security as a preference that ours should be paid first. I asked him what amount. He said probably ten thousand dollars. The arrangement was not made at *Liverpool*. I promised to telegraph to him what we would do. When I returned the vessel was here, and I made the arrange-

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ments for the firm with *Tupper* and *Mouzar*. We were to supply them and have complete control of all the goods until they got back. They were to give no goods out on credit, and sooner than give credit they were to bring goods back, and we would credit them with full price.

They promised to bring back any goods for which they exchanged them. We were to effect insurance on them to the full extent of cargo, and if there was not sufficient to pay everybody when they returned, we were to be paid first. They were our goods until they came back. When they went away they expected to make a profit on them. If they were successful they were to let us know what extra amount to price was needed for the benefit of the adventure.

To say that under this testimony the plaintiffs were merely unpaid vendors, with the rights only of unpaid vendors, is simply to ignore the evidence in the case and the agreement which it clearly establishes. The only evidence apparently relied on in the court below as displacing the effect of this evidence, is that of *Rumsey*, who on cross-examination, in answer evidently to a question put to him, says :—

If the goods had been lost on the voyage to *Newfoundland* without insurance, the loss I suppose would have been *Tupper's*.

I cannot see how this can possibly affect in any way the liability of the defendants to the plaintiffs. Plaintiffs had supplied *Tupper* and no doubt looked to him personally for payment, as well as to the goods over which it was agreed that they should retain the control for the purpose of securing such payment. But whatever may have been the relative liabilities of the parties as between themselves, it is quite clear that the plaintiffs had such a claim on these goods supplied and shipped as on the goods acquired and shipped in good order and well conditioned during such trading voyage as would have been enforceable against *Tupper*, had he endeavored to dispose of them and divert the proceeds from the plaintiffs contrary to the terms of the agreement.

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For these reasons I am of opinion that the appeal should be dismissed with costs.

STRONG, J.:—

I am of opinion that this appeal wholly fails. The policy was in terms upon "merchandise under deck on trading voyage from *Halifax* to *Labrador*, and back to *Halifax* on trading voyage." It is contended that these words only covered the original cargo shipped at *Halifax*. Such a proposition is wholly unsustainable. The policy must be construed according to the known course of trade, and according to that the only object of the voyage was to dispose of the original cargo and to substitute a return cargo for it. This is a much stronger case than that of *Columbian Insurance Co.* v. *Cattell* (1), cited for the respondent, for in the policy in that case the words "trading voyage" were not contained, and the court there held that the underwriters must be presumed to know what is here expressly stated in the definition of the risk. The English cases are clear to the same effect. In *Hill* v. *Patten* (2), Lord *Ellenborough* says:

> Yet it is not to be inferred that shipping on successive cargoes on board the same ship in the course of the same continued adventure as in the African and other trade out and home, may not properly be the subject of insurance under the word "goods," for in view of these cases the successive cargoes *i. e.* (1) of English goods (2) African articles of traffic, and lastly, West India produce are according to the course of such trading adventures construed subject matter of insurance under the one name of goods.

Upon the question of interest the evidence was ample to justify the verdict for the respondents, and the court below very properly held that there was sufficient evidence to show that the property in all the goods, as well those forming the original cargo as such as might be shipped in the course of the voyage, were to

(1) 12 Wheat. 383. (2) 8 East 373.

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be vested in the respondents until the joint-adventure was finally wound up by a sale of the return cargo. The answer of *Rumsey* on cross-examination that he supposed "the loss would have been *Tupper's*" if the goods had been lost on the voyage to *Newfoundland* without insurance, was a mere inference of what the witness supposed would have been the legal rights of himself and his partner, and afforded no ground for a new trial.

The appeal should be dismissed with costs.

FOURNIER, J.:

En juillet 1878, *Stephen Tupper*, *William Mouser* et *A. W. Moren* affrétèrent la goëlette "*Mabel Claire*," pour un voyage de trafic au *Labrador*, dans lequel ils étaient tous intéressés. La goëlette partit de *Liverpool*, *N. S.*, où elle prit une partie de sa cargaison, valant environ $1,200; elle fit escale à *Halifax* où elle compléta sa cargaison avec des marchandises achetées des Intimés et d'autres personnes. Ces marchandises ne furent pas alors payées. La goëlette fit voile d'*Halifax*, le 13 juillet pour *Boone Bay* et *Labrador* avec une cargaison valant environ $9,000, y compris $1,300 en argent.

Tupper et *Mouzar* qui s'embarquèrent sur le vaisseau, le premier comme subrécargue et le deuxième comme capitaine, vendirent et échangèrent les marchandises et reçurent en retour du poisson, de la pelleterie, etc., qu'ils mirent à bord du vaisseau. Lorsqu'ils laissèrent *St: Augustin* pour le retour à *Halifax*, ils n'avaient plus que pour environ $1,000 des marchandises prises à *Liverpool* et *Halifax*.

Le 13 juillet les intimés assurèrent pour leur propre compte au bureau de l'appelante pour $2,000 de marchandises. La perte de la goëlette à son voyage de

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retour est admise ; l'assurance fut effectuée de la manière suivante.

[Ici l'honorable juge donne lecture du reçu ci-dessus cité.]

Les moyens de défense invoqués par l'appelante soulèvent deux questions desquelles doit dépendre la décision de cette cause. 1o. Les demandeurs intimés ont-ils un intérêt assurable (*insurable interest*) dans les marchandises comprises dans la police d'assurance effectuée en leur faveur? 2e. La police couvre-t-elle les risques du voyage de retour et les marchandises reçues en échange de celles prises et mises à bord à *Halifax* et à *Liverpool*?

Les marchandises fournies par les intimés pour le voyage de trafic dont il s'agit, l'ont été en vertu d'un arrangement particulier par lequel ils se sont réservés une propriété spéciale dans les marchandises qui devaient remplacer celles qui avaient été mises à bord à *Liverpool* et *Halifax*. Ils devaient en retenir la possession jusqu'au paiement de leur réclamation.

La preuve à ce sujet établit que les intimés devaient équiper *Tupper* (*to fit him out*). *Rumsey*, l'un d'eux, dit :

Had arrangements with *Stephen C. Tupper* to fit him out—a verbal arrangement. We were to supply most of cargo for trading voyage. We took bills of lading of it. The return cargo was to come back to us. We were to dispose of the cargo and pay ourselves, and pay them the balance. It was to be a trading voyage to *Newfoundland* and back. The whole return cargo was to come back to us. *Tupper* put in some of the cargo himself. The whole of it, including what *Tupper* put in, was insured by us and was subject to these arrangements I have spoken of.

L'autre intimé, *Johnson* dit :

I made arrangements with *Tupper*. He wanted supplies for a trading voyage to *Labrador*. He applied to us at *Liverpool, N. S.*, through a friend of his who offered to give him a certain amount towards his supplies, and that as security to us, he would allow that portion to go as security, as a preference that ours should be paid first. We were to supply them and have a complete control of all

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the goods until they got back. They were to give no goods out on credit, and sooner than give credit they were to bring goods back and we would credit them with full price. They promised to bring back any goods for which they exchanged them. We were to effect insurance on them to the full extent of cargo, and if there was not sufficient to pay every body when they returned, we were to be paid first. They were our goods until they came back.

La seule tentative faite pour diminuer la force de cette preuve est la réponse donnée par *Johnson* sur la question de savoir qui aurait supporté les risques, dans le cas de perte sans assurance, "*if the goods had been lost on the voyage to Newfoundland without insurance, the loss, I suppose, would have been Tupper's.* Cette question avait pour but de faire voir que les intimés n'ont d'autre intérêt que celui de vendeur non payé, (*unpaid vendor*), ce qui ne constituerait pas un intérêt assurable. Mais le témoignage établit si positivement l'arrangement verbal entre *Rumsey* et *Tupper*, par lequel les intimés se sont réservés le contrôle absolu des marchandises afin de garantir leurs avances, et que ces avances n'ont été faites que sur la foi de cet arrangement qu'il faut nécessairement en conclure que les Intimés ont démontré qu'ils avaient un intérêt assurable, *an insurable interest.* Après la décision de la cause de *Clarke* v. *Scottish Imperial Insurance Co.* (1), dans laquelle cette question a été si complètement traitée, il serait inutile de revenir sur le sujet. Il suffit de référer à la savante dissertation de Sir *William Ritchie*, C. J., sur le sujet et aux nombreuses autorités qu'il a citées pour appuyer son opinion. Les prétentions des intimés à cet égard doivent donc être considérées comme parfaitement justifiées.

Il en doit être de même sur la question de savoir si la police ne couvre seulement que les marchandises chargées à *Halifax.* Les mots de la police "*merchandize under deck,*" sont assez amples pour comprendre

(1) 4 Can. S. C. R., pp. 192 et 706.

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toute espèce de marchandises ou autres propriétés qui devaient se trouver sous le pont du vaisseau pendant toute la durée du voyage jusqu'au retour. Le voyage dont il s'agit étant un (*trading voyage*) voyage de trafic, à la connaissance de l'appelante qui dans tous les cas doit être présumée savoir que le trafic dans un tel voyage signifiait le troc ou échange des marchandises. Les parties au contrat d'assurance en question ayant les faits présents à l'esprit ont dû avoir l'intention de comprendre dans la police toutes les marchandises sous le pont en tout temps, depuis le départ d'*Halifax* jusqu'au *Labrador* et de ce dernier endroit jusqu'au retour à *Halifax*. Que signifieraient les mots *back to Halifax*, s'ils ne s'appliquait à la cargaison de retour ? Les mots *from Halifax* to *Labrador* dans la première partie de la police n'indique pas la provenance des marchandises et ne sont là que pour la description du voyage et non pas pour la désignation des marchandises assurées qui sont désignées par les expressions *merchandizes under deck*. Les principes énoncés par le savant juge *Story*, dans la cause de *Colombian Insurance Co.* v. *Cattell* (1), sont parfaitement applicables à la présente cause. Là comme ici la question était de savoir si l'assurance ne s'appliquait qu'à la cargaison ordinaire, ou bien si elle comprenait également les cargaisons successives qui étaient le produit du trafic de la première. La citation entière de cette autorité serait trop longue, je n'en donnerai qu'un court extrait.

The underwriters must be presumed equally with the assured to know the nature and course of such a voyage. It is for the purpose of trade and the exchange of the outward cargo by sale or barter for a return cargo of West India productions. If we could shut our eyes to the knowledge of this fact, belonging as it does intimately to the history and commercial policy of the nation itself as disclosed in its laws, the whole evidence in the case furnishes abundant proofs of its notoriety. The true meaning of the policy is to be sought in

(1) 12 Wheat. 383.

an exposition of the words with reference to this known course and usage of the West India trade. The parties must be supposed to contract with a tacit adoption of it as the basis of their engagements. The object of the clause under consideration may be thus rationally expounded, as intended only to point out the time of the commencement and termination of the risk on the goods, successively, and at different periods of the voyage constituting the cargo. It would be pushing the argument to a most unreasonable extent to suppose that the parties deliberately contracted for risks on a homeward voyage on goods which, according to the known course of the trade and the very nature of the commodities, were not, and could not be, intended to be brought back to the *United States.*

Ces raisonnements s'appliquent parfaitement à la présente cause. On peut encore ici, invoquer le principe qui règle les assurances de fonds de commerce contre le feu. Ces fonds sont par leur nature destinés à être souvent renouvelés et remplacés. S'il n'y avait d'assuré en cas de perte que les marchandises qui se trouvaient en magasin lors de l'assurance, l'assurance serait une précaution vaine et illusoire, car le plus souvent on ne retrouverait pas les marchandises assurées. Aussi est-il de principe que :—

A policy covering merchandize in store, does not cover any special property, *but property comprising such a stock as may be on hand when a loss occurs,* although nothing is said in the policy concerning the matter. This is implied from the nature of the risk and the usages of the business covered by the policy.

Il serait plus facile qu'utile de multiplier les autorités à ce sujet.

En résumé je crois qu'il est bien établi en preuve que les intimés ont un intérêt assurable dans les marchandises comprises dans la police d'assurance, et que cette police doit être interprétée comme couvrant les risques sur la cargaison de retour reçue en échange des premières marchandises. Je me suis abstenu de prendre en considération quelques autres points, comme par exemple le défaut de mise en cause d'*Alfred W. More*, ne les pensant pas plus que la Cour Inférieure, nécessaires à la décision de cette cause.

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Pour ces motifs, je suis d'opinion que le jugement doit être confirmé.

HENRY, J.:

This case differs from some of those referred to, and therefore I have some doubt on the question raised, but not sufficient to induce me to dissent from the majority of the court. If the result were to be affected by my judgment, I should consider it necessary to give the question fuller investigation.

GWYNNE, J.:

Stephen C. Tupper and *William Mouzar* chartered the schooner "*Mabel Claire*" for a trading voyage from *Nova Scotia* to *Labrador* and back, and, not having sufficient means themselves to load the vessel with merchandize for the voyage, made an arrangement with the plaintiffs to supply them with a cargo.

Application for this arrangement was first made to the plaintiffs at *Liverpool*, where the vessel then was, by *Tupper*, through a friend of his, who had agreed to give him a certain amount towards his supplies, and that such portion should stand as security to the plaintiffs that they should be paid first. The arrangement was not then completed, but *Tupper* put goods on the vessel at *Liverpool* to the amount of $1,200.00 and took the vessel to *Halifax*, where the arrangement with the plaintiffs was completed, by which it was agreed between *Tupper* and *Mouzar* and the plaintiffs, that the plaintiffs should furnish the greater part of the cargo for the trading voyage and were to have complete control of all the goods put on board the vessel until it should return, when the return cargo was to be disposed of by the plaintiffs, who were to pay them-

selves for their advances and pay over any balance remaining to *Tupper* and *Mouzar*. In trading on the voyage *Tupper* and *Mouzar* were not to dispose of any goods on credit, but were to bring back such goods as they could not dispose of so as to obtain a return cargo in lieu thereof, accordingly the plaintiffs put on board the vessel at *Halifax* merchandize to an amount exceeding $6,000, and, after having done so, and, upon the day on which the vessel sailed from *Halifax* effected with the defendants the policy of insurance sued upon to the amount of $2,000 on merchandize under deck, from *Halifax* to *Labrador* and back to *Halifax* on trading voyage—time not to exceed four months—shipped in good order and well conditioned on board schooner *Mabel Claire*, beginning the adventure upon the said goods and merchandize from and immediately following the loading thereof on board said vessel, and to continue and endure until the said goods should be safely discharged and landed. On the 13th July, 1878, the vessel sailed on her voyage with *Mouzar*, as master, and *Tupper*, as super-cargo. In the course of the voyage they disposed of all the goods which had been laden on the vessel, with the exception of goods to the value of about $1,000, with which on board, together with a large return cargo, the vessel, when on her return voyage to *Halifax*, within the four months named in the policy, together with her cargo, was lost by the perils insured against.

Against the plaintiffs right to recovery upon this policy it is contended, first, that they were merely unpaid vendors and had no insurable interest, and that the goods put on board at *Liverpool* were not covered by the policy, and the value of the goods put on board at *Halifax* that were lost does not amount to $1,871 the amount of the verdict, and that the policy does not

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cover the return cargo. Some other objections were suggested but it is unnecessary to refer to them.

That the plaintiffs had an insurable interest under the agreement in evidence, as well upon all the goods which were on board the vessel when the policy was effected, including those which had been put on board at *Liverpool*, as also upon such goods as should be put on board as return cargo in pursuance of the agreement, cannot, I think, admit of a doubt. The only material question, therefore, is whether such interest is to its full extent covered by the policy. I quite agree with the view taken by the appellants in their factum to the effect that the underwriters, as is made clear by the policy, intended to insure all the goods then already loaded; the words "on the undermentioned property" which by the policy is declared to be "merchandize under deck," shipped in good order and well conditioned on board the schooner "*Mabel Claire*," seem, I think, sufficiently clearly to establish this contention of the appellants. But it seems to me to be also clear that as the appellants knew that the voyage during which the policy on cargo was to have effect, was to be a trading voyage from *Halifax* to *Labrador* and back to *Halifax* (not to exceed four months), they never could have supposed that all the goods leaving *Halifax* were expected to be brought back to *Halifax*; what must have been in their contemplation was that what usually takes place on a trading voyage should take place, namely, that other goods obtained at the points of destination of the vessel on her trading voyage, should be brought back in exchange for, or in lieu of, those taken from the port of departure of the vessel at the commencement of her voyage. The words then "beginning the adventure upon the said goods and merchandise from and immediately following the loading thereof," &c., &c., &c., can be given effect

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to by applying them to determine the time when the policy should begin to have effect upon the return cargo without interfering with the contention of the appellants that they were not intended to apply to the loading at *Halifax* which was already completed before the policy was effected. The policy being construed to apply to the return cargo, in which, under the agreement in evidence, the plaintiff had an undoubted insurable interest when obtained and loaded on the vessel, it is clear that the interest of the plaintiffs in the goods lost was abundantly sufficient to support the verdict, which ought, therefore, to be upheld, and this appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for appellants : *J. N. & T. Ritchie.*

Solicitors for respondents : *Meagher, Chisholm & Ritchie.*

DAME MARIE ANNE GIRALDI, *et al.*, (PLAINTIFFS)..... } APPELLANTS;

AND

LA BANQUE JACQUES-CARTIER (DEFENDANTS)..... } RESPONDENTS.

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*Nov. 23.

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*May 1.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA (APPEAL SIDE).

Creditor and debtor—Relation of—Agency—Payment—C. C. art. 1143 *—Parties.*

S. G. acquired during the life of his first wife, *M. A. B.*, certain immovable property which formed part of the *communauté de biens* existing between them. At his death, after his marriage with *H. S.*, his second wife, he was greatly involved. His widow, *H.*

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

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S., having accepted *sous benefice d'inventaire* the universal usufructuary legacy made in her favour by *S. G.*, continued in possession of her estate as well as that of *M. A. B.*, the first wife, and administered them both, employing one *G.* to collect, pay debts, etc. Shortly afterwards, at a meeting of *S. G's.* creditors, of whom the respondents were the chief, a resolution was adopted authorizing *H. S.* to sell and licitate the properties belonging to the estate of *S. G.* with the advice of an advocate and the cashier of the respondents, and promising to ratify anything done on their advice, and they resolved that the moneys derived from the sale or licitation of the properties should be deposited with the respondents, to be apportioned among *S. G's.* creditors *pro rata*. *G.* continued to collect the fruits and revenues and rents, and acted generally for *H. S.* and under the advice aforesaid, and deposited both the moneys derived from the estate of *S. G.*, and those derived from the estate of *M. A. B.*, the first wife, with the respondents, under an account headed "Succession *S. G.*" A balance remained after some cheques thereupon had been paid, for which this action was now brought by the heirs and representatives of Dame *M. A. B.*

Held,—Per *Strong*, *Taschereau* and *Gwynne*, JJ., (*Ritchie*, C.J., and *Fournier* and *Henry*, JJ., *contra*,) that, as between the heirs *B.* and the bank there was no relation of creditor and debtor, nor any fiduciary relation, nor any privity whatever; and as the moneys collected by *G.* belonging to the heirs *B.* were so collected by him as the agent of *H. S.* and not as the agent of the bank, and received by the bank in good faith, as applicable to the debts of the estate of *S. G.*, and as the representatives of *H. S.* were not parties to the action, the appellants could not recover the moneys sued for.

APPEAL from a judgment rendered on the 21st March, 1882, by the Court of Queen's Bench, *Montreal*, reversing a judgment of the Superior Court, *Montreal*, whereby appellant's action had been maintained against respondents, for an amount of $9,933.01 and interest, and dismissing said action.

The facts that gave rise to the appellants' action, the the pleadings and points relied on by counsel are referred to at length in the judgments hereinafter given (1).

(1) See also Report of case 26 L. C. Jur. 110.

Mr. *Trenholme* and Mr. *Beïque*, for appellants.

Mr. *Globensky*, Q. C., for respondents.

RITCHIE, C. J. :—

It cannot be doubted that a portion of the moneys of the heirs *Bosna* was deposited in the bank under the heading "Succession *S. Giraldi*," and is still there. The amount is clearly established, and the evidence shows that Dame *Henriette Giraldi* was entirely incapable of administering the estate, that she did not do so and that the cashier of the bank with the legal adviser did administer it. The amounts belonging to the old and new succession were capable of separation and were separated property belonging to the heirs *Bosna*, and those who were acting for them must reasonably be taken to have known, and must have known had they chosen to make reasonable enquiries, and as *Louis Guimond* unquestionably did know, that the half of said revenues belonged to the heirs *Bosna*. The mere fact of these parties depositing the money in the bank under the heading they did, does not entitle the bank to retain that portion of the moneys so deposited belonging to the heirs *Bosna* in payment of the debts of the succession *Giraldi* There is no principle of law or equity that I am acquainted with that would justify the robbing of one estate to pay the debts of another.

It is, to my mind, quite clear that in reference to the administering of this estate Dame *Henriette Senecal* was a cypher, that the collecting of the debts and rents and revenues of the immoveables, half of which belonged to the heirs *Bosna*, was, at the instance of the creditors of said *Giraldi* (the bank being the largest, in fact the principal creditor), practically and substantially taken out of her hands and confided to the attorney and cashier of the bank, with *Louis Guimond* acting under

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their directions and orders, who deposited the same in the said bank under the heading "Succession *S. Giraldi*." The bank knew full well that the creditors of *S. Giraldi* had no right to be paid out of these moneys

The parties must have known that the succession *Senecal* was only entitled to half of the revenues; that through the cashier and attorney, and *Louis Guimond*, employed by them, the revenues were collected, and that the other half belonged to the heirs *Bosna*, and could not legally or equitably be applied to the payment of the debts of the succession *Giraldi*.

This is by no means the ordinary naked case of banker and customer. It appears to me beyond all question, that from the very moment of the opening of this account the bank knew, or had the means of knowledge, and must have known but for wilful ignorance, that a portion of the moneys paid into that account arose from the rents and profits of the property of the heirs *Bosna*, and could make no arrangement with dame *Henriette Senecal* so as to be at liberty to appropriate such rents towards the liquidation of the debts of the succession *S Giraldi*, and made no such arrangement; and that no such arrangement was ever contemplated at the meeting of the 15th March, 1870, at which neither dame *Henriette Senecal* nor the heirs *Bosna* were represented.

Even supposing these amounts were paid in and received by the bank under the impression that they belonged to the succession of *S. Giraldi*, upon what principle can they, before they had been disposed of or distributed, and while still in hands of the bank, and when knowledge is brought home to them that they do not belong to the succession *S. Giraldi*, be permitted to misapply and mis-appropriate them, and apply them to the discharge of *S. Giraldi's* debts, to the loss and injury

of the heirs *Bosna*, who are in no way liable, legally or equitably, to discharge them; and the only reason the cashier gives why it should be paid to the creditors of *S. Giraldi* is to be found in his evidence, as follows:

Q. La Banque ne doit-elle pas cet argent aux créanciers, en vertu de l'autorisation à vous donnée, à l'assemblée des creanciers? R. Oui. * * *

Q. Quand vous dites que, d'après vous, la balance en depôt à la Banque *Jacques Cartier* devrait été payée aux creanciers de feu M. *Giraldi*, c'est parceque vous ne connaissez pas les droits des héritiers de *Marie Ann Bosna?* R. C'est parceque je pense tout simplement que ce serait un acte de justice: mais je ne connais pas les droits des héritiers de *Marie Ann Bosna.*

A most singular idea of an act of justice—for what possible right had the creditors of *S. Giraldi* to authorize the collecting of the revenues of the heirs *Bosna* to pay these debts?

I am of opinion the appeal should be allowed, and the judgment of the Superior Court restored.

STRONG, J.:—

I am of opinion that the proper conclusion from the evidence is that the revenues derived from all the properties, as well those belonging to the estate *Bosna*, as those belonging to the succession *Giraldi*, were paid by Madame *Giraldi*, acting through her agent *Guimond*, into the bank to be ultimately distributed amongst the creditors of the *Giraldi* succession. It does not, it is true, appear from the minutes of the meeting of the 15th March, 1870, the resolutions of which have reference exclusively to the sales of the properties belonging to the succession *Giraldi*, and the distribution of the monies arising from those sales, that the creditors came to any conclusion as to the disposal of the revenues. It is, however, a fair inference from the whole course of proceeding, as well as from the evidence of Mr. *Cotté*, that the monies were paid into the bank, not upon an

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ordinary deposit account, but as funds to be applied to the payment of the debts of the succession. Then, so far as I can see, the evidence fails to establish that *Guimond* was the agent, or mandatary, of the bank. He is not referred to in the minutes of the meeting and it is not shown that he received any express authority from the bank, or from Mr. *Cotté*, to receive the rents or to act in any manner as their agent or the agent of the creditors. He had been the agent of Mr. *Giraldi*, in his lifetime, acting as such in receiving the rents of the properties belonging to the estate *Bosna*, as well as of those belonging to Mr. *Giraldi* himself, and after the death of the latter he continued to act in the same capacity for Madame *Giraldi*, and this he continued to do after the creditors' meeting in the same manner as he had formerly done. In effect, therefore, these rents were received by Madame *Giraldi* through her agent, *Guimond*, and were by her paid to the bank, for the benefit of itself and the other creditors, as monies belonging to the estate *Giraldi*, and were by the bank received in good faith as monies properly applicable to that purpose, and the legal result must be precisely the same as if Madame *Giraldi* had personally collected the rents and paid the money to the bank. The law applicable to such a state of facts is contained in art. 1143 of the Civil Code of the province of *Quebec*. That art. (which is identical with art. 1239 C. N.) is expressed in these words:

> Pour payer valablement il faut avoir dans la chose payée un droit qui autorise à la donner en paiement.
>
> Néanmoins le paiement d'une somme en argent ou autre chose qui se consomme par l'usage, ne peut être répété contre le créancier qui a consommé la chose de bonne foi, quoique ce paiement ait été fait par quelqu'un qui n'en était pas propriétaire ou qui n'était pas capable de l'aliéner.

There is some difference of opinion amongst the commentators as to whether this article applies at all

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to the action which the true owner of the money or thing given in payment institutes for its recovery, and whether it is not confined to the case of the debtor who has unduly paid his debt with the money or property of another seeking a repetition of the payment (1). *Demolombe*, however, shows very clearly that it correctly expresses the law applicable to the action of the true owner, and is not restricted in the manner suggested by the other authorities quoted (2); and, interpreting it in this sense, it entirely agrees with the English law as expressed in the adage, that "money has no ear mark" (3).

Then, applying this article to the facts of the present case, as before stated, it is clear that the Court of Queen's Bench rightly dismissed the action, for the money was received by a creditor in good faith, it not being suggested that the bank had any knowledge of the rights of the heirs *Bosna*, unless, indeed, *Guimond* was their agent, and that he was not their agent appears to be the true conclusion from the facts in evidence.

The only other condition requisite to disentitle the plaintiffs to recover is that the money should be "consumed," and the payment of money into a bank and the mixture of it with its other funds according to the ordinary course of business, is equivalent to consumption. That the whole question turns upon the supposed agency of *Guimond* is conceded by the learned judge who dissented in the Court of Queen's Bench, Mr. Justice *Tessier*, and he only reached the conclusion that the plaintiffs were entitled to judgment by holding that it was proved that *Guimond* was the agent of the bank, a view of the facts in which I am compelled to differ from him.

(1) See Larombière, art. 1238, Aubry et Rau, vol. 4, p. 152; Laurent, vol. 17, p. 487.

(2) Demolombe, vol. 27, p. 105.

(3) See case of Market Overt, Tudor—L. C. Mercantile Law, p. 274 (3rd. Ed.)

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I am of opinion that the appeal must be dismissed with costs.

FOURNIER, J.:

Le présent appel est d'un jugement rendu par la Cour du Banc de la Reine à *Montréal*, le 21 mars 1882, infirmant le jugement de la Cour Supérieure pour le District de *Montréal*, par lequel cette dernière avait condamné l'intimée à payer aux appelants $9,933.04.

L'action des appelants est fondée sur les faits suivants: Feu *Seraphino Giraldi*, hôtelier de *Montréal*, fut marié deux fois; la première à *Marie Anne Bosna*, décédée en 1841; la seconde à *Henriette Sénécal*, décédée en 1877.

Il y a eu des enfants des deux mariages. Du premier sont nées *Marie Anne Giraldi*, *Julie Giraldi* et *Eliza Giraldi*. Avec sa première femme *Giraldi* était en communauté de biens. Avec sa seconde une séparation de biens avait été obtenue en justice.

Les immeubles décrits en la déclaration en cette cause formaient partie de la communauté de biens qui avait existé entre *Giraldi* et *Marie Anne Bosna*. Ce fait est constaté par l'inventaire fait par *Giraldi* en qualité de tuteur à ses trois filles issues de son mariage avec *Marie Anne Bosna*, sa première femme. Il était encore en possession, par indivis, de ces immeubles à l'époque de son décès.

L'action est intentée par l'une des trois filles du premier mariage de *Giraldi* et par les représentants des deux autres. Il est inutile d'énoncer ici de nouveau la filiation, les titres et qualités des parties, on en trouvera un exposé complet dans les notes de l'Honorable Juge *Tessier* sur cette cause.

Lors de son décès *Giraldi* était en faillite; cependant il avait fait un testament constituant Dame *Henriette Sénécal*, sa seconde femme, légataire universelle en usufruit, avec pouvoir de vendre ses propriétés pour payer

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ses dettes. Ce legs fut accepté par sa veuve sous bénéfice d'inventaire.

Les créanciers de *Giraldi*, au nombre desquels se trouvait l'intimée pour le plus fort montant, se réunirent le 15 mars 1870, et, après avoir pris communication du testament de feu *Giraldi*, autorisant dame *Henriette Sénécal*, sa légataire, de vendre les immeubles pour payer les dettes de sa succession, s'en déclarèrent contents et satisfaits Après quelqu'autres décisions concernant le règlement des affaires, ils adoptèrent, en outre, les résolutions suivantes:—

Ils désirent que sur le tout, ma lame *Giraldi* prenne, comme par le passé, l'avis de *F. Cassidy*, Ecuier, avocat, et *Honoré Cotté*, Ecuier, Caissier de la Banque *Jacques-Cartier*, deux des créanciers, et qui, même du temps de M. *Giraldi*, étaient ses aviseurs ordinaires, promettant avoir pour agréable tout ce qui sera fait de l'avis de ces Messieurs.

Et comme il est impossible de dire encore quel est l'état actuel et réel de la succession, les dits créanciers déclarent qu'ils sont d'opinion et désirent que les argents provenant de la vente à mademoiselle *Cuvillier*, ainsi que celle de la propriété de la rue *Dubord*, et celles des autres propriétés, après qu'autorisation suffisante aura été obtenue *soit pour les liciter volontairement ou forcément*, soient déposés dans la dite Banque *Jacques-Cartier* pour être partagés et divisés entre les dits créanciers, au *pro rata* de leurs réclamations contre la dite succession quand tout aura été réalisé, désirant dans l'intérêt de tous, que toute précaution possible soit prise pour arriver à un bon résultat, et se fiant entièrement aux dits Conseils de madame *Giraldi* et à ceux qui ont en mains le règlement des affaires de la succession. Les dettes hypothécaires et privilégiées devant être payées avant partage des dits argents, comme dit plus haut.

Et les dits créanciers ont signé.

Montréal, ce 15 Mars 1870.

Ces résolutions sont adoptées et signées par une longue liste de créanciers, dans laquelle ne figurent aucun des héritiers *Bosna*.

Conformément à ces résolutions la collection des revenus de cette succession fut confiée à *Louis Guimond*, qui avait été pendant plusieurs années le gérant d'affai-

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res de *Giraldi*. *Guimond* devait agir sous le contrôle et la direction de M. *H. Cotté*, caissier de la Banque *Jacques-Cartier* (Intimée) et de M. *Francis Cassidy*, solliciteur de cette banque.

Guimond s'est fidèlement acquitté de ses fonctions. Il a collecté tous les revenus des propriétés de *Giraldi*, tant ceux des propriétés dont il était seul propriétaire, que ceux des propriétés qu'il possédait par indivis avec les enfants issus de son premier mariage avec *Marie Anne Bosna*, demandeurs en cette cause. Ces revenus ont été indistinctement déposés par *Guimond* à la banque *Jacques-Cartier*, au compte ouvert par celle-ci sous le titre de "Succession *Giraldi*." Il est indubitable que les deniers provenant de la succession *Bosna*, de même que ceux provenant des propriétés de *Giraldi*, ont été déposés et confondus sous le même titre. La Banque (Intimée) à qui l'on demande maintenant le remboursement des deniers reçus de cette manière, et sur lesquels elle n'a aucun droit, prétend en justifier l'appropriation en alléguant qu'ils ont été déposés sous le nom de Succession *S. Giraldi*, qu'elle est créancière de *Séraphino Giraldi* pour $40,000, qu'elle n'est aucunement tenue de rendre aux héritiers *Bosna* leurs deniers ainsi reçus. Elle admet que ces deniers sont encore dans sa caisse, moins deux paiements qu'elle s'est faite à elle-même. Elle se plaint aussi que les héritiers *S. Giraldi* ne sont pas en cause.

Quant à ce dernier grief il y a été remédié par la mise en cause de *François Sénécal*, exécuteur testamentaire de feu Dame *Henriette Sénécal* et curateur à la substitution créee en faveur des enfants de feu *Z. B. Séraphino Giraldi*, légataire de la propriété. *Sénécal* n'a pas contesté les droits des *Bosna*.

Cette objection de forme écartée, il reste à savoir si le fait que les deniers des *Bosna* ont été déposés à la Banque au compte qu'elle a ouvert au nom de *S.*

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Giraldi lui forme un titre suffisant pour refuser de les rendre à ses propriétaires. *Guimond* était incontestablement le mandataire de la banque ; il a été choisi par elle, et dans tout ce qu'il a fait il a agi sous la direction de M. *Cotté*, son caissier et de *Cassidy* son solliciteur. *Guimond* savait que ces deniers appartenaient aux *Bosna*, et la connaissance qu'il en avait doit être censée remonter jusqu'à la Banque dont il était le mandataire. Indépendamment de cette connaissance présumée, la résolution citée plus haut, adoptée par les créanciers fait voir qu'on n'ignorait pas que des tiers avaient des droits de propriété dans les immeubles de la succession *Giraldi*. Après avoir ordonné le dépôt des argents devant provenir de la vente de deux propriétés mentionnées dans cette résolution, les créanciers ordonnent de plus qu'il en sera de même pour les autres propriétés, après qu'autorisation suffisante aura été obtenue soit pour les liciter *volontairement* ou *forcément*. Avec qui prévoit-on qu'on aura à liciter quelques-unes des propriétés. Evidemment, il n'est pas question là d'une licitation des propriétés appartenant à *Giraldi* seul. Pour être payés de leur dû les créanciers n'avaient qu'à la faire vendre soit en justice, soit par *Henriette Sénécal* qui y était autorisée. Il ne pouvait y avoir de licitation à moins d'un indivis entre *Giraldi* et quelques autres propriétaires dont on connaissait et admettait les droits dans quelques-unes des propriétés. Quels étaient ces co-propriétaires ? La résolution ne les nomment pas, il est vrai. Mais s'ils ne sont pas nommés, n'est-ce pas parce que l'on savait trop bien avec qui il fallait compter pour procéder à cette licitation *volontairement* ou *forcément*, comme le dit la résolution. Cette déclaration n'est-elle pas une admission formelle que l'on savait alors que *Giraldi* avait des co-propriétaires dans certaines propriétés ? La banque était donc informée et savait qu'en retirant tous les revenus des pro-

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prêtés elle se trouvait à retirer en même temps des argents n'appartenant pas à son débiteur et qu'en cela elle agissait comme *negotiorum gestor* des co-propriétaires de *Giraldi*. Bien que les *Bosna* ne soient pas nommés dans cette résolution, il n'est que juste de présumer que la banque agissant par son caissier et par *Guimond*, qui avaient la direction et la gestion des affaires de la succession *Giraldi*, savait aussi que les co-propriétaires, dont elle reconnaissait l'existence, étaient les *Bosna*. C'est en vain que l'intimée essaierait de rejeter sur la succession insolvable de *Giraldi*, la responsabilité de ce qu'elle a fait faire par ses agents *Louis Guimond* et *Henriette Sénécal*. Cette dernière, surtout, n'a été qu'un instrument passif entre les mains de la banque ; la seule part qu'elle a prise à cette administration a été de faire sa marque d'une croix au bas des chèques que le caissier *Cotté* et le solliciteur *Cassidy* l'induisaient à signer dans l'intérêt de la banque. Cette femme n'entendait rien aux affaires, et n'a fait en tout ceci que prêter son nom à la banque pour faciliter le règlement des affaires.

La preuve faite par *Guimond* a établi de la manière la plus positive quelles sommes ont été retirées pour la succession *Bosna*, et quelles autres sommes l'ont été pour la succession *Giraldi*. Il ne peut y avoir d'erreur sous ce rapport. La banque ayant encore dans sa caisse ces deniers qu'elle sait ne pas lui appartenir, et les *Bosna* ayant prouvé clairement que ces mêmes deniers leur appartiennent, il n'y a pas de motif raisonnable qui puisse empêcher d'en ordonner la restitution.

Toute la preuve faite par l'intimée consiste dans une reddition de compte faite en 1872 par *Henriette Sénécal* aux héritiers *Bosna*, et dans deux actes d'acceptation de ce compte par deux des Demandeurs. Elle prétend tirer de ces actes une preuve que les héritiers *Bosna* ont approuvé et sanctionné ce qui a été fait par *Henriette*

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Sénécal pour le règlement de la succession *S. Giraldi*, que, conséquemment, ceux-ci n'ont maintenant de recours que contre *Henriette Sénécal* ou la succession insolvable de *S. Giraldi*. Il est facile de voir en lisant les actes qu'il est impossible de les interpréter de manière à soutenir cette prétention.

D'abord il apparaît à la face de cette reddition de compte qu'elle n'a aucun rapport à l'administration de *Henriette Sénécal*, elle-même, des biens de la succession *Bosna*, depuis l'adoption de la résolution des créanciers, l'obligeant à déposer les revenus de la succession *Giraldi*, à la Banque *Jacques-Cartier*. Le préambule déclare au contaire que c'est en sa qualité d'administratrice des biens de la succession de son mari, en vertu de son testament qu'elle rend compte aux héritiers de feu Dame *Marie Anne Bosna des biens et de l'administration et gestion qu'en a eu le dit feu S. Giraldi*. Cette déclaration est assez précieuse pour faire voir qu'il ne s'agit aucunement d'une reddition de compte personnellement par la dite Dame *Henriette Sénécal*. C'est comme légataire en usufruit de son mari qu'elle rend un compte que celui-ci aurait dû rendre. Elle ne prétend pas rendre un compte de son intervention personnelle dans les affaires de la succession *Bosna*. Il est impossible de voir en quoi cela peut compromettre les droits des *Bosna* aux deniers retirés par la dite Dame *Sénécal* et déposés par elle dans la caisse de l'intimée. Il est vrai que les parties ont admis que dans ce compte se trouvent mentionnés les fruits et revenus des propriétés dont il est question en cette cause jusqu'à l'époque de sa date ; c'est-à-dire qu'on en a fait une déclaration et rien de plus. La rendant compte ne s'en est pas reconnue débitrice et n'a ni payé ni promis d'en payer le montant. Tout au plus ce compte pourrait être considéré comme un simple état de ce qui était alors dû pour fruits

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et revenus à la succession *Bosna*. L'acceptation de ce compte par deux des héritiers ne tire pas plus à conséquence que le compte lui-même. Les héritiers n'ont point donné une quittance à *Henriette Sénécal* pour les dits fruits et revenus, n'ayant touché aucuns deniers lors de cette reddition de compte, ils se sont bornés à approuver les chiffres du compte sous la réserve expresse de tous leurs droits, exprimés dans les termes suivants :

> Mais la présente acceptation du dit compte est ainsi faite par les dits comparants *sans préjudice, novation ni dérogation aux droits hypothécaires* qui leur sont acquis sur les biens du dit feu M. *Giraldi* et de sa succession pour le reliquat du dit compte et *toutes autres réclamations quelconques,* lesquels ils entendent conserver en leur entier pour les exercer et faire valoir quand et ainsi qu'ils aviseront et en seront avisés.

En examinant attentivement cette reddition de compte et les actes d'acceptation, on voit que ces documents ne peuvent aucunement préjudicier aux droits des appelants ; que si, au contraire, ils font quelque preuve, c'est que dans tous les cas l'intimée a eu une connaissance positive des droits des héritiers *Bosna*, au moins à la date de cette reddition de compte produite par elle-même, savoir au 13 octobre 1872. Mais je suis d'avis qu'elle avait déjà obtenu cette connaissance par la résolution citée plus haut.

On a dit que la banque aurait eu une bonne défense si elle eût fait des avances sur le dépôt des derniers en question où si elle les eût distribués aux créanciers de la succession *Giraldi*. Je ne le crois pas ; la connaissance qu'elle a eu du droit des tiers par la résolution du 15 mars 1870, et par la reddition de compte aurait toujours été un obstacle à son appropriation de ces deniers. Dans tous les cas les deniers sont encore en caisse, à l'exception des deux paiements faits. Quant à ces paiements on doit présumer que la banque les a faits avec les deniers qui lui appartenaient,

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et non pas avec ceux qui ne lui appartenaient pas. Je crois donc pour les motifs ci-dessus exposés, que la réclamation des *Bosna* est fondée en loi et en équité et que le jugement de la Cour Supérieure aurait dû être maintenu. Pour les raisons contenues dans ce jugement, je suis aussi d'avis que l'intérêt devrait être accordé pour cinq années au moins. Le jugement de la Cour du Banc de la Reine devrait être infirmé, et celui de la Cour Supérieure rétabli intégralement avec dépens dans toutes les cours.

Fournier, J.

HENRY :—

The decision in this case does not, in my view, turn upon any delicate points of law, but upon the correct appreciation of the facts arising from two distinct successions. *Séraphino Giraldi* was married to *Mary Ann Bosna*, and between them there was a community of property during their joint lives. She died, and on her death there were two successions—the maternal one, on her side, and the paternal one, that of her husband's. Her heirs then became entitled to the rents, issues and profits of all the immoveable property. After the death of *Séraphino Giraldi*, who died intestate, *Henriette Senecal*, his second wife, became the executrix of his estates, and being incompetent to manage the business portion of the administration, a meeting of the creditors was held at the bank *Jacques Cartier*, and at that meeting the bank was represented by its solicitor and their manager. At that meeting a Mr. *Guimond*, who had previously managed the estate of *Giraldi*, was appointed to act for the creditors and for the executors. He was authorized to collect the rents, to sell moveable property, and to administer the estate of *Séraphino Giraldi*. In carrying out his duties in that respect, it became necessary, to a certain extent, to collect the rents due to the two estates from undivided property held

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by the two successions. In doing so he acted to a great extent under the directions of the bank, through their manager and professional adviser. He did so, and in collecting the monies he paid them into this bank to the credit of *Henriette Senecal*, and they could not be withdrawn from that bank, (which, to my mind, became a mere bank of deposit in the interest of the parties whose moneys were deposited there), without the cheque or other authority of the executrix. There was no difficulty in tracing this money, for *Guimond* distinctly stated the amount that was collected for one interest and for the other. That money being placed there, then, to the credit of Mrs. *Senecal* or Mrs. *Giraldi*, it was at her disposal, and she could control the payment of it by her cheque. It was not paid in there for the use of the creditors, nor for the use of the bank, and there was no appropriation made of it by her until she drew cheques for it. A certain amount was drawn and applied to the debts of the *Giraldi* succession, and the amount now sought to be recovered is the amount that was properly due to the succession *Bosna*. It was said that *Guimond*, who paid that in, was not the agent of the bank. Whose agent was he, then? Whom did he act for? In carrying out the instructions of *Cassidy* and *Cotté*, the solicitor and manager of the bank, he was virtually acting so as to bind the bank as fully as if the directors had given positive instructions what to do with the money. That money never became the money of the bank. It was placed in the bank on deposit, the same as it would be in any other bank, and dismissing from our minds the fact that the bank were creditors of *Giraldi*, how would it stand if that money had been deposited in that bank for any other estate? To whose credit was it paid in? Certainly, to the credit of the executrix, partly for the one estate and as the tutor of the other. She had the right of appropriation of that money.

She could apply a portion of it to pay the debts due by one estate, and the other to the payment of the money due to the heirs of *Bosna*. That money being paid into the bank as a mere bank deposit, what right has the bank to retain it when the true owner of it appears to claim it, and clearly establishes his right to it? They cannot defend this action because it was not the money of the estate of *Giraldi*, that remains in the bank as its share had been withdrawn. We are told that there was no agency of the bank shown in *Guimond*. I cannot conceive how an agency can be proved in stronger terms. One party appoints another to do a certain act, and in doing it, it is necessary for him to involve the interests of a third party. It is true, he (*Guimond*) was not directly authorized to collect what was due to the succession *Bosna*, but if it became necessary in carrying out his instructions that that circumstance should arise, his acts became the acts of his principal.

Guimond paid that money into the bank to the credit of Mrs. *Senecal*, in the way mentioned, and it remains in the bank still. The bank has never attempted to use that money in any way. It is there to the credit of the executrix of the estate *Giraldi*, and of the tutor of the estate *Bosna*. No appropriation of that money has been made; the bank had no power to make any appropriation of it, but if they wished to exercise that power they certainly had many years to do it in. They never made the attempt to do so, and we have the right to conclude that they never considered themselves entitled to make such an appropriation. Under the circumstances, I entirely agree with the judgment of Mr. Justice *Tessier*, in the court below, and I have no hesitation in saying that both equity and law are in favor of these parties receiving their money. We have not in this case to strain nice legal points, and give them consider-

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ation in favor of the party against equitable rights. I maintain, however, there is nothing on the side of the defendants here as far as the law goes. We have a right then to look at the equity of the case, and see that the money of one party is not taken, as the Chief Justice says, to pay the debts of an insolvent estate to parties who are not entitled to it. I consider, under these circumstances, that the appellants have the right to recover this money. It is a principle of law that whoever receives another man's money through a third party, the owner has a right to go to the party who received it and say "That is my money; you have received it on my account, and, therefore, I have a right to recover it back," and the bank has no right, in this case, to say, "We received that money as a deposit from one who really did not own it." Under these circumstances, I am of opinion with the Chief Justice and Mr. Justice *Fournier*, that the appeal should be allowed. The bank received it merely as a holder of the money in the meantime, until it is appropriated by the party who has the right to do so by law. I consider the parties here are entitled in law and equity to recover the money that was paid in to their use.

TASCHEREAU, J.:

This most extraordinary action has been rightly dismissed by the Court of Queen's Bench. I cannot help seeing in it a conspiracy, between the *Giraldis*, the *Bosnas*, and *Guimond*, to defraud the bank of a comparatively large amount. On the simple ground alone, taken by *Cross* and *Ramsay*, JJ., that the late *Giraldi* is not represented in the cause, the judgment must be confirmed.

To say that this estate is represented by the parties

(I) 26 L. C. J. 114.

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mis en cause is an error. The estate is vacant. Evidently, the plaintiffs must be under the impression that, because *Giraldi's* succession was accepted *sous bénéfice d'inventaire*, this gave to his legatee, *Henriette Sénécal*, the right to appropriate all the revenues of the estate, without being liable for the debts. The court below rightly held that *Guimond* was not the agent of the bank. The meeting of creditors has nothing to do with these revenues, but only with the proceeds of the sale of the immoveables. This is clear on the face of the resolutions. Then it is, in itself, a perfect nullity These heirs *Bosna* were all of age in 1869, when *Giraldi* died. *Henriette Sénécal*, with their consent, for they never objected to it, took possession of the whole estate, *Bosnas'* as well as the *Giraldis'*, and had the administration of it. Acting consequently as agent for the *Bosnas*, the plaintiffs, she employed as a sub-agent or accountant a man named *Guimond*. She received $22,267.57 as revenues of the immoveables. Only $9,635.59 of this remain in the bank. Now, it is evident that, the difference, which is the amount drawn by *Henriette Sénécal* was the plaintiff's monies, and no other. It was the only money which she could draw as their agent. She had no right whatever over the *Giraldi* succession's monies. And the plaintiffs must be presumed to have known what their agent did in the matter. After allowing her to do so, after, perhaps, having benefitted themseves by these monies, they, immediately after *Henriette Sénécal's* death, (for it is remarkable that as long as she lived they never entered a claim against the bank,) contend that what *Henriette Sénécal* drew from the bank was not their monies, but the *Giraldi* monies. Their position is untenable. They may have a claim against *Henriette Sénécal's* estate, but they certainly have none against the bank.

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Then, in law, under art. 1143 C. C., the plaintiff's action must also fail.

It was held, in a case reported, that (1) :

Le paiement d'un somme en argent ne peut être répété contre le créancier qui l'a reçu de bonne foi de son débiteur croyant que celui-ci en était propriétaire.

Here it is clear, by *Côtté's* evidence, that the bank was in good faith.

I am of opinion to dismiss this appeal.

GWYNNE, J. :—

An accurate understanding of the facts is necessary to the due appreciation of the point of law involved in this case, and will serve to remove the difficulties which appear to surround it. Mr. *Séraphino Giraldi* in the month of January, 1821, married as his first wife Dame *Marie Ann Bosna*, without any marriage contract, *et sous le regime de la communauté ;* of this marriage there were three children born, namely :—1. *Marie Ann Giraldi*, now the wife of *Leon Chapdelaine ;* 2. *Julie Giraldi*, who became the wife of one *Alexis Girard*, and is now deceased ; and 3. *Eliza Giraldi* also now deceased. Dame *Marie Ann Bosna* died in the month of January, 1841, leaving her surviving and her sole heirs her said three daughters.

By an inventory duly taken at the instance of the said *Séraphino Giraldi* on the 3rd March, 1841, it appears that the assets of the community of property which had existed between him and his deceased wife, comprised three pieces of immoveable property situate in the city of *Montreal.*

Afterwards, but when in particular does not appear, save that it was prior to the year 1848, the said *Seraphino Giraldi* married, as his second wife, Dame *Henriette Sénécal. Julie Giraldi,* the wife of *Alexis Girard*, died

(1) Dalloz, 1867, vol. 2, p. 178.

in the month of January, 1845, leaving her sole heir a son of her marriage with *Alexis Girard*, whose name is also *Alexis*.

Eliza Giraldi, the third daughter and one of the co-heiresses of Dame *Marie Ann Bosna*, died in the month of July, 1848, after the second marriage of her father, having first duly made her last will and testament, whereby she appointed her step mother *Henriette Sénécal*, her universal legatee in *usufruct*, and *Seraphino Giraldi*, issue of the marriage of the said *Henriette* with *Seraphino Giraldi*, her universal legatee *en proprieté*.

Seraphino Giraldi, the husband of *Henriette Sénècal*, died in the month of May, 1869, having first duly made his last will and testament, whereby he made his widow universal legatee in *usufruct* of all his immoveable property of which he made their son *Seraphino* universal legatee *en proprielé*.

By the 7th article of his will he authorized his widow to sell any portion of his property for the payment of his debts upon her own sole authority without any *autorisation en justice*, or any previous valuation and without the consent of any of his legatees. Up to the time of his death the said *Seraphino Giraldi* was still in possession of the above mentioned landed property, which constituted the community of property that had existed between him and his first wife, and in receipt of the rents, issues and profits thereof.

The estate of *Seraphino Giraldi* was at the time of his death in a hopeless state of insolvency, and his widow *Henrietta*, having accepted *sous benefice d'inventaire* the universal usufructuary legacy made in her favor, a meeting of *Seraphino's* creditors, of whom the defendants were the principal, was held on the 13th March, 1870, at which meeting a resolution was adopted by the creditors, which was put into the form of a deed of deposit of an *acte sous seing privé signé et paraphé ne*

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varietur before *Jobin et Desrosiers*, notaries, to the effect following: The creditors, having taken cognizance of the last will and testament of the late Mr. *Giraldi*, made before Mr. *J. Belle et Confrère*, notaries, on the 21st July, 1868, and particularly of the 7th clause of it, by which Madame *Giraldi* is specially authorized to sell the real estate to pay the debts of the succession, declared themselves to be content and satisfied with it, and they declared themselves satisfied with a contemplated sale of property on *rue St. Denis* to a Miss *Cuvillier* for the sum of $7,200, and they authorized Madame *Giraldi* to complete that sale, and they advised Madame *Giraldi* to make sale of another property on *Dubord* street provided that it should not be sold for a less sum than $2,000.

And they desired that above all things, Madame *Giraldi* should take, as in the past, the advice of *F. Cassidy*, Esq, advocate, and *Honoré Cotté*, Esq., cashier of the *Bank Jacques Cartier*, two of the creditors, and who, even in the time of Mr. *Giraldi*, were his ordinary advisers, promising to confirm everything which should be done upon the advice of these gentlemen.

"And as it is impossible to say yet what is the actual and real condition of the succession, the said creditors declare that they are of opinion, and desire that the moneys arising from the sale to Miss *Cuvillier*, as well as that from the sale of the property on *Dubord* street, and from the other properties, after obtaining sufficient authority for the voluntary or forced licitation thereof, should be deposited in the *Jacques Cartier* Bank to be apportioned and divided amongst the said creditors *pro rata*, according to their respective claims against said succession, when the whole shall be realised, desiring in the interest of all that every possible precaution be taken to arrive at a good result, and confiding entirely in the said advisers of the

dame *Giraldi* and in those who have in their hands the regulation of the affairs of the succession; the hypothecary and privlieged debts being paid before the division of the said money as aforesaid."

Now, as regards this agreement concluded between the creditors, of whom the defendants were the chief, and Mrs. *Giraldi* as representing the *Giraldi* succession in her character of universal usufructuary legatee *sous benefice d'inventaire*, it seems to be appropriate to observe here that its object and effect was clearly, as it appears to me, to constitute the fund, when created by deposits in the bank, a trust fund, of which the bank who were parties to the agreement, and acting on behalf of all the creditors were quasi trustees, and as such having imposed upon them the duty to hold the moneys so deposited upon and for the trust purpose declared in the agreement—namely, for the benefit of the creditors generally, to be divided among them *pro rata* according to the amounts of their respective claims; and therefore that Madame *Giraldi* could not apply, and the bank should not permit to be applied, any part of such trust fund to any other purpose than it was by the agreement intended that it should be applied—namely, division among the creditors of the succession. If any moneys not derived from the property of the succession, but belonging to Mrs. *Giraldi* in her individual capacity, or moneys over which in such her individual capacity she had control, should by mistake and inadvertence be deposited to the credit of the trust fund, it should be competent for Mrs. *Giraldi* to claim the right to withdraw, and for the bank, upon being satisfied of the fact relied upon in support of her claim, to permit her to withdraw, such moneys from the trust fund account as not properly belonging to it. Hence, it follows, as it appears to me, as a clear principle of equity, that if any moneys should be withdrawn

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from such trust fund when once created by deposit in the bank, which moneys so withdrawn were not applied, or cannot be shown to have been applied, to the purposes of the *Giraldi* succession, it must be assumed that the moneys so withdrawn were the moneys not belonging to the succession and which had been, by inadvertence and mistake, deposited to the trust fund account. Where an act is done which may be rightfully performed, the person doing it cannot be heard to say that it was done wrongfully. So, here, if Mrs. *Giraldi* had deposited to the credit of the trust fund created in pursuance of the agreement with the creditors of the *Giraldi* succession, moneys either belonging to herself, or over which, as agent for others, she had control, and not arising from any property of the *Giraldi* succcession, and if she should be afterwards permitted by the bank, who, as I have said, were *quasi* trustees, having control of the fund for the benefit of all the creditors, to withdraw from the fund any money not for the purposes of the succession, she could never be heard as against the bank to assert that the money so withdrawn was not the money which, not arising from any property of the succession, had been improperly and by mistake and inadvertence deposited to the credit of the trust fund, but was money rightfully belonging to the succession, and which it had been agreed should remain in the bank for the benefit of, and to be divided among, the creditors of the *Giraldi* succession. An account kept in the books of the bank in pursuance of the said agreement between the creditors and Madame *Giraldi* would not be an account whereby, as in the ordinary course of business governing the opening of an account with a customer, the bank would simply become the debtor of the customer for the amounts deposited to his credit, but would be an account special in its character, as to which, for the protection of the

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fund for the benefit of all the creditors, the bank had agreed to assume a fiduciary position.

The agreement between the creditors and Madame *Giraldi*, apparently contemplating, as it did, an early sale of the real estate of her deceased husband, provided only for the deposit of the moneys arising from such sales; but the sale of the properties constituting the *communauté* did not take place for some years, and as the estate was hopelessly insolvent and the creditors of the estate were the sole persons beneficially interested in it, and the intention of the creditors parties to the agreement clearly was that the assets of the estate should be and remain deposited in the bank for their benefit until the period of division should arrive upon the whole estate being realised, Madame *Giraldi* appears to have acted in the spirit of the agreement by causing to be deposited in the bank the moneys belonging to the estate derived from the rents of the realty and from all other sources. What appears to have been done was this: Madame *Giraldi*, immediately after the decease of her husband and the acceptance by her of the *usufructuary* legacy given by his will, *sous bénéfice d'inventaire*, being herself an illiterate person and unable even to write her name, and quite incompetent to transact business, employed one *Guimond*, who had been a confidential clerk of her husband for ten years previously to his death, to get in and receive for her the assets of the estate, and she caused to be opened at the bank *Jacques Cartier* an account in the name of the "Succession *Seraphino Giraldi*," to the credit of which account she caused to be deposited all moneys belonging to the succession coming to her hands, or received by *Guimond* for her. Upon this account she was in the habit of drawing cheques, as well to pay the expenses of management as insurance repairs and other purposes.

To this account, so opened, she continued, after the

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agreement between her and the creditors of March, 1870, was entered into, to cause to be deposited all moneys belonging to the estate coming to her hands or received by *Guimond* for her; and on the 1st of April, 1870, there stood to the credit of the succession *Seraphino Giraldi* in the bank the sum of $240.67. It appears to me to be the reasonable inference to draw from the agreement with the creditors and the facts, namely, that the estate was insolvent, and that the creditors were the sole parties beneficially interested therein, that it was the undoubted intention of all the parties to the agreement of March, 1870 that until sale of real estate, the rents therefrom, and all moneys belonging to the *Giraldi* succession, from whatever source derived, should thenceforth be deposited in the bank *Jacques Cartier* for the like purpose as was expressly declared in the agreement in relation to the moneys arising from the sale of the realty. If all the moneys belonging to the *Giraldi* succession coming to the hands of Madame *Giraldi* or of her agent, without any deduction for necessary expenses of management, insurance, &c., &c., &c., were deposited to the account in the bank, it would be just that her cheques upon the fund for moneys required to pay expenses attending the management of the estate, the collection of its assets, insurance, repairs, and such like, as well as to pay hypothecary and privileged debts, should be honored by the bank, notwithstanding the terms of the agreement entered into with the creditors, but, except for such purposes, the fiduciary position on behalf of all the creditors assumed by the bank was such as to justify it and to require it in the interest of the creditors to refuse to honor any cheque drawn upon the fund by Madame *Giraldi*, every deposit to the credit of which fund they were entitled to regard as a conclusive appropriation made for the purpose of satisfying their claims, of the benefit of

which, when once deliberately made, she could not deprive them against their will.

It appears, however, that the bank did not exercise that strict supervision and power of restraint upon Madame *Giraldi* which I think it possessed, in virtue of the agreement between her and the creditors, to prevent her withdrawing moneys once they were deposited to the credit of the creditors' trust fund, but that the bank was in the habit of honoring her cheques upon the fund without enquiry as to the purpose for which the moneys drawn out on those cheques were required. By the books of the bank it appears that, including the sum of $240.67, standing to the credit of the fund on the 1st April, 1870, the whole amount deposited to the credit of the fund between that day and the 31st of May following was $3,258.07, and that during the said month of May the bank honored four cheques of Madame *Giraldi* made thereon, amounting in the whole to the sum of $3,338.49, one of which only, so far as appears in the evidence, amounting to $1,483, was to pay a debt of the succession. Upon the 31st of May the account opened with the bank was thus over drawn to the amount of $80.42. She appears to have been permitted to continue over drawing the account until upon the 1st of October, 1870, there appears to have been the sum of $215.54 again to the credit of the fund.

All prior deposits made by her from the time of her husband's decease in 1869, amounting to $7,410.43, with the exception of this sum of $215.54, were thus wiped out, and we have nothing to do with them in this suit. The account, therefore, which has been presented by *Guimond*, commencing in July, 1869, as a basis upon which to charge the bank is wholly misleading, and considering Mr. *Guimond's* knowledge of all the transactions of both estates, of which he appears to have had the management, seems to me, I must say, to have been

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made designedly so, for Mrs. *Giraldi* having withdrawn all sums which had been deposited by her previously to the 1st October, 1870, with the exception of this sum of $215.54 then remaining to the credit of the fund, Mr. *Guimond's* account, prepared by him expressly for the purposes of this suit, to have been honest, should not have gone behind that balance.

From that time forth deposits appear to have been made every month to the credit of the fund until the end of the month of June, 1874, when the account was closed. During this period, although there appear to have been twenty-four months, in which nothing at all was drawn from the fund, Madame *Giraldi* appears to have drawn upon her cheques the amount in the whole of $5,035.92, all other sums spoken of in the evidence as having been deposited by her in the bank and withdrawn therefrom by her cheques occurred before the agreement between her and the creditors was entered into, whereby the account with the bank was effected with a trust in favor of the creditors The balance remaining to the credit of the account at its close was $9,635.59.

The question is not now whether, in view of the agreement entered into between the creditors and Madame *Giraldi*, the bank, in permitting her to draw upon the fund as she did, acted in accordance with the duty it owed to the creditors, or properly executed the trust reposed in the bank by the creditors—that it would retain all moneys deposited to the credit of the fund, so that they should be forthcoming to be divided among the creditors *pro ratâ* when the whole of the assets of the succession should be realised. No question of that kind arises in this case which only raises the question whether, as between the heirs of Dame *Marie Anne Bosna* and the bank, the relation of creditors and debtor, or any fiduciary relation, or any privity

whatever exists, which entitles the former to recover judgment against the latter for the above sum of $9,365.59, or any, and if any, what part thereof?

It appears now by the evidence of Mr. *Guimond*, who was so, as aforesaid, appointed by Madame *Giraldi* to collect and get in the assets of the *Giraldi* estate, that she also authorised him to collect and receive the rents accruing in respect of the Dame *Marie Anne Bosna's* succession's half share in the property which had constituted the *communauté* which had existed between the said Dame *Marie Anne Bosna* and *Seraphino Giraldi*, in which *Bosna* estate she herself, the said *Henriette Sénécal,* was beneficially interested in *usufruct* to the extent of one-third, and Mr. *Guimond* says that he did accordingly collect such rents, and he now further says that the amounts collected by him for such rents were paid into the bank with the moneys which were the property of the *Giraldi* succession to the credit of the *Giraldi* succession fund, and he says further that by the books which he kept he is able to tell what amount in the whole so received by him being the property of the *Bosna* succession were so paid in, and what proportion of the amounts withdrawn are properly applicable to the *Bosna* succession, but he does not profess to be able to say what particular deposit comprised, or to what amount any deposit comprised, moneys belonging to the *Bosna* estate. He does not, moreover, profess to say that the bank had, and Mr. *Cotté*, cashier of the bank distinctly, swears that it had not, any knowledge that any moneys belonging to the *Bosna* succession constituted any part of the moneys deposited to the credit of the *Giraldi* succession fund, and upon this evidence we must take it to be established that the bank had no knowledge that such was the fact. It was argued that by reason of the agreement entered into with the creditors *Guimond* is to be considered as thenceforth employed by the bank,

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and that the bank must be affected by his acts and knowledge; but there is not, in my opinion, any ground for holding that *Guimond* was employed by the bank at all, or otherwise than by Madame *Giraldi*, in whom the creditors express their confidence, but at the same time agree to be bound only by such acts as shall be approved by Mr. *Cassidy* and Mr. *Cotté*. But even if *Guimond* is to be considered as employed by the bank, such his employment must be limited to dealing with the property of the *Giraldi* succession, with which alone the creditors of that succession had anything to do, and cannot extend to his dealings with the *Bosna* estate, with which they claimed no right of interference; upon no principle, therefore, can the bank be charged with constructive notice of *Guimond's* acts, or knowledge in relation to the *Bosna* estate, because he may have been employed by the bank in relation to the *Giraldi* estate. It may be true, as is contended, that the bank knew that the heirs of Madame *Bosna* were equally interested in the property which constituted the assets of the *Giraldi* succession, but it was only in respect of the *Giraldi* succession's interest in that property that the creditors claimed any right to interfere, and their requiring the moneys belonging to the *Giraldi* succession to be deposited in the bank to a special account for their benefit, constituted no interference whatever with the rights and interests of the *Bosna* succession in the property in which that succession and the *Giraldi* were jointly interested. If, indeed, the bank had been aware that moneys belonging to the *Bosna* estate had been deposited to the credit of the *Giraldi* succession fund, that might have afforded a reasonable explanation of its having permitted Madame *Giraldi* to draw so freely upon the fund; for in justice, no doubt, the creditors of the *Giraldi* succession would have had no right to have payment of their claims made out of the *Bosna*

estate, and any moneys belonging to that estate appropriated by mistake to the *Giraldi* succession fund in the bank it would have been reasonable that the bank should permit to be withdrawn by the depositor, upon the fact of the mistake being made clearly to appear.

It is obvious that Madame *Henrietta Giraldi* upon her husband's decease had no authority whatever, either in the character of his usufructuary legatee, or as administratrix of his property under the directions contained in his will, to collect, or receive, any of that portion of the rents of the real estate which constituted the *communauté* which had existed between him and his first wife, in which the heirs of his said first wife were interested. For the receipts of the *Bosna* estate by *Seraphino Giraldi* in his life time, the *Giraldi* succession was debtor to the heirs *Bosna*. For the receipts of *Guimond* of funds belonging to the *Bosna* heirs under the direction of Madame *Giraldi* after the decease of her husband, she alone, in her individual capacity, was liable to her co-heirs for their two-thirds, she herself being interested in usufruct to the other third part.

It appears, however, that in the month of October, 1872, in the character of administratrix of the estate of her deceased husband, she rendered an account, as well of the dealings of her deceased husband in his life time as of herself, subsequent to his decease, with the funds belonging to the heirs *Bosna*, all blended in one account up to the 15th of October, 1872. This account is upon its face said to be divided into two parts, tho first terminating on the 1st of August, 1871, and the second upon the 15th October, 1872. By the first the total amount due to the heirs of the late Dame *Bosna* on the 1st of October 1871 is shown to be $6430.34\frac{1}{2}$; by the second part the sum of $435.00 is added for interest on the above to the 15th of October, 1872, making $6865.34\frac{1}{2}$. The total receipts from the

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joint property which had formed the *communauté* between Dame *Bosna* and her husband between the 1st August, 1871, and the 15th October, 1872, is shown to have been the sum of $5531.12, from which is deducted for disbursements $857.73, leaving a balance of $4673.39, which being divided into two equal parts, show the sum of $2336.69½ as belonging to the *Bosna* heirs, to which $6865.34½, above mentioned being added makes $9202.04 divisable into three equal parts, namely, to Madame *Chapdelaine* $3067.34⅔; to *Alexis Girard* the like sum of $3067.34⅔; and to Madame *Henrietta Giraldi* the sum of $3067.34⅔; as the whole sum due to them respectively upon the 15th October, 1872, save that to the above share of Madame *Chapdelaine* a further sum of $1465.93, shewn to be due to her for principal received by *Seraphino Giraldi* in his life time, and interest thereon, was to be added, making the total amount due to Madame *Chapdelaine* on the 15th October, 1872, to be $4533.27⅔.

By an act of acceptance, dated the 19th of October, 1872, executed before *L. A. Desrosiers*, notary public, by Madame *Chapdelaine* and her husband and by *Alexis Girard*, Madame *Chapdelaine* and *Alexis Girard*, two of the co-heirs, (Madame *Henriette Giraldi* herself being the third,) accepted this account, without prejudice, however, to the hypothecary rights which they had acquired upon the property of the said late *Seraphino Giraldi* and of his succession for the balance of the said account, and all other claims whatsoever, which they reserved the right to retain in their entirety to exercise them and to make them available as they should be advised. At the time of the rendering of this account Madame *Chapdelaine* and *Alexis Girard* must have been well acquainted with the manner in which Madame *Giraldi* had been dealing with their property since the death of her husband, and having accepted the account

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so rendered as one undivided account after having had, as the acceptance says, knowledge and communication of the vouchers proving its correctness, they must be taken to have accepted it as it was rendered, as one undivided account, and inasmuch as, with the exception of that portion of the account which relates to the period between the 1st of August, 1871, and the 15th of October, 1872, there is no distinction drawn between the receipts of *Seraphino Giraldi*, in his life time, and those of his widow after his decease, and inasmuch as, in respect of the receipts by *Seraphino Giraldi* in his life time, the only relation which existed between his succession and the heirs *Bosna*, at the time of the acceptance by the latter of the account rendered in October, 1872, was that of debtor and creditors, so, as it appears to me, the whole account must either be taken to have been accepted in the like character, and as establishing a debt due by the *Giraldi* succession to the *Bosna* heirs as creditors, merely subject, of course, to the reservation contained in the act of acceptance, whatever the effect of that may be, of all hypothecary rights which the heirs *Bosna* had acquired upon the property of the said late Mr. *Giraldi* and his succession, and all other claims whatever, or the heirs *Bosna* must assume the position of creditors of the *Seraphino Giraldi* succession for the amounts received by *Seraphino Giraldi*, in his life time, and as entitled only to claim from Madame *Henriette Sénécal* in her individual capacity the respective amounts received by her since the death of *Seraphino Giraldi* belonging to her co-heirs of the estate *Bosna*—each of such co-heirs having a separate and distinct cause of action for the amount due to each, and for which they must each respectively pursue his and her remedies. Unless and until that account shall be avoided for fraud or error, it must, as it appears to me, prevail, to the extent of defining the amount which

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the account rendered and accepted acknowledges to be due to each of the heirs *Bosna* at the time of its having been so rendered and accepted; and even if the bank could be made liable in the present action, framed as it is, we have no occasion to refer to the account prepared by Mr. *Guimond* of the receipt by him of moneys belonging to the *Bosna* estate prior to the rendering of this account; and so, rejecting all prior receipts, we find that between the 15th October, 1872, and the closing of the account when the properties were sold, the total amount of receipts from what he calls "the *M. A. Giraldi* succession"—that is, the community property of Dame *Marie Ann Bosna* and *S. Giraldi*,—was $2,811 75, from which, according to him, the sum of $1,374.45 is to be deducted for disbursements, leaving $1,437.30, which, being divided by two, shows the sum of $718.65, the share of the *Bosna* heirs, one third of which would belong to Madame *Henriette Giraldi* herself. Then, as to the account rendered by Mr. *Guimond*, which he calls the expenditure common to the succession *M. A. Giraldi* and the succession *S. Giraldi*, it does not appear how much of this should be charged against the *Bosna* heirs. It would not, perhaps, be unreasonable to charge to them a proportion which would swallow up the whole of the above sum of $718.65, and so there would be nothing due to them by the bank, even if this action against it can be at all sustained.

It appears to me, I must confess, to be strange how Mr. *Guimond* could present to the court in this case an account so calculated to mislead as that prepared by him for the purposes of this suit, when he must have known that an account was rendered to the heirs *Bosna* up to the 18th September, 1872; when, in fact, that account must have been prepared by himself, and the vouchers and proofs of its correctness must have been

supplied by himself. It seems equally strange if, at the time of the sale of the properties in 1874, when the heirs *Bosna* must have received their proportion of the amount arising from the sale, they had not a final settlement with the Dame *Giraldi* in respect of the moneys which they knew she had received of the rents belonging to them, as well as those contained in the account stated and accepted in October, 1872, as those received subsequently thereto; and that they should never, until after her decease, three years later, set up the claim which is asserted in the present action. It is difficult to understand why Madame *Chapdelaine* and *Alexis Girard*, aware as they were of all the facts, should have had no settlement, if they had no settlement with her during her life. To hope to arrive at the truth now is vain, when the heir of the accounting party, and those to whom the account should have been rendered, and with whom the settlement should have taken place, appear to have combined together with the assistance of the agent of the accounting party to make the demand made upon the bank in this suit, in which it is the interest of the parties so combining to suppress the truth, if, in truth,—a fact which they must know and the bank cannot,—a settlement had taken place between Madame *Giraldi* and her co-heirs during her life. The plaintiffs then are in this dilemma, that as to the receipts by *Seraphino Giraldi*, in his life time, they must present their respective claims against the *Seraphino Giraldi* succession as creditors of that succession, a proposition which the plaintiffs admit to be correct, and that unless they can claim as creditors also of that succession in respect of the moneys of the *Bosna* estate received by Madame *Henriette Sénécal* since the death of *Seraphino*, by reason of the account rendered by her in her character of administratrix of *Seraphino Giraldi's* will, they must

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look to her in her individual character only and to her succession, and not to the *Seraphino Giraldi* succession at all.

The learned counsel for the appellants relied strongly upon *Pennell* v. *Deffell* (1), as an authority in support of his contention, but the facts of that case were totally different from the present, and, properly understood, the case is rather adverse to his contention.

In applying that case to the present we must separate the claim of Madame *Henriette Giraldi* from that of Madame *Chapdelaine* and *Alexis Girard;* and first as to any claim made in the right of Madame *Henriette Giraldi* as one of the *Bosna* co-heirs, she must be regarded as having, since the death of her husband, received in her individual character all the moneys belonging to the *Bosna* succession which she did receive and which are the subject of this suit. In the third of those moneys she was herself beneficially interested and was at full liberty to deal with as she pleased. That third so, belonging to her, it may be admitted that she paid into the bank *Jacques-Cartier*, not however to her own credit, but to a special account, namely, the *Seraphino Giraldi* succession fund, in which the bank as principal creditor, and as a *quasi* trustee for the other creditors, had a special interest, and which fund was kept at that bank in pursuance of the agreement entered into between Madame *Giraldi* and the creditors of *Seraphino Giraldi's* succession for the special benefit of the latter. The moneys thus deposited to that account constituted trust moneys whereof the creditors of the *Giraldi* succession were the *cestuis que trustent.* Having thus blended her own private moneys with that trust fund, she could not withdraw any thing from the fund, unless at least she could show clearly that the money she might wish to draw out was her own private money,

(1) 18 Jur. 273.

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and if permitted by the bank to withdraw any thing from the fund without shewing that the amount was in truth her own private property, she could not afterwards, as against the creditors of the *Giraldi* succession, who are sufficiently represented by the bank, and of whom the bank was the chief creditor, be heard to say that her own moneys were still remaining in the bank to the credit of the fund and liable to be drawn out by her, and that the moneys which she had already withdrawn were moneys belonging to the *Giraldi* succession, so as aforesaid deposited in the bank for the benefit of the creditors of the succession. This is the effect which the application of the principle involved in *Pennell* v. *Deffell* would have as regards Madame *Giraldi's* own share of the *Bosna* succession moneys deposited to the credit of the *Giraldi* succession fund. The guiding principle of that decision, as stated in *Firth* v. *Cartland* (1), and in *Knatchbull* v. *Hallett* (2), is that a trustee cannot assert title of his own to trust property. A second principle involved in that case is, that if a man mixes trust funds with his own, or, which is the same thing, mixes his own moneys with moneys belonging to a trust account, the whole will be treated as trust property, except so far as he may be able clearly to distinguish what is his own—that is, the trust property comes first, and *Firth* v. *Cartland* is an authority that, as between Madame *Giraldi* and the *Giraldi* succession, the moneys withdrawn by her must be held to have been her own moneys, intentionally or mistakenly deposited to the credit of the *Giraldi* succession fund, which was a trust fund in which the creditors of that succession alone had any interest.

Now, Madame *Giraldi*, having withdrawn from the creditors' fund, with which she had mixed her own

(1) 2 H. & M. 420.

(2) 13 Ch. Div. 719.

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moneys, an amount far in excess of any moneys of her own deposited to the credit of that fund, cannot now, nor can any person in her right, assert any claim against such fund in respect of any private moneys of hers so deposited. Then, as to Madame *Chapdelaine* and *Alexis Girard*, the contention is, that in so far as their shares are concerned, Madame *Giraldi* is to be regarded as their agent in receiving their moneys, and that having thus, in a fiduciary character, as regards them, received their moneys and deposited them to the credit of the *Seraphino Giraldi* succession fund, they can follow their moneys so deposited and recover them from the bank, which is the holder of that fund.

Pennell v. *Deffell* does not support this contention; the action in that case was not brought by the person claiming the moneys as trust funds against the bank where they had been deposited. The claim was made in a suit duly instituted for the administration of the estate of a deceased trustee, who had deposited the funds of which he had been trustee to the credit of his own private bank account. The contention arose between the executors of a Mr. *Green*, who, as assignee in bankruptcy, had received large sums of money belonging to the estates of which he was assignee, which he had mixed with his own private moneys in two bank accounts which he kept, and his successor as assignee of the bankrupt estate, whose funds he had so deposited to his own private account, claiming payment of the trust funds in preference to his general creditors.

Lord Justice Sir *J. L. Knight Bruce* premises his judgment with the statement that the bank accounts were opened and kept with Mr. *Green* as a private man merely without any official designation—without any title of a trust—without anything to mark that he was not interested in the amount for the time being due to him upon it. And again he says: "There is here no dis-

"pute with either of the two banking establishments; "each is indifferent as to the contest." Proceeding upon these premises he lays down the principle which is the gist of the judgment in the case, thus: "When a trustee "pays trust money into a bank to his credit, the account "being a simple account with himself, not marked or "distinguished in any other manner, the debt thus con- "stituted from the bank to him is one which, as long as "it remains due, belongs specially to the trust as much "as and as effectually as it would have done had it speci- "fically been placed by the trustee in a particular reposi- "tory, and so remained;" that is to say, if the specific debt shall be claimed on behalf of the *cestuique trust*, it must be deemed specifically there as between the trustee and his executors and general creditors after his death, on the one hand, and the trust on the other.

Now, if Madame *Giraldi*, who, it may be admitted for the puposes of this suit, received the share of Madame *Chapdelaine* and *Alexis Girard* in the moneys of the *Bosna* succession, as their agent, had deposited those moneys to her own private account in the bank, on a claim being made by Madame *Chapdelaine* and *Alexis Girard* against her succession after her death, *Pennell* v. *Deffell* would be, it may be admitted, a conclusive authority so long as any part of the debt constituted by such deposit remained due to her from the bank; but here the facts are totally different.

Madame *Giraldi*, who, in her private character only, received the moneys of Madame *Chapdelaine* and *Alexis Girard*, did not deposit suchmoneys to her own private account; on the contrary, she deposited them to a special account impressed with a trust for a special purpose, of which trust purpose, and the fund thus constituted, the bank *Jacques Cartier* were beneficial depositaries. No debt ever became due from that bank to Madame *Giraldi*. The moneys deposited by

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her to the credit of the *Seraphino Giraldi* succession fund did not constitute a debt due from the bank to her. The moneys so deposited constituted a trust fund specially appropriated for the benefit of the *Seraphino Giraldi* succession creditors, which moneys, by agreement with the creditors, were to remain in the hands of the bank as holders of the fund until the whole of the estate should be realized, and then to be divided among the creditors, of whom the bank was the largest. Madame *Giraldi* in her private character had no right to touch any moneys deposited to that fund, at least, not without the special consent of Mr. *Cassidy* and Mr. *Cotté*. All moneys, once they were deposited to the credit of that fund, became as much the property of the creditors as if they had been paid into the hands of a trustee for them, and as much appropriated to their benefit, and removed from all power and control of Madame *Giraldi* over them, as if she had paid them to a creditor of the *Seraphino* succession in payment of a debt due by the succession, and in any proceeding taken by Madame *Chapdelaine* and *Alexis Girard* against their trustee or agent Madame *Henrietta Giraldi* personally, or her succession, (which alone since her death is now accountable to them,) such appropriation to the *Seraphino Giraldi* succession trust fund in the bank could not be recalled, that succession would have nothing to do with such a suit. The case presented in this case is, in fact, the same as if *A*, as agent of *B* and *C*, had received moneys belonging to each, and having spent *B's* money had appropriated *C's* to pay *B*. Neither *Pennell* v. *Deffell*, or any other case, is an authority that in such a case *C* could recover from *B* the money so paid to him. Upon the merits, therefore, as well as for the imperfection in the frame of the record in not being framed as against the succession of Madame *Henerietta Giraldi*, who alone in her life time was in her private character

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accountable to Madame *Chapdelaine* and *Alexis Girard*, and in claiming payment out of the *Seraphino Giraldi* succession trust fund established for the benefit of the creditors of that succession without bringing a legal representative of that succession before the court, the appeal should, in my opinion, be dismissed with costs.

Gwynne, J.

Appeal dismissed without costs.

Solicitors for appellants: *Beïque, McGoun & Emard.*

Solicitors for respondents: *Lacoste, Globensky & Bisaillon.*

JAMES D. LEWIN AND G. SIDNEY SMITH, SURVIVING TRUSTEES UNDER THE MARRIAGE SETTLEMENT OF MARTHA M. S. ROBERTSON..... } APPELLANTS;

AND

GEORGIANA WILSON, BENJAMIN LAWTON AND JAMES HARRIS... } RESPONDENTS.

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*Feb'y. 21.

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*Dec. 9.

ON APPEAL FROM THE SUPREME COURT IN EQUITY OF NEW BRUNSWICK.

Statutes of Limitations—Ch. 84, sec. 40, and ch. 85, secs. 1 & 6 Con. Stats. N. B.—Covenant in mortgage deed—Payment by co-obligor.

J. H. borrowed $4,000 from *M. C.* on the 27th of Sept., 1850, at which date *J. H.* & *J. W.* gave their joint and several bond to *M. C.* conditioned for the repayment of the money in five years, with interest quarterly in the meantime. At the same time, and to secure the payment of the $4,000, two separate mortgages were given: one by *J. H.* and wife on *H's* wife's property, and one by *J. W.* and wife, on *W.'s* property. Neither party executed the mortgage of the other. The mortgage from *J. W.* contained a provision that upon repayment of the sum of £1,000 and interest according to the condition of the bond by *J. W.* and *J. H.*, or either of them, their, or either of their, heirs, etc., then said mortgage should be void; a similar provision being inserted in the

*PRESENT.—Strong, Fournier, Henry, Taschereau and Gwynne, JJ.

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mortgage from *J. H.* The bond and mortgages were assigned to *L. et al.* (the appellants) in 1870, and the principal money has never been paid. *J. W.* died in 1858, and by his will devised all his residuary real estate, including the lands and premises in the above mentioned mortgage, to *G. W.* (one of the respondents) and others. *J. W.*, in his lifetime, was, and since his death the respondents have been, in possession of the premises so mortgaged by *J. W.* Neither *J. W.*, nor any person claiming by, through, or under him, ever paid any interest on said bond and mortgage, or gave any acknowledgment in writing of the title of *M. C.*, or her assigns. *J. H.*, the co-obligor, paid interest on the bond from its date to 27th March, 1870.

On 20th January, 1881, under Consolidated Statutes of *New Brunswick*, ch. 40, a suit of foreclosure and sale of the premises mortgaged by *J. W.* was commenced by the appellants in the Supreme Court of *New Brunswick* in equity, and the court gave judgment for the respondents. On appeal to the Supreme Court of *Canada*,

Held (affirming the judgment of the Court below, *Strong*, J., dissenting)—

1st. That all liability of *J. W.'s* personal representatives and of his heirs and devisees to any action whatever upon the bond was barred by secs. 1 and 6 of ch. 85 Consolidated Statutes of *New Brunswick*, although payment by a co-obligor would have maintained the action alive in its integrity under the English Statute 3 and 4 *William IV.*, ch. 42.

2nd. That the right of foreclosure and sale of the lands included in the *J. W.* mortgage was barred by the Statute of Limitations in real actions, Cons. Stats. *N. B.*, ch. 84, sec. 40.

Per *Gwynne*, J.—The only person by whom a payment can be made, or an acknowledgment in writing can be signed, so as to stay the currency of the Statute of Limitations to a point which, being reached, frees the mortgaged lands from all liability under the mortgage, must be either the original party to the mortgage contract, that is to say, the mortgagor, or some person in privity of estate with him, or the agent of one of such persons, and that moneys paid by *J. H.* in discharge of his own liability had none of the characteristics or quality of a payment made under the liability created by *W's* mortgage.

APPEAL to the Supreme Court of *Canada* from the Supreme Court in Equity of *New Brunswick*, without any intermediate appeal to the Supreme Court of *New*

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Brunswick, sitting in appeal, from so much of the decree of the said Supreme Court in Equity, in a suit therein, wherein the present appellants were plaintiffs, and the present respondents and *John Howe*, *William Edwin Archdeacon* and *Elizabeth White Archdeacon* (his wife), *Louisa Catherine Hanford*, *Charles Edward Brown* and *Sarah Georgiana Brown* (his wife), *Arthur Wellesley Howe* and *Mary Elizabeth Howe* (his wife), *Joseph Howe*, *Charles Lawton* (the younger), *Charles Lawton*, *Sarah A. Lawton*, *Eliza Lawton*, the Reverend *William Armstrong*, *James Sterling*, *James Dunlop*, *James Duke*, *Edward Thorpe* and *James Davis* were defendants, as directed that the plaintiffs' bill of complaint should stand dismissed with costs against the said respondents.

The following is the case settled by the Judge in Equity of *New Brunswick*.[1]

"1. This suit was commenced by summons issued out of the Supreme Court in Equity dated the twentieth day of January, A.D. 1881. The bill of complaint was a bill filed for the foreclosure and sale of certain mortgaged lands and premises comprised and described in a certain indenture of mortgage from *John Howe* and wife to *Margaret Cunningham*, dated the twenty-seventh day of September, A.D. 1850; and also certain mortgaged lands and premises comprised and described in a certain indenture of mortgage from *James White* and wife to the said *Margaret Cunningham*, of the same date; both mortgages and the assignments thereof being duly registered in the records of the city and county of *Saint John*.

"2. On the said twenty-seventh day of September, A.D. 1850, the said *John Howe* and *James White* executed a bond or obligation to the said *Margaret Cunningham* in the words and figures following, that is to say:—

"Know all men by these presents that we, *John Howe*, of the city of *Saint John*, in the county of *Saint John*,

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and province of *New Brunswick*, postmaster for said province, and *James White* of the same place, Esquire, are held and firmly bound unto *Margaret Cunningham* of the same place, spinster, in the penal sum of two thousand pounds of lawful money of the province aforesaid, to be paid to the said *Margaret Cunningham*, or to her certain attorney, executors, administrators or assigns, for which payment well and truly to be made, we bind ourselves and each of us by himself, our and each of our heirs, executors and administrators firmly by these presents, sealed with our seals, and dated the twenty-seventh day of September, in the year of our Lord one thousand eight hundred and fifty.

"The condition of this obligation is such that if the above bounden *John Howe* and *James White*, or either of them, their or either of their heirs, executors or administrators, do and shall well and truly pay or cause to be paid unto the said *Margaret Cunningham*, or to her certain attorney, executors, administrators or assigns the just and full sum of one thousand pounds of lawful money of the province aforesaid, with lawful interest thereon, in manner and at the times following, that is to say: the said principal sum of one thousand pounds to be paid on the twenty-seventh day of September, which will be in the year of our Lord one thousand eight hundred and fifty-five, and lawful interest on the said principal sum to commence from the day of the date of these presents, to be paid quarterly on the twenty-seventh day of December, the twenty-seventh day of March, the twenty-seventh day of June, and the twenty-seventh day of September in each and every year until the said principal sum shall be paid and satisfied, then this obligation to be void, otherwise to remain in full force and virtue.

"Signed, sealed and delivered in "*J. Howe.* [L.S.]
"presence of *Geo. A. Lockhart.*" "*J. White.* [L.S.]

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"3. That to secure the amount of the said bond or obligation the two several mortgages, to foreclose which this suit was instituted, were severally given by the said *James White* and *John Howe*, the condition of the mortgage from the said *James White* being as follows, that is to say :—

"Provided always, nevertheless, and these presents "are upon this express condition, that if the said *James* "*White* and *John Howe* of the city aforesaid, postmaster "for *New Brunswick* aforesaid, or either of them, their "or either of their heirs, executors or administrators, do "and shall well and truly pay or cause to be paid unto "the said *Margaret Cunningham*, or to her certain attor- "ney, executors, administrators or assigns, the just and "full sum of one thousand pounds of lawful money of "the province aforesaid, with lawful interest for and "on the same, in manner and at the times following, "that is to say: the said principal sum of one thousand "pounds on the twenty-seventh day of September, "which will be in the year of our Lord one thousand "eight hundred and fifty-five, with lawful interest on "the said principal sum to commence from the date of "these presents, quarterly, on the 27th day of December, "the 27th day of March, the 27th day of June, and the "27th day of September in each and every year until "the said principal sum shall be paid and satisfied, "without fraud or delay, according to the condition of "a bond or obligation bearing even date herewith, and "made and given by said *John Howe* and *James White* "to said *Margaret Cunningham*, then these presents to "be void, otherwise to remain in full force and virtue."

And the condition in the mortgage from *John Howe* and wife being as follows, that is to say:

"Provided always, nevertheless, and these presents "are upon this express condition, that if the said *John* "*Howe* and *Mary E.*, his wife, or the said *James White*,

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"or either of them, or their, or either of their, heirs, "executors or administrators, do and shall well and "truly pay, or cause to be paid, to the said *Margaret* "*Cunningham*, or to her certain attorney, executors, "administrators or assigns the just and full sum of one "thousand pounds of lawful money of the Province of "*New Brunswick*, with lawful interest on the same, in "manner and at the times following, that is to say: "the said principal sum to be paid on the 27th day of "September, which will be in the year of our Lord one "thousand eight hundred and fifty-five, and lawful "interest on the said principal sum of one thousand "pounds, to be paid quarterly on the 27th day of De- "cember, the 27th day of March, the 27th day of June, "and the 27th day of September in each and every year "until the said principal sum shall be fully paid and "satisfied, such interest to commence from the date of "these presents, according to the condition of a certain "bond or obligation bearing even date with these pre- "sents, and given by the said *John Howe* and *James* "*White* to said *Margaret Cunningham*, then these pre- "sents to be void, otherwise to be and remain in full "force, virtue and effect."

"4. That the interest of the said *Margaret Cunningham* in the said bond and mortgages is now vested in the plaintiffs, and they are the assignees of the said bond and mortgages.

"5. That the said *James White* died in the year of our Lord one thousand eight hundred and fifty-eight, leaving a will appointing the said *John Howe* an executor thereof, and by his said will, after making certain specific devises, devised all his residuary real estate, including the lands and premises in his above mentioned mortgage, to his daughter, *Georgiana Wilson*, the respondent, and his daugher *Mary E. Howe*, wife of the said *John Howe*.

"6. That in the year of our Lord one thousand eight hundred and eighty, a partition was made between the said respondent *Georgiana Wilson* and the said *Mary E. Howe*, the said *John Howe* being a party thereto, and the said *John Howe* and *Mary E. Howe* releasing to the said *Georgiana Wilson* their interest in the portion of the said mortgaged premises so devised by the said *James White*, which the appellants seek to have foreclosed and sold, but the said *John Howe* concealed from the said *Georgiana Wilson* the fact that the property had been encumbered by the said mortgage of the said *James White*, and that such mortgage was then in existence, and she took the property at full value in the division.

"7. That the said *James White* up to the time of his death was in possession of the said mortgaged premises described and set forth in the said indenture of mortgage given by him to the said *Margaret Cunningham*, and since the death of the said *James White* the said respondent *Georgiana Wilson* has been in possession thereof, except a portion of the same conveyed by her to *William A. Lawton*; and the said *William A. Lawton* and his assigns (the said *Benjamin Lawton* being now in possession) have been in possession of said portion so conveyed to the said *William A. Lawton* since the said conveyance; and the said respondent *James Harris* being a tenant to the said *Georgiana Wilson* of another portion thereof.

"8. That it was proved on the hearing, without objection, that the said *John Howe* admitted that the original debt was contracted for his benefit, and that he received all the money on said bond.

"9. That neither the said *James White* during his lifetime, nor any person claiming by, through or under him, did at any time pay the interest on the said bond and mortgages, nor has any payment of interest been made otherwise than as is hereinafter mentioned, nor

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did the said *James White*, nor any person claiming by, through or under, him ever give any acknowledgment in writing of the title of the said *Margaret Cunningham* or her assigns, either to the said *Margaret Cunningham* or to any person claiming under her.

"10. That the said *John Howe* from the date of the said bond paid the interest thereon to the said *Margaret Cunningham* and the assignees of the said bond and mortgages up to the twenty-seventh day of March, A.D. 1879, since which time no interest has been paid, and the principal sum due on the said bond and the interest from that date are now due to the appellants.

"11. The said *Georgiana Wilson* at the time of the partition above mentioned was not aware of the existence of the said mortgage, except the knowledge, if any, to be implied constructively from the registry thereof.

"12. That the respondent *James Harris* has placed valuable improvements upon the lot of land leased by him from the respondent *Georgiana Wilson*.

"13. The said *Margaret Cunningham* was not, nor were any of her assignees, ever in possession of the said mortgaged premises, or any part thereof, nor in receipt of any of the rents or profits thereof.

"14. That on the thirtieth of November, A. D. 1846, being previous to the date of said mortgage made by said *James White*, he the said *James White* leased to one *James McGregor* with covenants to pay for improvements or renew for a further term with like covenants, one of the parcels of land included in said mortgage called lot 18 (eighteen), which said lease was duly registered before the registry of said mortgage, and is referred to in said mortgage as having been given to said *McGregor*. That said lease was by several mesne assignments, all duly registered, surrendered, assigned and transferred to the said *Mary E. Howe* and *Georgiana Wilson*, the last transfer being dated 23rd December, 1858, and

registered the fourth day of April, A. D. 1860, in which year the partition deed hereinbefore referred to was executed and by which the said *Mary E. Howe* released to the said *Georgiana Wilson* all her interest in said lot number 18 (eighteen), and which said partition deed was registered March 1st, 1860. And the said *Georgiana Wilson* by deed conveyed by way of mortgage all her interest in the said land to secure the sum of seven hundred pounds to one *William A. Lawton*, and afterwards released all her interest in the equity of redemption in the said lot of land to the said *William A. Lawton*, all whose interest subsequently became vested in the said respondent *Benjamin Lawton*.

"15. The plaintiffs filed the bill in this suit to foreclose the said mortgages and have the mortgaged premises sold, to which the other defendants put in no answer, and the bill has been taken *pro confesso* against them.

"16. The respondents appeared by separate solicitors and filed separate answers to the said bill of complaint, insisting and claiming that the right of the appellants to have a foreclosure and sale of the lands and premises described and conveyed in the mortgage from *James White* to *Margaret Cunningham*, in which they are interested, was barred by the Statutes of Limitation in force in the province of *New Brunswick*.

"Question.—Whether the right of the plaintiffs to foreclose and sell the lands that were so partitioned to *Georgiana Wilson* and included in *White's* mortgage, are barred by the Statute of Limitations? and whether the right of foreclosure and sale exists against lot number eighteen, held by the said *Benjamin Lawton*."

Mr. *Weldon*, Q. C., for appellants.

Dr. *Tuck*, Q. C., and Mr. *Millidge*, for respondents.

The statutes and authorities relied on by counsel are commented on in the judgments hereinafter given.

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STRONG, J.,

This is an appeal from a decree made by the judge in Equity of the Supreme Court of *New Brunswick*, in a suit for the foreclosure of a mortgage. There is no dispute as to the facts, which are few and free from complication. For the purposes of the appeal to this Court, a case has been settled by a judge of the court below, in which all the facts are admitted, and the only question presented for decision is one of law, relating to the construction and application of section 40 of the English Statutes of Limitations, 3 and 4 *W.* 4, ch. 27, and 7 *W.* 4, and 1 *Vic.*, ch. 28, which have been adopted and re-enacted in *New Brunswick*, and are respectively sections 29 and 30, ch. 84, of the Consolidated Statutes of *New Brunswick*, entitled "An Act relating to the limitation of real actions."

The suit was commenced by summons issued out of the Supreme Court in Equity on the 20th January, 1881. The facts stated and admitted in the case are as follows:

On the 27th of September, 1850, *John Howe* and *James White*, executed a joint and several bond to *Margaret Cunningham* in the penal sum of two thousand pounds, conditioned for the payment by the obligors, or one of them, of one thousand pounds, on the 27th of September, 1855, with interest payable quarterly, on the 27th day of December, the 27th day of March, the 27th day of June, and the 27th day of September, in each and every year, until the principal sum should be paid and satisfied. The case contains the following statement as to the debt which this bond was given to secure. It says:—

> That it was proved on the hearing without objection that the said *John Howe* admitted that the original debt was contracted for his benefit and that he received all the money on said bond.

The case then states:—

> That to secure the amount of the said bond or obligation the two several indentures of mortgage, to foreclose which this suit was

instituted, were severally given by the said *James White* and *John Howe*, the proviso of the mortgage executed by the said *James White*, [and which is alone in question in this appeal] being as follows:— Provided always, nevertheless, and these presents are upon this express condition, that if the said *James White* and *John Howe* of the city aforesaid, or either of them, their, or either of their heirs, executors, administrators, or assigns, do and shall well and duly pay, or cause to be paid, unto the said *Margaret Cunningham*, or to her certain attorney, executors, administrators, or assigns, the just and full sum of one thousand pounds of lawful money of the Province aforesaid, with lawful interest for and on the same in manner and at the times following, that is to say, the said principal sum of one thousand pounds on the 27th day of September, which will be in the year 1855, with lawful interest on the said principal sum, to commence from the date of these presents, quarterly, on the 27th day of December, the 27th day of March, the 27th day of June, and the 27th day of September in each and every year, until the said principal sum shall be paid and satisfied, without fraud or delay, according to the condition of a bond or obligation bearing even date herewith and made and given by said *John Howe* and *James White* to the said *Margaret Cunningham*, then these presents to be void, otherwise to remain in full force, virtue and effect.

And the proviso contained in the mortgage deed executed by *Howe* was (*mutatis mutandis*) to the same effect. *Howe* was not a party to the mortgage now in question, and no covenant by him was contained in it. These mortgages were in fee and of lands of which the respective mortgagors were severally seised. The bond and mortgages were assigned to and are now vested in the plaintiffs, who are trustees under a marriage settlement. *White* remained in the possession of the mortgaged premises comprised in the mortgage executed by him, up to the date of his death in 1858, upon which the property, under the provisions of his will, became vested in his two daughters, the respondent *Georgiana Wilson* and Mrs. *Howe*, as tenants in common, and upon a partition the lands now in question were allotted to Mrs. *Wilson*, and she and the other respondents claiming under her have since remained in pos-

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session, and neither the original mortgagee, *Margaret Cunningham*, nor the plaintiffs, her assignees, nor any of them, were ever in possession of the whole or any part of the mortgaged premises. The joint and several bond and the mortgage given by *White* were executed by him as a surety for *Howe*, to whom the money advanced was lent by Mrs. *Cunningham*. The special case then contains these statements, which I extract *verbatim*:

> Neither the said *James White* during his lifetime, nor any person claiming by through or under him, did at any time pay the interest on the said bond and mortgage, nor has any payment of interest been made otherwise than as is hereinafter mentioned, nor did the said *James White*, nor any person claiming by, through, or under, him, ever give any acknowledgment in writing of the title of the said *Margaret Cunningham*, or her assigns, either to the said *Margaret Cunningham*, or to any person claiming under her. The said *John Howe*, from the date of the said bond, paid the interest thereon to said *Margaret Cunninghan* and the assignees of the said bond and mortgages up to the 27th day of March, 1879, since which time no interest has been paid, and the principal sum due on the said bond and the interest from that date are now due to the appellants.

To the bill for the foreclosure of the mortgages mentioned, which was filed in this suit, the respondents by their answers pleaded the statutes of limitations, and insisted and claimed that upon the foregoing state of facts the right of the appellants to foreclose the lands comprised in the mortgage from *White* to Mrs. *Cunningham* was barred.

The cause came on to be heard before the judge in equity, before whom evidence was taken, and who dismissed the plaintiff's bill, so far as it sought to foreclose the lands comprised in the mortgage executed by *White*. This decision proceeded upon the ground that the payment of interest made by *Howe* up to 1879 could not be considered as payments made by an agent for or on behalf of *White*.

The decision of this question must be governed en-

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tirely by the provisions contained in the English Statute of Limitations, 1 *Vic.*, ch. 28, which, in common with the provisions of the statutes 3 and 4 *W.* 4, ch. 27, and 3 and 4 *W.* 4, ch. 42, have been adopted and re-enacted in *New Brunswick*, and are, as before stated, included in ch. 84 of the consolidated statutes of that province, entitled "Limitation of Real Actions," and ch. 85 of the same consolidation, entitled "Limitation of Personal Actions." The English Statutes of Limitations have also been adopted and re-enacted in two other provinces of the dominion, *Nova Scotia* and *Ontario*. The question now presented for our adjudication is therefore of considerable general importance, more especially as in at least one of these provinces—*Ontario*—it is a common practice of loan companies and other lenders on mortgages to take, as in the present case, as collateral security, in addition to the mortgage of the borrower and principal debtor on his own lands, a mortgage of a surety on other lands. The enactment applicable to the present case, which must be regarded as a suit for the recovery of land, is the 30th sec. of ch. 84 of the consolidated statutes, which is a literal transcript of the Imperial statute 7 *W.* 4, and 1 *Vic*, ch. 28, and is in the words following:

> It shall and may be lawful for any person entitled to, or claiming under, any mortgage of land, to make an entry, or bring an action at law, or suit in equity, to recover such land, at any time within twenty years next after the last payment of any part of the principal money or interest secured by such mortgage, such payment being made within twenty years after the right of entry first accrued, although more than twenty years may have elapsed since the time at which the right to make such entry or bring such action or suit in equity shall have first accrued, anything in this chapter to the contrary notwithstanding.

The cases of *Heath* v. *Pugh* (1) and *Harlock* v. *Ash-*

(1) 6 Q. B. D. 345, S. C. in App. 7 App. Cases, 235.

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berry (1) have decided that a suit for the foreclosure of a mortgage of land is a suit for the recovery of the land, and is therefore within secs. 3 and 4 of the 3 & 4 *W.* 4, ch. 27 (of which secs. 3 and 21 of ch. 84 of *New Brunswick* are re-enactments), and is barred at the end of twenty years after the accrual of the right, unless the party can bring himself within some of the savings contained in the original statute, or within the provision already stated of 1 *Vic.*, ch. 28, and these cases have determined that the right of a mortgagee to foreclosure does not depend upon the 40th sec of 3 and 4 *W.* 4, ch. 27 (*New Brunswick* statutes, ch. 84, sec. 29), which is applicable, not to a suit for a recovery of the land, but to an action or suit for the recovery of money charged on land, which a foreclosure is not considered to be, a point which was left in uncertainty by the previous case of *Chinnery* v. *Evans* (2), which was, however, not a foreclosure suit, but a proceeding to have a charge upon lands raised by a sale.

Nothing, however, depends upon this consideration, since the House of Lords in *Chinnery* v. *Evans*, as well as the Court of Appeal in *Harlock* vs. *Ashberry*, hold that the two enactments are to receive the same construction as regards the point now in question,—that as to the person by whom the payment of principal or interest requisite to take a case out of the bar of the statute is to be made. It is true that in the case of *Chinnery* v. *Evans* the Lord Chancellor read the words found in sec. 40, but not found in 1 Vic., ch. 28, "by whom the same shall be payable, or his agent," as applicable, not only to a written acknowledgment, but also to a payment of principal or interest, but in a subsequent part of his judgment he says:

> I should have stated that the other statute, the 7 *W.* 4 and 1 *Vic.*,

(1) 19 Ch. Div. 539. (2) 11 H. L. C. 115.

cap. 28, was passed for the purpose of preserving in the mortgagee the right to make an entry and bring an ejectment to recover the lands, the language of the 40th sec. of the former act being confined to cases of recovery of money. The same principle is applicable to both, and the same *ratio decidendi* will apply to both sections.

I should say therefore that if *Chinnery* v. *Evans* stood alone, that it established that the payment mentioned in the 1 *Vic.*, ch. 28, meant a payment by a party liable or entitled to pay, or by some person expressly or impliedly delegated to make the payment. But all doubt on this point is removed by the subsequent case of *Harlock* v. *Ashberry* in which the Master of the Rolls (Sir *George Jessel*), whilst doubting the verbal construction of the words of sec. 40, 3 and 4 *W.* 4, ch. 27, already mentioned, construes the word "payment," standing alone in 1 *Vic.*, sec. 28, as implying satisfaction by a person liable to pay, or by some one acting as his agent, or by his authority, or, as Lord Justice *Brett* expresses it: "by a person 'entitled' to make a payment," and held that it does not apply to money received by the mortgagee from a mere volunteer.

The question here is therefore reduced to this:—Was *Howe*, upon the facts stated, and having regard to the terms of the proviso in *White's* mortgage, and to the legal relation of principal and surety which existed between him and *White*, a person entitled to make a payment of principal and interest within the statute 1 *Vic.*, ch. 28 (*New Brunswick.* ch. 84, sec. 30)?

I should say that it was admitted on the argument at the bar, that the interest was regularly paid by *Howe* up to the 27th March, 1879, and that this fact was shown by the evidence or admissions at the hearing of the cause, and that the 10th paragraph of the case, framed for the purpose of this appeal, was to be taken as so stating, and it was not pretended that at any interval between the date of the mortgage deed and the

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27th of March, 1879, the interest was ever in arrear for twenty years.

I am of opinion that the payment of the interest by *Howe* was a payment by a person entitled to make it, and a payment on behalf of *White*, and this upon two distinct grounds; first, the proviso or condition of the mortgage deed executed by *White*, in the words "these presents are upon this express condition that if the said *James White* or *John Howe*, or either of them, do and shall well and duly pay or cause to be paid," is an express stipulation that *Howe* shall be entitled to make payments which shall enure to the benefit of the mortgagor; and secondly, that, if this proviso had been differently framed, and had made no mention of payments by *Howe*, but had been the usual condition for the avoidance of the mortgage upon payment by *White*, the mortgagor, alone, there would, from the established relationship between the parties—that of principal and surety—have been an implied authority to *Howe* to pay on behalf of *White*. Whatever may be said upon the point of law involved in the last of these grounds, it is to me difficult to see how there can be any doubt as to the effect of the proviso. *Primâ facie* if a mortgagor stipulates that the mortgage shall be avoided, not only by a payment made by himself, but also by a payment made by another person named, he stipulates that he shall have the benefit of a payment made by such named person, and if he stipulates that he shall have this benefit of the payment made by the third person, it would seem to require no demonstration to show that the third person is entitled to make the payment, and that the mortgagee cannot legally refuse to accept a payment tendered by such third person.

By the law of *England* a stranger to a contract for the payment of money cannot make a payment which will be good to discharge the debtor, though if the

creditor accepts the payment, and the debtor afterwards ratifies it, then, upon the general principle of the doctrine of ratification, the subsequent adoption is equivalent to a prior authority, and the payment is good; but I apprehend there is nothing to prevent the parties to a contract from providing by the contract itself that the obligation of the debtor may be discharged by a third person not a party to it, and where this is done the person whose payment is so agreed to be accepted by the creditor is not to be considered a mere agent of the debtor whose authority would be revoked by the death of the latter before the day of payment, but that his payment *ad diem* after the death of the original debtor, would also discharge the executor. Again, no reason can be suggested why, as in the present case, an estate upon condition such as a mortgage may not by the terms of the condition be made defeasible upon payment by a stranger to the deed, and if so, just as in the case of the personal contract, the third person so named would not be an agent whose agency would be revoked by the death of the mortgagor before payment, but as his payment would be the event upon which the condition was to be determined, he would be a person entitled to pay, and whose payment at the day named would, by force of the literal terms of the condition, have the effect at law of re-vesting the estate in the mortgagor. Therefore, if *White* had died before the 27th of September, 1855, the day named for the payment of the principal of the mortgage debt, and before any default in the payment of the interest at the stipulated terms, payment on that day by *Howe* would at once and irrespective of adoption or ratification have enured to the benefit of *White's* representatives, and the estate would have immediately become re-vested in the devisees.

By reason of this distinction between a mere agent

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and a person entitled to pay by the terms of the mortgage deed, *Littleton*, sec. 334, and Lord *Coke's* commentary upon it (l), where he says :

> But if any stranger in the name of the mortgagor or his heir (without his consent or privity) tender the money and the mortgagee accepts it this is a good satisfaction and the mortgagor or his heir agreeing thereunto may re-enter into the land —

are inapplicable so far as the assent of the heir is said to be requisite. And if such would have been the effect at law of a payment *ad diem*, it of course follows that a good equitable tender of the whole debt might have been made by *Howe* at any time, and that consequently he was a person entitled to make payments of interest accruing due subsequently to default in the payment of the principal at the day appointed by the mortgage deed.

I have made these observations, which may appear so elementary as scarcely to have been called for, not because I consider there is any real difficulty upon the point, but as affording an answer to the argument, which I understood to be urged at the hearing of the appeal, that *Howe* was a mere agent whose authority was revoked upon the death of his principal, *White*.

So far I have been considering the case with regard to the effect of the proviso only, and as if *Howe* had been a mere stranger in no way liable for the mortgage debt, but when we advert to the fact that whatever legal form may have been given to the transaction by making the parties jointly liable as bond-debtors and severally liable as mortgagors, its real nature was that *Howe* was the principal debtor and *White* a mere surety, whose mortgage was given as a collateral security for the debt of his principal, the conclusion is irresistible that *Howe* was under the terms of the proviso a person entitled to pay, notwithstanding *White's* death. The

(l) Coke, Litt., 207 b.

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mortgagee must have had notice that *White* was a mere surety, for it is found as a fact that the loan was made to *Howe* alone. Then, is it not reasonable to consider this proviso, though very inartificially drawn, to have been framed as it is for the very purpose of making provision for the case of payment by *Howe* alone as the party primarily liable? I am of opinion that it is, and that when we find this form of proviso, coupled with the fact that the parties were from the beginning principal and surety, we must assume that it was intended for the purpose of giving expression to the right of *White* the surety and all claiming under him, to the benefit of payments made by *Howe*, the principal debtor, as being made in exoneration of *White's* estate.

These considerations make it impossible to say that *Howe* was a mere agent for payment whose authority was revoked by the death of his principal.

I have come to the conclusion therefore, that by the terms of the proviso *Howe* was entitled to make payments of interest in discharge of *White's* liability. And merely adverting to the principle upon which all these exceptions in statutes of limitations proceed, that a party is not to be considered in default unless he sleeps upon his rights, this appears to me to be not an unreasonable conclusion. On the contrary, would it not be most unreasonable to say that the mortgagees were neglecting to enforce their rights, when all the time they were receiving payments, sufficient to satisfy the requirements of the statute, according to the strict tenor of the agreement between the parties and from the person primarily liable to pay, and were thus, to the extent of these payments at least, under no necessity of enforcing their rights and disabled from doing so.

Further, the authorities warrant the second proposition before stated, that, discarding altogether the pro-

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vision of the deed already considered, and treating the case as though there had been no express mention of payment by *Howe*, the legal relationship of principal and surety which existed between *Howe* and *White*, which is admitted in the case, made payments by *Howe* which enured to the benefit of *White*, payments by a person who, according to the expression of Lord Justice *Brett* in *Harlock* v. *Ashberry*, "was entitled to pay," which is all that is required to bring the case within the terms of 1 *Vic.*, ch. 28, (*New Brunswick* Statutes, ch. 84, sec. 30.) Upon this point, which in the view I take it is unnecessary to dwell upon, there are ample authorities. *Harlock* v. *Ashberry* is itself one of these authorities, but others can be produced. *Chinnery* v. *Evans*, if it establishes anything, establishes the proposition, that a person who has a right to require from the mortgagee the acceptance of his payment, whose offer of payment would be considered a good equitable, if not a good legal, tender, is a person entitled to pay within the meaning of the statute—unless, as in the case of the personal liability of joint contractors, some statutory provision is found to the contrary. If this be so, the payment of a principal debtor must be sufficient to keep alive the claim of the mortgagee against the mortgaged estate of the surety. But this very point was decided in a case before the Master of the Rolls in *Ireland*, which was cited in argument without disapprobation in the case of *Chinnery* v. *Evans*. The case I refer to is *Homan* v. *Andrews* (1). The facts there are very long and somewhat complicated, but may be stated shortly as follows; there being a charge (not a mortgage) upon certain lands, the owner of the lands sold them subject to the charge, and gave the purchasers, by way of indemnity

(1) 1 Ir. Chy. Rept. (N.S.) 106.

or collateral security against the charge, a lien or charge upon other lands; no payments were for upwards of twenty years made by the purchasers, the owners of the lands originally charged, but the owner of the indemnity lands, had made payments of interest, from time to time, within the statutory term, to the persons entitled to the money charged, and the Master of the Rolls held that such payments were sufficient to take the case out of the statute. It is true, that this case of *Homan* v. *Andrews* was considered to be within section 40 of 3 and 4 *W.* 4, ch. 27 (*New Brunswick* statutes ch. 84 sec. 29,) but that can make no difference, as the person entitled to make payments sufficient to save the statute is the same under both statutes, as is established by *Chinnery* v. *Evans* and *Harlock* v. *Ashberry*. This case of *Homan* v. *Andrews* is therefore a direct authority for the proposition I am now dealing with, and its authority, so far as I can ascertain, has never been impugned. Again, a case decided by the Chancellor of *Ontario*, *Slater* v. *Mosgrove* (1) is also an authority for the appellants. The interest on a mortgage debt being in arrear and overdue, the mortgagor gave the mortgagee his promissory note for the amount of the arrears, endorsed by his son as a surety, the surety subsequently paid the note, and the learned Chancellor held this sufficient to prevent the statute operating as a bar to the mortgagee's right of foreclosure. It is true that the learned Judge refers to Mr. Justice *Fry's* decision in *Harlock* v. *Ashberry*, which had not then been reversed, but it is obvious from the context of his judgment that he did not proceed upon that decision alone, but also upon the principle that the interest had been paid by a person entitled to make the payment, and whose money the mortgagee was legally bound to accept in payment.

(1) 29 Gr. 392.

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The case of *Toft* v. *Stephenson* (1) may also be added to these authorities (2).

The principle of all these cases appears to be that the payment is sufficient, if it is a payment on account of the identical mortgage debt itself, made directly on account of the debt, and not merely of a sum which the mortgagor would, according to the rules of a court of equity in taking a mortgage account, be bound to give credit for and also provided it is a payment by a person who could require the mortgagee to accept a payment of the whole amount due for principal and interest. The argument in support of this last proposition being obviously this, that a mortgagee should not be barred by the statute of limitations as long as his rights are recognised by a payment on account of interest from a person who has a right to call upon him to accept the principal and interest in full. For these reasons, I am of opinion that the appellants are clearly entitled to a reversal of the decree, and this conclusion is not in the least degree shaken by a consideration of the reasons for the contrary view given in the judgment below and also in that which will be delivered on behalf of the majority of this court, and which I have been permitted to read. As regards the argument which is founded on the bond which was executed as collateral to the mortgage, and which was the joint and several bond of *Howe* and *White*, and the effect of section 6 of chapter 85 of the consolidated statutes of *New Brunswick* upon the right to recover the bond debt, I see nothing in it to cause any doubt as to the correctness of the opinion already stated. The provisions of the statutes of limitations which would

(1) I. DeG. McN. and G. 28.

(2) See also *Forsyth* v. *Bristowe*, 8 Exch. 722; *Cann* v. *Taylor*, 1 F. & F. 651; *Dowling* v. *Ford*, 11 M. & W. 329.

apply in the case of this bond would not be those which I have been considering, 3 and 4 *W.* 4, c. 27, secs. 2 and 24, and 1 *Vic.*, ch. 28 (*New Brunswick*, ch. 84, secs. 3, 21 and 30), but 3 and 4 *W.* 4, ch. 27, sec. 40 (*New Brunswick*, ch. 84, sec. 29) which, as settled by cases very lately decided, *Sutton* v. *Sutton* (1), *Fearnside* v. *Flint* (2), applies to personal actions for the recovery of debts charged on lands. Section 6 of ch. 85, con. stats. *New Brunswick*, is in the following words:—

> No person jointly contracting, or liable, or his representative, shall be answerable for or by reason of, any payment, acknowledgment, or promise of his co-contractor, or debtor, or his representatives.

Although not exactly in the same words, this section is in substance a re-enactment of section 14 of the English statute, known as the Mercantile Law Amendment Act of 1856. The statute in which it is found, ch. 85 of consolidated statutes of *New Brunswick*, is confined to the "Limitation of Personal Actions," whilst the provisions corresponding to the English statute, 1 *Vic.*, ch. 28, and 3 and 4 *W.*, ch. 27, are included in the preceding chapter of the *New Brunswick* statutes ch. 84, which is entitled "Limitation of Real Actions."

It appears to me quite plain that this provision can have no application here, since this is not an action for the recovery of the money due upon the joint and several bond, but one for the recovery of the land, and that the payment relied on as preserving the right to maintain this suit or action is not a payment by a joint contractor, but a payment by a person entitled to pay on behalf of the mortgagor. It is, I think, for these reasons manifest that this provision can have no reference to a payment sufficient under 1 *Vic.*, ch. 28 (*New Brunswick* ch. 84, sec. 30). Indeed, I should

(1) 22 Ch. D. 511. (2) 22 Ch. D. 579.

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doubt if it could apply to sec. 40 of 3 & 4 *W. IV.*, ch. 27, (*New Brunswick* ch. 84, sec. 29), but as that question does not arise here I need not stop to consider it.

The case of *Harlock* v. *Ashberry* is relied on as in favor of the respondents. So far from being so, it seems to me a clear authority for the appellants. The *ratio decidendi* of that case was that the payment of the rent by the tenant of one of several mortgaged parcels was not a payment of either principal or interest, that at most it was the payment of a sum which the mortgagee would be compelled to bring into account; and that no ratification by the mortgagor would make it a payment of principal or interest, since it was not originally made as such; the payment therefore only operated as a receipt of rent equivalent to a taking of possession of the particular parcel in the occupation of the tenant, and saved the statute as to that, but had no effect as to the other lands comprised in the same mortgage—a decision upon questions which obviously have no bearing upon the present case. But, on the other hand, the learned judges of the Court of Appeal all distinctly recognize, and state in the most explicit manner, the principle that a payment of interest by any party liable or even "entitled" to pay it, is sufficient to bring a case within 1 *Vic.*, ch. 28, (*New Brunswick* ch. 84, sec. 30,) which, as the court also decides, is the statute which exclusively regulates the saving of the rights of mortgagees from the operation of the statute by means of payment. As regards the case of *Bolding* v. *Lane* (1), it was a case, not of payment, but of written acknowledgment, it came under section 42 of 3 and 4 *W.* 4, ch. 27, and, as is shown by Lord *Westbury* in *Chinnery* v.

(1) 1 DeG. J. & S. 122.

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Evans, can have no bearing on the present question. The cases of *Fearnside* v. *Flint* and *Sutton* v. *Sutton* do not touch the present question; they merely decide that a debt arising on a bond given as collateral security to a mortgage, or for money otherwise charged on land, is within sec. 40 of 3 and 4 *W.* 4, ch. 27,(*New Brunswick* ch. 84 sec. 29) and was therefore subject to the shorter period of limitation of 12 years applied by the last statute to the recovery of money charged on land, and not to the provisions as to bond debts not charged on land, which are governed by 3 and 4 *W.* 4, ch 42, which makes 20 years only a bar to such debts. It may be remarked that these cases of *Fearnside* v. *Flint* and *Sutton* v. *Sutton*, also show that an action to enforce the personal liability on the bond in the present case would be subject to sec. 40 of 3 and 4 *W.* 4, ch. 27, (*New Brunswick* Consolidated Statutes ch. 84, sec. 29,) and not to the provision of sec. 6 ch. 85 of the last mentioned statutes. It appears to me, therefore, that none of the reasons upon which the majority of the court rely are sufficient to show that the conclusions I have above stated are erroneous, and I must adhere to them.

This appeal, as I have said, comes before us upon the case settled by the court below, pursuant to the 29th section of the Supreme Court Act, and the pleadings and evidence have not been printed, and are not before this court. In the case the suit is described as one for foreclosure, and I have so treated it. If, however, it had been one for a sale of the mortgaged lands instead of foreclosure, though it might not have been a suit for the recovery of land, and so within the *New Brunswick* enactment corresponding to the 1st *Vic.*, ch. 28, it would have been a suit for the recovery of money charged on land, and so within the *New Brunswick* re-enactment of sec. 40 of 3 and 4 *W.* 4, ch. 27, which, as already

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shewn, is to be construed in the same way as 1 *Vic.*, ch. 28, and I should, therefore, have been, in that case, also of opinion that the payments of interest by *Howe* were, for the reasons before stated, sufficient to prevent the bar of the statute.

I am of opinion that the plaintiffs are entitled to a decree of foreclosure, and that the appeal should be allowed.

FOURNIER, J., concurred with *Gwynne*, J.

HENRY, J.:—

The decision of this case depends, in my mind, wholly on the application to it of the provisions of section 6 of the 85th chapter of the Consolidated Statutes of *New Brunswick*.

That section provides as follows:

> No person, jointly contracting or liable, or his representatives, shall be answerable for or by reason of any payment, or acknowledgment, or promise, of his co-contractor, or debtor, or his representatives.

The circumstances of this case may be briefly stated as follows:

In 1850 *John Howe*, as principal, and *James White* became parties to a joint and several bond to a party, through whom the appellants claim, in £2,000 conditioned for the payment of £1,000 as therein mentioned. It would seem that *White* became a party to it as surety for *Howe*, although such does not appear by the bond. On the same day *Howe* and *White* executed two separate mortgages of different real properties to the obligee of the bond conditioned for the payment by *Howe* of the same £1,000 secured by the bond. The time provided for the payment thereof expired on the 27th September, 1855. *Howe* continued to make payments on the bond and mortgage up to 1879. *White* died in 1858, and it is

not shown that either he or any one authorized by him ever paid anything in the shape of principal or interest on the bond or mortgage executed by him, nor has any of his representatives, or any one authorized by law to bind them, done so. The statute of limitations, as to him, began to run in 1855, and if *White* and his representatives are not bound by the payments made by *Howe*, the claim as against the latter is barred by the statute.

Previous to the enactment I have quoted, there is no doubt that payment by a joint debtor by bond or otherwise would suspend the operation of the statute, and another joint debtor could not successfully set it up as a defence, but since the enactment of a similar provision in *England*, I can find no case to justify me in deciding that the payments made by *Howe* had any effect in suspending the operation of the statute as to the representatives of *White*.

As, therefore, no *payment*, *acknowledgment* or *promise* is shown to have been made by *White* or any one by him authorized—for *Howe* had no authority to bind him—or by any one of his representatives, I am of opinion the claim against the respondents was barred by the statute, and that the appeal should be dismissed with costs.

TASCHEREAU, J., concurred with *Gwynne*, J.

GWYNNE, J.:

This case, when thoroughly understood, appears to me to be free from difficulty and concluded by authority.

On the 27th September, 1850, *John Howe*, as principal, and *James White*, as his surety in fact, though not expressed so to be, executed in favor of one *Margaret Cunningham*, their joint and several bond or obligation, whereby they bound themselves, and each of

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them, himself, his heirs, executors and administrators, in the penal sum of £2000 money of *New Brunswick*, subject to a condition thereunder written that the said obligation should be void, if the said *John Howe* and *James White*, or either of them, or either of their heirs, executors, or administrators, should well and truly pay, or cause to be paid, unto the said *Margaret Cunningham*, her executors, administrators, or assigns, the just and full sum of £1000 of lawful money of *New Brunswick*, with lawful interest thereon, as follows, that is to say, the said principal sum to be paid on the 27th day of September, A.D., 1855, and lawful interest on the said principal sum to be paid quarterly on the 27th day of December, March, June and September in each and every year.

On the same day, the said *John Howe* and *James White* severally executed to the said *Margaret Cunningham* two several indentures of mortgage conveying to her certain lands of which they were respectively seized in fee simple. The indenture of mortgage so executed by the said *James White*, conveying to the said *Margaret Cunningham*, her heirs and assigns, the lands of the said *James White* therein mentioned whereof he was seized in fee simple, was subject to a proviso in the words following:

Provided always, nevertheless, and these presents are upon this express condition, that if the said *James White* and *John Howe*, or either of them, their, or either of their heirs, executors or administrators do and shall, well and truly pay, or cause to be paid, unto the said *Margaret Cunningham*, her executors, administrators or assigns, the just and full sum of one thousand pounds of lawful money of the province aforesaid, with lawful interest for and on the same, in manner and at the times following, that is to say, the said principal sum of one thousand pounds on the 27th day of September, which will be in the year of our Lord, 1855, with lawful interest on the said principal sum to commence from the date of these presents quarterly on the 27th days of December, March, June and September in each and every year until the said principal sum shall be paid

and satisfied without fraud or delay according to the condition of a bond or obligation bearing even date herewith, and made and given by the said *John Howe* and *James White* to said *Margaret Cunningham*, then these presents to be void, otherwise to remain in full force and virtue.

The indenture of mortgage executed by *John Howe* of the lands whereof he was seized in fee simple to his sole use, was subject to a like proviso for avoiding it.

It will be convenient here to draw attention to the difference between the mode of expression in the English statute and in that of the province of *New Brunswick* bearing upon the point in issue. In the Imperial statute 3 & 4 *W.* 4., ch. 42. by the 3rd section it is enacted that actions of debt upon any bond or other specialty shall be brought within 20 years after the cause of any such action or suits, and not after.

The 4th section makes provision for the case of infants, femmes covertes, &c., and the absence of defendants beyond seas.

Then comes the 5th section, which provides—

That if any acknowledgment shall have been made, either by writing signed by the party liable by virtue of such indenture, specialty or recognizance, or his agent, or by part payment or part satisfaction on account of any principal or interest being then due thereon, it shall and may be lawful for the person or persons entitled to such actions to bring his or their action for the money remaining unpaid, and so acknowledged to be due, within twenty years after such acknowledgment by writing or part payment or part satisfaction as aforesaid, or in case the person or persons entitled to such action shall at the time of such acknowledgment be under such disability as aforesaid, or the party making such acknowledgments, at the time of making the same beyond the seas, then within twenty years after such disability shall have ceased as aforesaid, or the party shall have returned from beyond the seas, as the case may be, and the plaintiff or plaintiffs in any such action on any indenture, specialty or recognizance, may by way of replication, state such acknowledgment and that such action was brought within the time aforesaid in answer to a plea of this statute.

Now, if the present question arose under this statute

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the payments by *Howe* would have had the effect of preserving the original action in its integrity against *White* and his heirs and executors upon that bond. That point was decided by Lord Chancellor *Cranworth*, assisted by two common law judges, *Williams* and *Crowder*, JJ., after a most careful examination of the statute, in *Roddam* v. *Morley* (1). In the opinion delivered by the common law judges, they say that it never had been at all doubted, either at the bar or on the bench, but that the act extends as well to the case of a bond with several obligors as also to the case where the liability has been transferred by death to a representative of the party originally liable, and that if one of several obligors were to make the requisite acknowledgment, it had never been disputed that this would be an acknowledgment by the party liable, within the intention of the statute, and that it follows from thence, that the words: "The party liable or his "agent," are to be read as if they were "the party "or parties liable by virtue of the bond, &c, &c., or any "of them, or his, her, or their agents," and Lord Chancellor *Cranworth*, in giving judgment, says:

> I have come to the conclusion that when a part payment, or payment of interest, has been made which has the effect of preserving any right of action, that right will be saved not only against the party making the payment, but also against all other parties liable on the specialty.

It was held in that case, that where a tenant for life of devised real estate had for many years, and up to the time of his death regularly paid interest on a bond of his devisor, in which the heirs were bound, such payment of interest by the tenant for life was an acknowledgment within the meaning of the proviso of 3 & 4 *William IV.*, ch. 42, sec. 5, and kept the bond alive in its integrity as against the devisee in remainder. The

(1) 1 DeG. & J. 15, & 3 Jur. N. S. 449.

provision of the *New Brunswick* statute upon this point is very different. By the 85th chapter of the Consolidated Statutes of *New Brunswick*, sec. 1, it is enacted that no action upon any judgment, recognisance, bond or other specialty shall be brought but within twenty years after the cause of action. By sec. 5:

> No acknowledgment or promise shall be evidence of a new and continuing contract or liability whereby to take any case out of the operation of the provisions of this chapter, or to deprive any party of the benefit thereof, unless such acknowledgment or promise be in writing signed by the party chargeable thereby, but a payment made on account of any such debt shall have the effect of such acknowledgment or promise.

And by section 6—

> No person, jointly contracting or liable, or his representatives, shall be answerable for or by reason of any payment, acknowledgment or promise of his co-contractor or debtor, or his representatives.

Now, upon the execution of the several instruments above mentioned, *Margaret Cunningham* held, as security for the moneys due to her, the joint and several bond or obligation of *John Howe* and *James White*, which was enforceable against them jointly and severally and against their several and respective personal representatives, and also against their respective heirs, and devisees as to lands descended or devised, by an action brought upon the bond in pursuance of the statute 3 *W. & M.* ch. 14. She also held special separate security upon the respective real estates of them, the said *John Howe* and *James White*, conveyed by the several mortgages by them respectively executed. Upon the 27th September, 1855, the principal secured by the bond became due, and from that day the statute of Limitations began to run. The regular payment of interest by *Howe* until the 27th March, 1879 (it may be admitted) deprived *Howe* and his real as well as personal representatives, of all benefit of the statute of Limitations as a defence to an action upon the bond,

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but it had no effect in stopping the running of the statute of Limitations as a defence by *White* and his real and personal representatives to any action upon the bond. While the statute was so running in favor of *White* and his representatives, *White* died in the year 1858, having by his will made *Howe* his executor. It is admitted, however, that all payments of interest made by *Howe* since the death of *White* were, as had been those made by him before *White's* death, made by him on his own individual liability, and not in the capacity of *White's* executor, so that, on and from the 25th September, 1875, all liability of *White's* personal representatives, and of his heirs and devisees as to lands descended or devised, to any action whatever upon the bond, became extinguished by force of the provisions of the 1st and 6th sections of the 85th chapter of the consolidated statutes of *New Brunswick*, although such a payment by a co-obligor would have maintained the action alive in its integrity, under the English statute, equally against the other obligor not paying as against the one making the payments; and the sole question remaining is whether, during all the time that the statute was thus running so as to mature into a complete discharge of *White's* personal representatives, and of his heirs and devisees as to lands descended or devised, on any action being instituted on the bond, it was or not running at all in favor of *White's* devisee of the real estate mentioned in the mortgage, the contention of the plaintiffs being that it was not—or, in other words, that the act of *White's* co-obligor which could not keep alive *White's* liability or that of his real or personal representatives under the bond, could nevertheless keep alive his liability and that of his real representatives under the mortgage, or that an act which was insufficient to prevent the completion of the discharge of *White* and his real and personal repre-

sentatives from all liability in respect of the principal obligation, is sufficient to keep alive his liability, if living, and that of his real representatives, he being dead, in respect of a property conveyed only as a security collateral to, and for securing payment of such principal obligation.

The *New Brunswick* statute directly bearing upon this point, namely, the 27th section of ch. 84 of the Consolidated Statutes of *New Brunswick*, is identical in its terms with the English statute, 3rd and 4th *William IV.*, ch. 27, sec. 40, and is as follows:—

> No action or suit or other proceeding shall be brought to recover any sum of money, secured by any mortgage, judgment or lien, or otherwise charged upon or payable out of any land at law or in equity, but within twenty years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for, or release of, the same (unless in the meantime some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing signed by the person by whom the same shall be payable or his agent,) to the person entitled thereto or his agent, and in such case no such action or suit or proceeding shall be brought but within twenty years after such payment or acknowledgment or the last of such payments or acknowledgments, if more than one were given.

The whole point in the case lies in the proper solution of this question, namely, who is the person designated by the expression in the act:—

> Unless in the meantime some part of the principal money or some interest thereon shall have been paid by the person by whom the same shall be payable or his agent?

The connection of the words "or some acknowledgment of the right thereto, shall have been given in writing, signed," after the words "unless in the meantime some part of the principal money, or some interest thereon shall have been paid," and before the words "by the person by whom the same shall be payable," seems to indicate, I think, very plainly, that the statute contemplates that the person competent to make a pay-

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ment so as to stay the continuance of the running of the statute and to keep the mortgage alive, and the person competent to keep it alive by a written acknowledgment of a right thereto, that is, to payment, must be one and the same person, and that such person must be either the mortgagor or some person interested in the estate mortgaged by title derived from him. Money handed over to the mortgagee by a person not a party to or affected by the contract contained in the mortgage, could not be a payment in discharge of, or in acknowledgment of, a liability existing in virtue of the mortgage, so as to have the effect of keeping it alive. As the section is dealing with respect to the rights of the mortgagor and mortgagee and those claiming under them the lands held in mortgage, and to the money secured thereby, it appears to me to be equally clear that the principal money, the payment of some part of which, or of some interest thereon, is to have the effect of staying the operation of the statute of limitations and of keeping alive the liability created by the mortgage, must be the principal money as secured by the mortgage, and not as secured by some other instrument. Upon the execution of the mortgage, the principal money for which the bond, which constituted the principal obligation, had been given, was made payable out of, and charged upon, *White's* land comprised in the mortgage. Upon *White's* death, in 1858, all *White's* estate and interest in that land passed to his devisee, in whose hands it remained subject to the liability to pay the money secured by the mortgage, or in default to lose the land; coupled, however, with a right to come upon *White's* personal estate for indemnity if compelled to pay the debt so secured by mortgage, in order to release the mortgaged lands. The statute is to be read, as it appears to me, as providing that no action shall be brought to recover any sum of money secured upon

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and payable out of any land, but within 20 years next after a present right to receive the money so made payable out of the land mortgaged, shall have accrued, unless, in the meantime, some part of the principal money, that is, as secured by the mortgage, or some interest thereon, shall have been paid by some person by whom the same, that is, the money secured by the mortgage, shall be payable under and by force of the mortgage. The language of the section appears to me to point very distinctly to the mortgagor as the person primarily referred to in the sentence as the person by whom the same shall be payable, and, secondarily all persons claiming through him any estate or interest in the lands out of which the money secured by the mortgage is thereby made payable. There could be no sense, as it appears to me, in holding that any person could by any act of his deprive *White's* devisee of the benefit of the Statute of Limitations continuing to run to maturity so as to free the land devised to such devisee from all liability under the mortgage other than such devisee as the owner of the equity of redemption in the land mortgaged, or his or her agent. No act of *White's* personal representatives, who are strangers to the devisee of the land mortgaged, and to any estate in such lands could, as it appears to me, have such effect, and if no act of *White's* personal representatives could have the effect, *a fortiori* a person who, by the statute ch. 85 of the Consolidated Statutes of *New Brunswick*, could not by any act of his subject *White's* personal representatives to any liability under the bond, could not by any act of his prejudice the estate and interest of *White's* devisee in the land devised. And this view is consistent with the construction which the act has received in the English courts.

In *Bolding* v. *Lane* (1) the question arose as to the

(1) 1 DeG. J. & S. 122 & 9 Jur. N. S. 506.

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right to recover more than six years arrears of interest on money decreed by mortgage under the 42nd section of 3rd and 4th *William IV.*, ch. 27, in which similar words to those in the 40th section, viz., "the person by whom the same was payable," occur. The question was whether an acknowledgment in writing signed by a mortgagor to the effect that the arrears for more than six years were due would enable the first mortgagee to recover the whole amount of the arrears out of the land as against the second and subsequent mortgagees, and it was held that it would not. V. C. *Stuart* had held the words, "the person by whom the same was payable" meant the person who was liable to pay the interest under the contract, *i. e.*, the mortgage contract, namely, the mortgagor or his representative, and he accordingly held that the acknowledgment by the mortgagor was sufficient, but upon appeal this decision was reversed, Lord *Westbury* holding that the acknowledgment signed by the mortgagor was not binding on the second and subsequent mortgagees. The words of the statute appear, he says, to have been selected as a description capable of including not only every person liable to be sued at law, *i.e.*, under the mortgage, but every person who, having an interest in the land sought to be charged, might be properly sued as a defendant in a suit in equity brought to enforce payment of the principal and interest out of such land, and it follows, he says, as a necessary consequence, that it was not the intention, nor is it the effect of the section, to give to the mortgagor, or other person who is by law compellable to pay the interest, a statutory power to deprive, by his acknowledgment given to a prior incumbrancer, the subsequent incumbrancers of the benefit of the statute, which would be monstrously unjust, but to enact a plain and simple rule that no

person having a charge on lands shall recover more than six years' interest on such charge against any other person having an interest in the lands without an acknowledgment in writing signed by such person, or by some former owner from whom his interest is derived, *i.e*, as the context shows, signed by some former owner before the interest, derived from him and existing when the acknowledgment was given, was created.

That rule, as it appears to me, applies precisely to the present case in which the payment relied upon as keeping the mortgage alive notwithstanding the currency of the statute of limitations was not made by the mortgagor or by any person liable to pay by force of the mortgage, but by a person an utter stranger thereto, and to any interest whatever in the land mortgaged, which is sought to be charged with the liability originally and solely created thereby.

In *Chinnery* v. *Evans* (1), where a mortgage had been made of estates A, B and C, situate in three different counties, and by an order made, on the petition of the mortgagee under the provisions of a statute in that behalf, a receiver was appointed who entered into possession of estate A only, and out of the rents received in respect thereof, paid the interest upon the mortgage, the equity of redemption in estates B and C was sold and conveyed by the mortgagor without the mortgagee being made a party to the conveyance to a purchaser, it was held that payment by the receiver out of the rents of estate A, was a payment "by a person by whom the sum was payable or his agent," within the meaning of the section so as to preserve the mortgagee's rights against estates B and C also, and *Bolding* v. *Lane* (2) having been cited as an authority to the effect that payment by such receiver was not sufficient for that purpose, Lord

(1) 11 H. L. C. 45. (2) 2 *Ubi supra.*

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Westbury, while insisting upon the correctness of the decision in *Balding* v. *Lane*, points out the distinction between it and *Chinnery* v. *Evans*, that the former was a case of several incumbrancers ranking in a series one after another, in which case payment, although made by the mortgagor, could not keep alive the right of a first mortgagee to arrears of interest as against a second mortgagee, whereas in *Chinnery* v. *Evans*, the payment by the receiver being, as it was held to be, the same as payment by the mortgagor himself to the mortgagee, of the three estates included in one mortgage, and out of the rents derived from one of them, the mortgagee could not be deprived of his right to resort to any estate comprised in his mortgage, so long as that mortgage is legally and regularly kept alive, as it was in that case kept alive by payment of interest accruing due upon it by the mortgagor, whom the receiver represented within the meaning of the statute. In this case it was also held that the same principle and *ratio decidendi* are to be applied to the English Act 7th *William IV.*, and 1st *Vic.*, ch. 28, which is identical with ch. 84 of the Consolidated Statutes of *New Brunswick*, sec. 30, as are to be applied to 3rd and 4th *William IV.*, ch. 27, sec. 40, which is identical with sec. 29 of the above ch. 84 of the *New Brunswick* Statutes, the Act 7th *William IV.*, and 1st *Vic.*, ch. 28, having been passed merely to remove doubts and to secure to mortgagees the same right to recover the lands held in mortgage as by 3rd and 4th *William IV.*, ch. 27, sec. 40, they are given to recover the monies secured thereby.

As remarked by Sir *George Jessel*, M. R, in the Court of Appeal from the Chancery Division of the High Court of Justice in *Knatchbull* v. *Hallett* (1), it is the establishment of some principle to assist a judge in deciding

(1) 13 Ch. D. 712.

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future cases arising, that the chief use of authorities consists. Now, the principle to be derived from *Chinnery* v. *Evans*, and *Bolding* v. *Lane*, appears to me to be that whether the action, suit or proceeding, be for recovering the mortgaged lands, or for enforcing payment of the moneys secured by the mortgage, the only person by whom a payment can be made, or an acknowledgment in writing can be signed, so as to stay the currency of the statute of limitations to a point which, being reached, frees the mortgaged lands from all liability under the mortgage, must be either the original party to the mortgage contract, that is to say, the mortgagor, or some person in privity of estate with him, or the agent of one of such persons. Now, the payments by *Howe* were not made in discharge of any contract of *White* contained in the mortgage; in making those payments, which *Howe* made in discharge of his own liability under his own bond and mortgage, he was as much a stranger to *White's* mortgage and the liability incurred thereby as any other person could have been. Money paid by *Howe* in discharge of his own liability had none of the characteristics or quality of a payment made under the liability created by *White's* mortgage, and consequently could not in reason be held to have the effect of staying the progress of the statute of limitations to the point of liberating the lands comprised in the mortgage from the liability created thereby.

In *Toft* v. *Stephenson* (1), it was held in 1852 that the person competent to make the payment which should keep alive the mortgage must mean a person, who, unless he paid, must lose *his* land. That decision is referred to as good law in 1871 in *Pears* v. *Laing* (2). The principle which is established by *Harlock* v. *Ash-*

(1) 1 DeG. M. & G. 28. (2) L. R. 12 Eq. 54.

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berry (1) in the Court of Appeal, I take to be also, that payment to keep alive a mortgage against the operation of the statute of limitations must be a payment by a party affected by the mortgage or his agent—that the payment to prevent the barring by the statute the mortgagee's title to the lands mortgaged must be equivalent to an acknowledgment by the party making it of *his* liability under the mortgage, and an admission of the title of the mortgagee to the benefit of the mortgage and to the mortgaged lands, and this principle, appears to me, to carry with it the sanction of sound sense and wholly independently of authority recommends itself to the understanding. The payments made by *Howe*, who is an utter stranger to the mortgage, and made by him in discharge of his own liability under his bond and mortgage, can never amount to such an acknowledgment by *White* or his devisee.

Upon principle, therefore, and upon authority, I am of opinion that an act of a person wholly inadequate and incompetent to preserve the liability of *White* and his representatives under the principal obligation involved in his bond can not preserve his liability and that of his devisee under the mortgage, which is but a collateral security to the principal obligation, and that, therefore, this appeal must be dismissed with costs.

Since writing the above, the April number of the current volume of the Chy. Div., vol. 22, has come to hand containing two cases, which confirm me, in my view, *Sutton* v. *Sutton* (2) and *Fearnside* v. *Flint* (3). These cases arose under 37 and 38 *Vic.* ch. 57, which reduced the period of prescription from 20 to 12 years, but they equally apply to the present case. They decide that where the remedy against the land is barred by lapse

(1) 19 Chy. Div. 539.

(2) P. 511.

(3) P. 579.

of time, the personal remedy, whether that personal remedy consists in an action upon the covenant contained in the mortgage deed, or an action upon a collateral bond, is barred also, the debt secured by the real and personal obligation being one. The same principle applies to the converse of this proposition.

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Appeal dimissed with costs.

Solicitor for appellants: *G Sidney Simith.*

Solictors for respondents: *Harrington & Millidge, W. B. Wallace & C. A. Palmer.*

JOSEPH BARSALOU, *et al*.....APPELLANTS;

AND

DAVID DARLING, *et al*.....RESPONDENTS;

Trade Mark—Infringement—Injunction.

1881

*Nov. 15,16.

1882

*Mar. 28.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA (APPEAL SIDE).

B. et al. manufactured and sold cakes of soap, having stamped thereon a registered trade mark, described as follows:—A horse's head, above which were the words "The Imperial;" the words "Trade Mark," one on each side thereof; and underneath it the words "Laundry Bar." "*J. Barsalou & Co., Montreal,*" was stamped on the reverse side. *D. et al.*, manufactured cakes of soap similar in shape and general appearance to *B. et al.*,, having stamped thereon an imperfect unicorn's head, being a horse's head with a stroke on the forehead to represent a horn. The words "Very Best" were stamped, one on each side of the head, and the words "*A. Bonin,* 115 St. Dominique St.," and "Laundry" over and under the head. At the trial the evidence was contradictory, but it was shown that the appellants' soap was known, asked for and purchased by a great number of illiterate persons as the "horse's head soap."

*PRESENT—Sir W. J. Ritchie, C.J., and Strong, Fournier, Henry and Taschereau, JJ.

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Held, (*Henry*, J., dissenting), reversing the judgment of the Queen's Bench (appeal side) and restoring the judgment of the Superior Court, that there was such an imitation of the *B. et al.'s.* trade mark as to mislead the public, and that they were therefore entitled to damages, and to an injunction to restrain *D. et al.* from using the device adopted by them.

APPEAL from a judgment of the Court of Queen's Bench for *Lower Canada* (appeal side) reversing the judgment of the Superior Court, sitting at *Montreal*

This action was instituted before the Superior Court, at *Montreal*, for the purpose of restraining the defendants (respondents) from making use of a trade-mark belonging to the plaintiffs (appellants) and for the recovery of damages thereby occasioned to the latter.

The plaintiffs alleged,—

"That at *Montreal*, in the district of *Montreal*, on the 5th December, 1877, and for a long time before, the plaintiffs manufactured and sold, at *Montreal* and elsewhere, in large quantities, a soap stamped with a horse's head, such as that upon the cake of soap filed by plaintiffs as exhibit No. 1;

"That after the plaintiffs had begun to manufacture the said soap, and had long used as trade-mark for the sale thereof the stamp of a horse's head aforesaid, they sought and obtained from the Minister of Agriculture of *Canada*, at *Ottawa*, on the 5th December, 1877, the registration according to law, for the Dominion of *Canada*, of their said trade-mark, as appears by the certificate filed as exhibit No. 2;

"That the plaintiffs were, at the said times, the sole manufacturers of the said soap bearing the said trade-mark or stamp of a horse's head; that they had and still have the exclusive right to employ the said trade-mark; and that their said soap, largely sought after by tradesmen and consumers in the Province of *Quebec* and elsewhere, was universally known by the said stamp of a horse's head.

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"That during the month of August, 1878, or thereabouts, the defendants, well knowing the foregoing facts, had, in fraudulent violation of plaintiffs' rights to the exclusive use of the said trade-mark, manufactured, sold and caused to be sold in large quantities, at *Montreal* and elsewhere, a soap bearing a stamp made in imitation of plaintiffs' said trade-mark, to wit, the stamp borne by the cake of soap filed as plaintiffs' exhibit No. 3:

"That this stamp, which defendants have employed for the sale of their soap as aforesaid, is a fraudulent imitation of plaintiffs' trade-mark, and that defendants used the same with intent to deceive the public, and to induce purchasers to buy their soap for that of plaintiffs, and to profit by the custom which plaintiffs had succeeded in gaining for their soap;

"That the defendants, in so using their imitation of plaintiffs' trade-mark had sold and caused to be sold a large quantity of their soap to persons who intended to buy plaintiffs' soap, the whole to the great prejudice of the latter;

"That on or about the 28th August, 1878, plaintiffs notified defendants that proceedings would be taken against them for the illegal use they had made and were making of the said fraudulent imitation of their said trade-mark; but that notwithstanding this notice, the defendants have since continued and still continue to use the said fraudulent imitation of plaintiffs' trade-mark;

"That the defendants, by reason of the above mentioned facts, have caused to plaintiffs, who own and operate at *Montreal* a large soap manufactory, damage to the extent of at least two thousand dollars;"

And the plaintiffs prayed that by the judgment to be rendered, it be declared that defendants had, illegally and without any right, made use of a fraudu-

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lent imitation of the plaintiffs' trade-mark; that they be enjoined to cease using the same or any imitation of plaintiffs' said trade mark and selling or causing to be sold soap bearing such imitation; and that, for the causes aforesaid, the defendants be condemned jointly and severally to pay to plaintiffs a sum of two thousand dollars currency, by way of damages, with costs.

To this action the defendants, now respondents, pleaded,—

"That the soap manufactured and sold by the defendants does not bear the plaintiffs' trade-mark, nor any fraudulent imitation, nor any imitation whatever thereof; that their soap bears the stamp of a unicorn's head and not of a horse's head; that there is no resemblance between the words printed upon the soaps manufactured by the plaintiffs and the defendants; that the soaps have no resemblance, either in size, color or otherwise, and that the one could not be taken for the other;

"That the soap manufactured by the defendants was manufactured only for one *A. Bonin*, and that in small quantities, and that in manufacturing their soap, the defendants had no intention of imitating, and have not in fact imitated, plaintiffs' trade mark."

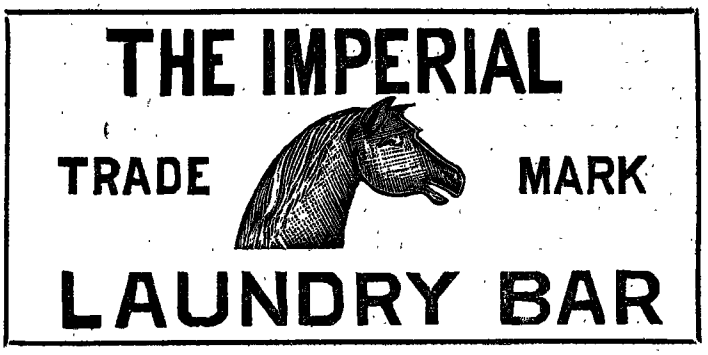
There was also a plea of general denial.

The plaintiffs answered generally, and after proof judgment was rendered in the Superior Court, condemning the defendants to pay plaintiffs $100 damages

The defendants appealed from this judgment and had it reversed in the Court of Queen's Bench, by whose judgment plaintiff's action was dismissed.

The facts of the case and the evidence bearing on the case are reviewed at length in the judgments hereinafter given; the following will show the stamps used on the cakes of soap sold by the appellants and respondents respectively.

Plaintiff's Stamp.



Defendant's Stamp.

On the reverse side of the plaintiff's stamp are the words "J. Barsalou & Co., Montreal."

Mr. *Beique* and Mr. *Geoffrion*, for appellants, and Mr. *Pagnuelo*, Q.C., and Mr. *Cruickshank*, for respondents.

The points relied on and cases cited are referred to in the judgments.

RITCHIE, C. J.:—

I think that the first judgment in this case was correct. I think that there was an infringement of the plaintiffs' trade mark. This appeal should be allowed and the judgment of the court below confirmed, with an injunction.

STRONG, J., was of opinion that the appeal should be allowed.

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FOURNIER, J. :—

Les appelants ont poursuivi les intimés devant la Cour Supérieure à *Montréal* pour infraction à leur droit à l'usage exclusif de la marque de commerce imprimée sur chaque morceau de savon sortant de leur manufacture. Cette marque consiste principalement dans une tête de cheval d'un côté et de l'autre dans l'arrangement de certains mots tel qu'il appert par les échantillons produits comme exhibits en cette cause. Les appelants se sont assurés le privilège de faire usage de cette marque par l'enregistrement conformément à la loi concernant les marques de commerce.

Les intimés, qui sont aussi manufacturiers de savon, ont adopté, comme marque distinctive de leur savon, un certain emblême qu'ils appellent une tête de licorne. Ils n'ont point pris d'enregistrement pour cette marque. Les appelants se plaignent que cette prétendue marque n'est qu'une imitation frauduleuse de leur propre marque de commerce ; qu'elle constitue une infraction au droit à l'usage exclusif que leur assure l'enregistrement et leur cause des dommages. Ils ont pris les conclusions suivantes :

A ces causes les Demandeurs concluent à ce que par le jugement à intervenir, il soit déclaré que les Défendeurs ont illégalement et sans droit aucun, fait usage d'une imitation frauduleuse de la susdite marque de commerce des Demandeurs, à ce qu'il leur soit enjoint de cesser de faire usage de toute imitation de la dite marque de commerce des Demandeurs et de vendre ou faire vendre du savon portant telle imitation, et à ce que pour les causes susdites les Défendeurs soient condamnés conjointement et solidairement à payer aux Demandeurs une somme de deux mille dollars courant à titre de dommages-intérêts ; le tout avec dépens aux soussignés.

Le plaidoyer des intimés peut se résumer en une dénégation générale. L'imitation et l'intention de fraude sont spécialement niées. Pour justifier l'usage d'une tête de licorne, les défendeurs ont donné dans leur plaidoyer le détail des circonstances dans lesquelles ils ont adopté cette marque.

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De nombreux témoins ont été entendus d'une part, par les appelants, dans le but d'établir la ressemblance entre les deux marques; et de l'autre, par les intimés pour faire voir que la différence entre elles est telle qu'un acheteur ordinaire ne pourrait les confondre. La question à décider se borne donc à l'appréciation de cette preuve. S'il y a eu réellement imitation, qu'elle soit ou non accompagnée d'intention frauduleuse, les droits des appelants doivent être protégés.

Avant la signification de l'action, les intimés ont été requis d'avoir à se désister de l'usage de la tête de licorne parce qu'elle était une imitation de la marque des appelants. Nonobstant cette demande ils ont continué à en faire usage, ainsi qu'il est prouvé par le témoignage de *Brody*, l'un des intimés. Celui-ci reconnait aussi que lorsqu'ils ont commencé à fabriquer à la demande de *Bonin* le savon portant la marque dont il s'agit, ils savaient que les appelants vendaient un savon portant comme marque de commerce l'empreinte d'une tête de cheval. Ils en avaient des échantillons dans leur établissement.

Le député ministre de l'agriculture, M. *J. C. Taché*, dont une des non moins importantes fonctions est celle de juger les contestations de cette nature, est le seul expert compétent qui ait été examiné sur cette délicate question de la ressemblance des deux marques en question, et sur ce qui peut constituer une imitation suffisante pour être contraire aux dispositions de la loi. Il s'exprime comme suit à ce sujet:

La principale partie de la marque de commerce des Demandeurs comme question pratique est constituée par l'emblême qui représente une tête de cheval et l'arrangement des mots qui entourent l'emblême font aussi partie de l'apparence générale de cette marque de commerce.

A la question qui lui est particulièrement faite sur la similitude qu'il y a entre les deux marques, il fait la réponse suivante:

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R.—Je trouve que l'une de ces empreintes constitue une imitation de l'autre ; les mots diffèrent mais leur arrangement est à peu près le même. L'emblême qui caractérise l'une de ces marques de commerce étant une tête de cheval et l'autre une tête de licorne, la seule différence qui existe dans l'emblême n'est constituée que par l'addition d'un simple trait placé au front de la tête de cheval.

Interrogé pour savoir si après l'enregistrement de la marque des appelants il eût accordé aux intimés une marque de commerce semblable à celle qu'ils réclame en cette cause, il dit entre autres choses en réponse à cette question :

Je crois cependant d'après mon impression d'aujourd'hui, que si on eût fourni avec la description les deux pièces de savon qui sont ici produites et marquées exhibits Nos. 1 et 3, portant l'empreinte exhibée, nous aurions refusé le second enregistrement ou plutôt nous aurions notifié les deux parties d'avoir à procéder à la preuve de priorité d'usage, d'après la clause sixième de l'acte des marques de commerce de 1868.

A la question de savoir si la priorité d'usage eût suffi pour refuser l'enregistrement de la marque des intimés, il donne la réponse suivante :

Le cas eût été difficile si on avait eu pour se guider seulement la description technique des deux marques de commerce ; mais la production de l'empreinte telle qu'elle se montre sur chacune des pièces de savon produites me paraît prouver clairement l'imitation. J'ai fait faire une recherche dans nos livres par le commis chargé de la besogne des marques de commerce et il m'a dit ne rien exister qui ait trait à la marque de commerce des Défendeurs.

Après avoir donné en réponse aux transquestions une description des deux marques de commerce, il déclare dans une de ses réponses :

There is a difference in the depth of the impression, but I have no hesitation in stating that the two emblems are made in such a manner that ordinary purchasers may take one for the other.

Les autres témoins des appelants ont fait la même preuve. *Barcelo* trouve beaucoup de ressemblance entre les deux marques ;

Je trouve, dit-il, qu'en général il a (le savon des intimés) la même apparence et que c'est une très bonne imitation.

Il considère qu'il pouvait vendre l'un pour l'autre. Le témoin *Corbeil* trouve aussi que c'est une belle contrefaçon.

Réellement, ajoute-t-il, les gens peuvent se tromper bien souvent, surtout les acheteurs ordinaires, et prendre un savon pour l'autre.

Lui-même s'y était d'abord mépris. Dans ses transquestions il reconnaît comme suit qu'il y a une certaine différence.

Of course, there is a difference between the two soaps, and I find a difference when I look at it sharp. The greatest difference between this kind of unicorn's head on *Bonnin's* soap and the horse's head on the plaintiff's soap is the kind of horns on *Bonnin's* soap.

Hilaire Brais dit *Desrochers* prouve que le nommé *Aldéric Payette* a voulu lui vendre le savon fabriqué par les intimés pour celui des appelants. *Urgèle Perreault*, à la question s'il trouve de la ressemblance entre les deux savons, répond :—

R.—Oui, il y a beaucoup de ressemblance avec le savon des Demandeurs, et ce qui me frappe davantage dans cette ressemblance, c'est la tête de cheval, car je trouve moi, que les deux morceaux portent la tête de cheval, il m'est même arrivé à moi-même de m'y tromper ; j'ai eu occasion, il y a quelque temps, d'aller dans une grocerie chez un marchand en gros, je crois que c'était chez M. *Cusson*, mais je n'en suis pas sûr, et malgré que je vendais le savon des demandeurs depuis longtemps, j'ai d'abord pris celui de M. *Bonnin* pour celui des demandeurs. Ce n'est qu'en y regardant de plus près que je me suis aperçu de l'erreur que je faisais, et le marchand chez qui j'étais m'a aussi fait remarquer que c'était en effet le savon de M. *Bonnin*, et non celui des demandeurs. Je suis convaincu que je puis vendre tous les jours ce savon *Bonnin* pour celui des Demandeurs à ceux qui demandent du savon à tête de cheval, et je suis certain aussi qu'un grand nombre des acheteurs en useraient sans s'en apercevoir.

Lockerby, marchand en gros d'épiceries, interrogé sur la ressemblance des échantillons de savon, dit :—

A.—Well, this soap at the first glance a person would take Mr.

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Bonnin's soap for Mr. *Barsalou's* soap and to the consumer who couldn't read the lettering on them he would take the soap of *Bonnin* for that of *Barsalou's* the Plaintiffs.

If the two soaps were not side by side and no name on *Bonnin's* soap with this head as it appears here on the bar of soap, I could be led to believe that it was Mr. *Barsalou's* soap on account of the ressemblance of the head and the general appearance of the goods.

Riendeau, commis, parlant de la ressemblance des marques, dit :—

Je considère par la marque de commerce, que le savon *Bonnin*, produit en cette cause, est une contrefaçon de celui des Demandeurs. Je trouve assez de ressemblance entre les deux têtes pour que ce savon soit pris l'un pour l'autre en fait de marque de commerce, et je considère que les acheteurs peuvent s'y tromper facilement s'ils n'examinent pas les écritures.

A ces témoignages si positifs établissant l'imitation de la marque des appelants, les intimés en ont opposé d'autres pour faire voir qu'il existe entre cette marque et la leur des différences si caractéristiques qu'un acheteur ordinaire ne saurait les prendre l'une pour l'autre. Je n'en donnerai que quelques extraits, car la plupart de ces témoins, comme ceux des appelants, s'expriment, quoi qu'en sens contraire, à peu près dans les mêmes termes pour faire ressortir la différence des deux marques.

Alfred Bonnin, le premier témoin des intimés, que l'on peut considérer comme l'auteur de la difficulté entre les parties, nous donne l'origine de la marque des intimés. Voulant, dit-il, avoir un aussi bon savon que celui de *Strachan* ou des appelants, il a engagé les intimés à fabriquer pour lui un savon de cette qualité. S'étant assuré qu'il conviendrait à son commerce, il a demandé aux intimés quel emblême il conviendrait de mettre sur ce savon avec son adresse. M. *Darling*, fils de l'un des intimés et leur teneur de livre, fit le dessin de la marque en question. L'ayant montrée à *Bonnin*, celui-ci s'en déclara satisfait et ordonna d'en faire faire

un modèle. A l'époque où il a ordonné ce savon chez les intimés, il avait cessé de vendre celui des appelants qu'il vendait depuis environ six mois et en assez grande quantité. Ce qui paraît l'avoir décidé à faire fabriquer le savon portant son nom, c'est le refus qu'il avait essuyé de la part des appelants de lui donner un escompte qui n'est accordé qu'aux marchands en gros. Il leur a dit alors qu'il pouvait faire faire un savon et l'introduire comme le sien. Il nie avoir dit qu'il allait faire faire une imitation du savon des appelants. Il considère que cette tête de licorne ne lui est pas beaucoup utile, qu'une autre aurait fait aussi bien, mais que vu que cette tête lui a été montrée sur le dessin, il l'a acceptée pensant qu'il était le seul qui avait cette tête de licorne. Il prétend que le savon des intimés est plus connu par le mot impérial qui est, dit-il, plus facile à dire pour les dames que tête de cheval. A la question suivante: "Pensez-vous par exemple que pour les personnes qui ne savent pas lire le mot impérial frappe plus les yeux que la tête de cheval? Il répond:

Tant qu'à cela, le mot impérial est connu et cela prend un homme expert pour juger si c'est une tête de cheval ou une autre tête.

Il ajoute que la tête de licorne sur son savon ressemble, dans sa façon, autant à la tête de licorne que la marque de commerce des demandeurs ressemble à une tête de cheval. Il y a une différence sur le papier et sur le savon. En transquestion, il dit:

I always have found a great deal of difference between the two as also in the size.

I believe that no ordinary purchaser could be deceived in these two soaps; during five months that I have had my soap, no person has ever mistaken my soap for the Plaintiffs'.

Malgré le caractère positif de cette déclaration, il est difficile de croire à la sincérité de *Bonnin*.

L'idée de faire fabriquer un savon portant sa marque ne lui est venue qu'après le refus des appelants de lui

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accorder l'escompte qu'il voulait avoir. Le choix qu'il a fait de sa marque indique le désir de faire concurrence aux appelants. *Darling*, fils, lui montre plusieurs échantillons de savon empreints de diverses marques ; aucune ne peut le satisfaire, pas même la marque d'une tête de licorne fort bien imitée, que les intimés avaient autrefois employée comme leur propre marque et qu'ils étaient prêts à lui donner. Cette tête de licorne ne pouvait remplir son but, parce qu'elle ne rassemblait pas assez à la tête de cheval sur le savon des appelants.

J. M. Darling, teneur de livres des intimés, le témoin qui a fait des esquisses d'emblême pour *Bonnin*, déclare qu'un acheteur ordinaire ne pourrait être trompé par la ressemblance des deux marques. Je suis assez porté à croire que cela serait vrai si la tête de licorne sur le savon de *Bonnin* ressemblait tant soit peu à la description qu'il donne d'une tête de licorne :

The head of a unicorn is surmounted with a horn which a horse has not and that a unicorn's head, in my consideration, is smaller and features sharper, and on the whole a very distinct animal,

Au lieu de cela les échantillons nous font voir que la prétendue tête de licorne n'est qu'une servile copie de la tête de cheval du savon des appelants, à laquelle on a simplement ajouté pour dissimuler l'imitation un trait qui est supposé figurer une corne. Un autre témoin des intimés, M. *Adams*, dit qu'en ne regardant que la tête seule, on peut prendre cette prétendue tête de licorne pour une tête de cheval. Il croit que la classe des consommateurs pauvres pourraient prendre l'une pour l'autre, surtout s'ils avaient la garantie ou la parole du vendeur. Dans ses transquestions, il dit que cette tête peut être tout aussi bien prise pour une tête d'âne que pour une tête de cheval. *Cunningham* tout en déclarant qu'un acheteur ordinaire ne pourrait confondre les deux marques, dit en transquestions que si on lui montrait l'emblême du savon des intimés sans le trait sur le

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front, qu'il ne pourrait le prendre pour la tête d'aucun animal. Comment concilier cela avec les déclarations si positives qu'il n'est pas possible de confondre les deux marques. *A. W. Hoods* après avoir dit qu'il y a une grande différence entre les deux emblêmes, ajoute en transquestions que s'il n'y avait pas de corne, que très probablement il prendrait l'emblême sur le savon de *Bonnin* pour une tête de cheval.

Quoiqu'en général les témoins des intimés s'accordent à constater entre les deux marques de commerce des différences telles qu'un acheteur ordinaire ne pourrait s'y tromper, un bon nombre d'entre eux admettent aussi qu'en supprimant le trait qui simule la corne dans la tête de la licorne, cette tête ressemble à une tête de cheval. *Foster*, lui-même, le graveur qui a fait l'emblême en question, et qui est si intéressé à nier l'imitation, ne peut s'empêcher d'avouer que s'il n'y avait pas de corne sur la tête, il y aurait une petite ressemblance avec une tête de cheval; qu'elle pourrait être prise, s'il n'y avait pas de corne, pour une tête de zèbre ou " même de cheval ou pour celle de tout autre animal de l'espèce chevaline." Même pour l'artiste qui a fait cet emblême il y a ressemblance, à plus forte raison doit-elle exister pour les acheteurs ordinaires au point de les induire en erreur. Il me semble qu'il n'y a pas d'autres conclusions à tirer de toute la preuve que celle qu'il y a eu imitation de la marque des appelants. Si l'appréciation de la preuve pouvait offrir quelques difficultés, l'examen des échantillons les feraient disparaître. Je partage entièrement, sur ce rapport, l'opinion de M. J. C. *Taché*, député-ministre de l'agriculture, lorsqu'il dit : " Mais la production de l'empreinte telle qu'elle se " montre sur chacune des pièces de savon produites me " paraît prouver clairement l'imitation."

Bien que *Bonnin* soit le premier auteur de l'infraction qui a été commise au droit exclusif que les

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appelants avaient à l'usage de leur marque, les intimés n'en sont pas moins responsables que lui. Ce sont eux qui ont fait faire l'emblême d'après leurs instructions. Ils étaient alors en possession d'échantillons du savon des appelants. Il leur était facile de donner ou d'éviter la ressemblance. Avant d'avoir été poursuivi, ils ont été invités par les appelants à se désister de l'usage de la marque en question. Malgré cette intimation ils ont persisté à manufacturer du savon portant la même marque. C'est donc en parfaite connaissance du tort qu'ils faisaient aux appelants qu'ils ont continué l'imitation de leur marque et ils doivent en supporter les conséquences. Faisant application des autorités citées dans le factum des appelants à cette appréciation des faits, j'en suis venu à la conclusion que l'appel doit être accordé avec dépens.

HENRY, J.:—

This is an action brought by the appellants to recover from the respondents damages for infringing a trade-mark registered and used to distinguish an article of laundry soap which they manufactured. Their trade mark consists of a horse's head, over which are the words "The Imperial" and under it the words "Trade-Mark"—the first of the two latter words being on the left side of the horse's head and the other on the right, with the words "Laundry Bar" in a third line beneath. On the reverse side are the words "*J. Barsalou & Co.*", and beneath them the word "*Montreal.*" An injunction was also sought to restrain the respondents from using a trade-mark they adopted upon soap of something of a similar kind, which they manufacture, as being like the trade-mark of the appellants. No judgment was given by the court of original jurisdiction as to the latter and none by the Court of Appeal, and it was not asked for at the argument. The question is not therefore before

this court. The allegation as to the similarity of the two trade-marks is denied; and the respondents contend that the one used by them is no imitation of that of the appellants, and that there is no probability, with the exercise of ordinary observation and intelligence, of the one article being taken for the other.

A great many witnesses were examined on both sides as to the probability of the one being taken for the other. The proof of the issue was on the appellants and great latitude was given to the witnesses, but no evidence was given that any one person had been induced to buy soap manufactured by the respondents for that manufactured by the appellants. The appellants have a large factory and were making their soap for upwards of seven years before the commencement of their action. The respondents, too, have a large factory and have manufactured several kinds of soap for upwards of thirty years, and similar in shape and general appearance, but somewhat different in color compared with the cakes of soap made by the appellants.

They used various devices on the cakes of soap manufactured by them, and, about a year before the institution of the present proceedings, commenced to use one with the head of a unicorn.

Before doing so, they were applied to by one *Alfred Bonnin*, a grocer, of 115 St. *Dominique* Street, to manufacture for him a superior article of soap, with his address impressed thereon, so as to serve him as a means of advertising his business. *Bonnin* proposed as a device a female head, but a clerk in the respondent's establishment suggested, amongst others, the head of a unicorn, which was agreed upon. It was also agreed to have the inscription "*A. Bonnin*, 115 St. *Dominique* Street, Very Best Laundry," disposed in four lines to surround the device, with no device or inscription on the obverse side. Thus the respondents' inscriptions were in

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four lines whilst the appellants' were in three, and many of the letters of the former were cut longer and much finer than the respondents'. On the latter the words were all one side—the other being smooth and plain—the two cakes presenting a strikingly different appearance, even to the eye of illiterate persons. With the difference indicated by the "horn," most conspicuously appearing on the head of the unicorn, the difference altogether is most apparent. Taking, then, the two, in view of the law as applicable to such cases, can we arrive at the conclusion that the trade-mark of the respondents is an infringement of that of the appellants'? Is the one a literal copy of the other, or is it a colorable one, so as to deceive persons of ordinary intelligence when using ordinary care, so that when purchasing the one they would think they were purchasing the other? It must be remembered that no evidence was given that any person had been so deceived when purchasing; that the evidence of the appellants went no further than as a matter of opinion that parties might be deceived, the principal reason given being that the soap of the appellants was sometimes asked for as the "horse head soap," and that the head of the unicorn being so much like that of the horse, illiterate people and children might be deceived. This is the strength of the appellants' case. It is freely and fully admitted that, taking the whole of the marks together, no intelligent person, who took the trouble to use ordinary observation, could be deceived. It is said that this soap is largely used by illiterate people who cannot read, but the same might be said of a great variety of articles—patent medicines, so called, included. Suppose a medicine, called by any particular name, were put up with the same colored labels, wrappers on the bottles, the same kind of printing, the same kind of bottles as those used by another previously;

one, however, has the device of a church and the other that of some other building, alike in general appearance; but the latter has also the figure of a tower or steeple; each has the name of the manufacturer on it; could it be properly said the one was an infringement of the other, because ignorant people did not know that the tower or steeple was an important distinguishing feature, and that, being illiterate, they could not read, and profit by, the different manufacturer's names being printed on the bottles?

It is well known that illiterate people are often more instinctive in the practical knowledge they possess; and, in the purchase of articles of constant daily consumption, they are generally harder to deceive than their more intelligent and educated neighbors. Besides, if they cannot read, they can see; and if one accustomed to purchase and use the cakes of soap of the appellants, even if not held to be bound to see the horn on the head, would be bound, in my judgment, by the fact that those cakes had plainly indented marks *on both sides*, while the respondents' cakes had all the marks on *one* side, the reverse side being wholly smooth. I am of opinion that the mere fact of the appellants' soap being called by some the "horse head soap," should have little weight in the consideration of this case, particularly when one of the appellants' witnesses, who sold quantities of both soaps, swears it was not known or asked for as such, as customers asked for "seven cent soap or *Barsalou's* soap," and called it "Imperial," that when they wanted "*Bonnin's* soap they asked for the six cent soap, and some for *Bonnin's*"; and it is strange in this connection to find the appellants calling it "Our Imperial Laundry Soap."

We are to be governed solely by the two trade-marks as I feel satisfied, from the evidence, there was no intention

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of infringing the appellant's trade mark, for it is distinctly shown how the device was adopted, and if it were otherwise, why should the address of *Bonnin* have been stamped on the cakes? That would frustrate any object to sell it, as the appellants'. It was suggested that it was he who proposed and adopted the trade-mark, because the appellants would not ameliorate the terms upon which they had previously been supplying him; but the evidence negatives that suggestion, and by the whole evidence it is shown that *Bonnin* received from the respondents and sold all the cakes of soap so marked, and that he did not sell them as the manufacture of the appellants, but as his own. Samples of the two kinds of cakes were exhibited in the case, and inspected by the members of this court. I found no difficulty in ascertaining the difference in the two devices, and I cannot see how any other person, knowing the appellants' trade-mark, with reasonable diligence and ordinary eyesight, could find any, unless, indeed, they lived in a country where horses were found to have a horn in the centre of their foreheads. But, under any circumstances, the reverse side of one being wholly smooth while the other had words indented upon it, was a sufficient indication of difference to the most illiterate.

The appellants in their declaration allege that the respondents fraudulently imitated the horse's head, which is alone stated to be their trade-mark—leaving out the words "Imperial laundry bar" and "trade-mark." It appears to me that the words "Imperial laundry bar," at least constitute a part of it, and that the trade-mark is improperly described in the declaration, but which defect is cured, I think, by the reference to the appellants' registry, as shown by their exhibit No. 2. That document shows the trade-mark to include the

other words I have just stated, and also to include the name of the appellants, &c., on the reverse side.

To such a trade-mark the respondent pleaded, and denied all the allegations in the declaration as to their having fraudulently imitated it. It is alleged in the declaration that the appellants' soap was universally recognized by the said imprint or horse's head, but several of the witnesses who sold large quantities of it say that it was not so known, but as the "Imperial Laundry."

It is further alleged that the impression that the respondents used for the sale of their soap, is a fraudulent imitation of the appellants' trade-mark, and that the respondents used it with the intention of deceiving the public, and to make sale of their own soap for that of the appellants, and to profit by the custom secured, or by the reputation that the appellants had the knowledge to acquire for their soap, and that the respondents had sold and caused to be sold a large quantity of their soap to persons who intended to purchase the soap of the appellants.

It is not necessary to show a fraudulent imitation of a trade-mark, where one is an actual imitation, because in the absence of evidence, that would be generally assumed, but it might be shown not to have been fraudulently done. The owner of the trade-mark would in that case be entitled to an injunction, and also to recover at least nominal damages. When the complaint is made of a colorable infringement it is founded on a charge of fraud. That is not, however, what is here charged against the respondents. They are charged with using the exact trade-mark of the appellants, and that is the issue raised, and the only one; and according to long and well-established rules of pleading, they should succeed or fail according to the proofs offered as to that sole

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issue. Were the charge for a colorable imitation, they should have set out in their declaration what the nature of it was. Both trade-marks should have been set out and described. In the English precedents that I have been enabled to consult, and in the American also, such is the practice; and it is done so that, by a comparison of them, the court can ascertain whether in law it is such a colorable imitation as could possibly mislead, or where any doubt existed, so to direct a jury that they can find whether such charge is sustained. Suppose the respondents in this case had pleaded only a general denial of the appellants' allegations, and on the trial the appellants put in evidence the trade-mark of the respondents, there would have then appeared, in my opinion, an important and fatal variance. That is an important issue, and if found—as it unquestionably should be—for the respondents, they would be entitled to judgment in their favor. But it may be said that in another plea the respondents set out their trade-mark. To succeed they need not have done so, and inasmuch as no colorable imitation is charged, the appellants could not recover, as such a remedy would be for a cause of complaint not alleged.

But, had such been the complaint, the charge of a colorable imitation, such as arises in this case must necessarily include a charge of fraud. In fact the word colorable necessarily implies a charge of fraud. From all the principles laid down in reported cases and by text writers on the subject in *England* and the *United States*, the action for a colorable imitation necessarily implies that the defendant was aware of the plaintiff's trade-mark, and fraudulently made such a change of a part or parts of it as would vary it; but still retain such parts as would leave the general aspect and appearance materially untouched. Some cases are reported in which it was decided that the change of the christian name

only, where both surnames were alike, was insufficient to authorize the use of the trade-mark of another, and the same, in others where the change was made by adding or leaving out one or more words, but the general appearance not materially altered.

I have referred to the charge of a colorable imitation involving necessarily a charge of fraudulent intention, and it was held by Lord *Chelmsford* in *Wotherspoon* v. *Currie* (1), that where the two marks are not identical proof of a fraudulent intention on the part of the defendant must be given to entitle the plaintiff to relief.

It is said by Mr. *Adams* in his treatise on the law of trade-marks (2), that:

> The main thing to be taken into consideration is whether such an inspection of the defendant's mark taken as a whole, and having regard also to the mode of affixing it to the goods, and to all the circumstances attending its use, as a purchaser of ordinary intelligence exercising a proper amount of caution might be expected to bestow upon it, would lead him to suppose he was buying the manufacture of the plaintiff.

On this point I will quote the language of Lord *Cranworth* in *The Leather Cloth Company* v. *American Leather Cloth Company*, (3) and hereinafter pretty fully recited, when saying, that in such cases:

> The maxim *vigilantibus non dormientibus leges subserviunt* is not to be lost sight of, and even an unwary and incautious person must be expected to bestow some attention upon the mark when purchasing an article.

In the same case Lord *Cranworth* says:

> The gist of the complaint in all these cases is that the defendants, by placing the plaintiffs' trade-mark on goods manufactured by the defendants, have induced persons to purchase them, relying on the trade-mark as showing them to be of the plaintiffs' manufacture. This necessarily supposes some familiarity with the plaintiffs' trade-mark.

When referring to the want of any evidence to show

(1) 5 H. L. 519. (2) P. 107.
(3) 11 Jur. p. 517.

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that any purchaser had been deceived, I did not intend to assert that such evidence was absolutely required, but referred to the fact, to establish the position that the case of the appellants is therefore weaker, and it is wanting in another important feature, which is, that none of the witnesses on the part of the appellants assert that, taking the whole of each trade-mark as presented by the impressions on the cakes of soap, ordinary purchasers would be liable to be deceived. Some of them say that by looking only at the figure of the horse's head in the one case, and of the unicorn's in the other, they or others might be deceived, but that I hold, in view of the principles laid down and acted on in the case just cited, should not be the test.

The question, in the case of a complaint for a colorable imitation, in a common law court, that the fraud of the defendant is a necessary ingredient, may be considered as judicially settled. It has been ruled and decided that the imitation must appear as fraudulent. In *Crawshay* v. *Thompson* (1), Chief Justice *Tindal* left the matter of the intention of the defendant in using the trade-mark to the jury "because it seemed to him that unless there was a fraudulent intention existing (at least before notice) the defendant would not be liable." The jury found a verdict for the defendants, and there was a motion for a new trial, but the court held the direction right. In that case an attempt was made to make the defendant liable for the use of trade-marks without reference to his intention, but it was thoroughly canvassed and rejected by the whole bench. See *Browne* on Trade Marks (2).

In the Treatise on the Law of Trade Marks in *England* (1877) of *Ludlow* and *Jenkins*, the authors on this point say:

But although in the opinion of the authors the view that the

(1) 4 Man. & Gr. 357. (2) P. 395.

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action depends on fraud is incorrect, still, as it has long maintained its ground, and has never in the common law courts been judicially abandoned, it is necessary for the practitioner to be acquainted with it.

According to the view which we are now considering, it becomes necessary therefore in an action for the infringement of a trade-mark to show.

1. That the defendant asserted that which was false as by selling his manufactures as and for the manufactures of the plaintiff.

2. That the defendant did this knowingly, that is, with the intention to pass them off as the plaintiffs manufactures.

3. That the plaintiff has been injured.

Every case of putting another trade-mark on one's own goods is not actionable. It must be put on with the intention to deceive.

In *Edelston* v. *Edelston* (1), Lord Chancellor *Westbury*, when giving judgment, said:

At law, the proper remedy is by an action on the case for deceit; and proof of fraud on the part of the defendant is of the essence of the action. But this court will act on the principle of protecting property alone, and it is not necessary for the injunction to prove fraud in the defendant.

In equity the rule is different in this respect from that of the Common Law Courts. This is essentially an action brought in a common law court irrespective of equity jurisdiction, and must be so dealt with.

The Dominion statute 31 *Vic.* ch. 55, which provides for the registry of "Trade Marks," imposes penalties for the use of another person's trade mark, and for the close imitation of it so as to deceive ordinary purchasers. In a succeeding section is reserved the right of action by the proprietor of a trade-mark "against any person using his registered trade-mark or any fraudulent imitation therefor, or selling articles bearing such trade-mark or any such imitation thereof."

To sustain an action under the statute for using a trade mark, a fraudulent intention is not required to be shown, but no action for an imitation lies under it, unless it is found to have been done fraudulently

(1) 1 DeG. J. & S. 199.

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The statute is therefore but an affirmance of the common law on the subject. In all the cases in the Common Law Courts, I have had an opportunity of seeing where the complaint was not for the use of a trade-mark, but for a simulated imitation of one, fraud was charged, and in all the cases where the plaintiffs were successful, it was found.

If, then, such be the state of the law, we must consider the circumstances under which the respondents adopted and used their trade-mark. They did not manufacture the particular kind of soap when applied to by *Bonnin*, but, having been applied to, they agreed to make the article for him. They adopted the trade-mark, as is proved by one of the partners, called as a witness by the appellants, without any reference to that of the appellants. That statement is fully sustained by *Bonnin*, another witness called by the appellants, and also by the son of one of the defendants; and their statements being uncontradicted should be received as true. That position is, also, sustained by *Bonnin*, who states that he never intended to, or did, sell any of the soap as that made by the appellants; and also by the fact that no evidence was given to show that any person bought *Bonnin's* soap for that of the appellants. It is admitted the respondents and *Bonnin* knew the appellant's trade-mark; but, from all the surrounding circumstances as furnished by the evidence, I have no difficulty in concluding that in adopting the trade-mark neither the respondents, nor *Bonnin* had any intention of making fraudulently a simulated imitation of that of the appellants. If fraud is necessary to be established and the authorities show that it is, I am clearly of the opinion that the evidence calls for a finding, that it did not exist on the part of the defendants in this case.

But admitting that the rule in equity should

govern in the common law courts, we must next decide whether there was really such a similitude between the two trade-marks as would make the respondents liable. *Browne* in his treaties on trade-marks, says : (1)

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It is frequently a difficult matter to determine what is an infringement. The two marks which are supposed by the plaintiff in a case to conflict may resemble each other and yet be different. The question then arises, is the difference only colorable? No general rule can be laid down as to what is, or what is not a mere colorable variation. All that can be done is to ascertain in every case as it occurs, whether there is such a resemblance as to deceive an ordinary purchaser, using ordinary caution.

See for his authority Lord *Cranworth* (2).

According to that authority, the rule, which is always applied, is in substance that the resemblance must be such as to deceive an ordinary purchaser using ordinary caution. Evidence on the part of the appellants was given by witnesses, all of whom, I think, could read; and, although saying they would not themselves be deceived, gave it as their opinion that parties who could not read might be. As some intimacy with the trade-mark said to have been imitated is necessarily assumed, I have already shown two important features by which illiterate persons who could not read could frustrate an attempt to deceive them in regard to the soap of the appellants, the one the horn conspiciously shown on the unicorn's head, and the other, that in the case of *Bonnin's* soap the trade-mark is all on one side of the cake.

In the treatise last cited (3) the author says :—

Now, although a court will hold any imititation colorable which requires a careful inspection to distinguish its marks and appearances from those of the manufacture imitated, it is certainly not bound to interfere when ordinary attention may enable a purchaser to discriminate. And again, it does not suffice to show that persons incapable of reading the lables bearing the mark, might be deceived

(1) At p. 24.

(2) 11 Jur. 513.

(3) See p. 387.

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by the resemblance. It must appear that the mass of ordinary purchasers paying that attention that such persons usually do in buying the article would be deceived, *Partridge* v. *Menck.* (1)

The latter I hold to be the true interpretation of the law in the case to which it refers, and if so, there is not the slightest evidence to sustain the case of the appellants. Its main strength consisted of evidence, (not of experts or illiterate parties themselves), given by persons who said they would not have been deceived, but that persons unable to read were likely to be. In none of the English or American cases that I have found is such a position taken; nor can I think it could in any case be properly allowed to influence a decision. In this case, however, the testimony of the appellants' witnesses is more than neutralised by that of about double the number on the other side, who state that there would be no likelihood of any one using ordinary caution being deceived.

The weight of evidence strongly preponderates on this important point in favor of the respondents.

I will hereafter cite, at some length, as bearing upon this case, the judgment in the House of Lords, in what is called "the case of the Leather Companies," before referred to (2)—the decision in which was against the plaintiff—because the trade-marks of the two parties in that case were in their general character and features relatively to each other more like those in this case than in any other case I could find. The proceedings in that case were in equity for an injunction. The Vice-Chancellor decided in favor of the plaintiff, but the Lord Chancellor reversed the judgment, and the case was taken on appeal to the House of Lords. See also the case of *Denis & Mounier Vighnier, Dodart & Co.*, cited in *Browne* on Trade Marks (3), and referred to by Mr. Justice *Cross* in his judgment.

(1) 2 Sand. Ch. R. 622. (2) 11 Jur. 513.
(3) P. 174.

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Lord *Cranworth:*

The defendant's trade mark is certainly not the same as that used by the appellants. But it is only colourably different? I think it is so different as to make it impossible to say that it is substantially the same. No general rule can be laid down as to what is or is not a mere colourable variation. All which can be done is to ascertain in every case as it occurs, whether there is such a resemblance as to deceive a purchaser using ordinary caution. Here the differences are so palpable that no one can be deceived. In the first place, the shape is different. The plaintiff's trade-mark, if trade-mark it is to be called, is contained in a circle. The design of the defendants' is a semi-circle mounted on a parallelogram. It is said that the defendants' goods may be so rolled as to expose only the semi-circle. and so lead to the belief that the device in its integrity is a circle, I answer *vigilantibus non dormientibus, leges subserviunt.* There might, however, be some force in the observation if the upper half was the same as, or even if it closely resembled, the upper half of the plaintiff's device. But this is not so. The name of the company is different. The word "Crockett" is prominently exhibited twice in the plaintiff's upper half; not once in the defendants. No one taking the trouble to read the two can say that he would be deceived.

The gist of the complaint in all these cases is, that the defendants, by placing the plaintiff's trade-mark on goods manufactured by the defendants, have induced persons to purchase them, relying on the trade-mark as proving them to be of the plaintiff's mauufacture. This necessarily supposes some familiarity with the trade mark. But to any one at all acquainted with the plaintiff's trade-mark in this case, I can hardly think that, even on the most cursory glance, there could be any deception.

Each of the trade-marks, it is true, as well that of the plaintiffs as that of the defendants, contain within its periphery an eagle, or that which we suppose was meant to represent an eagle, but not at all resembling each other. The rest of the device, if it is to be called a device, consists merely of words intended to indicate the nature or quality of the article, the place of its manufacture, and the names of the manufacturers. No one reading the two could fail to see that they differ in all these particulars. The letters are all printed in very large type, and the diameter of the circle which contains them is above six inches, so that there can be no difficulty in deciphering what is stamped.

I mention this because, if, instead of occupying the large space, the whole had been engraved on a stamp of the size of a sixpence or

(1) 11 Jur. 513. (2) P. 174.

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a shilling. so as not to be capable of being read without a magnifying glass, or even without close examination, the case might have been different. A person purchasing leather cloth so stamped might perhaps fairly say, "I did not attempt to decipher what was stamped on the article which I bought. I saw it had on it what appeared to be, and what I could not discover not to be, the plaintiff's stamp, and I therefore took it for granted, it was the produce of his manufactory." But this cannot apply to a case like that now before us, where that which is called a trade-mark is, in truth, an announcement of the names of the manufacturer, the style of the firm, and the place of the manufacture, in large letters, not only capable of being easily read but intended to be read by all to whom the goods are exposed for sale.

The object of the plaintiffs in the use of their device was to announce (I do not say unfairly or dishonestly to announce) to purchasers that they were buying goods manufactured at what was the original International Leather Cloth Company, at *West Ham*, carried on by Messrs. *Crockett*. I do not think that a firm using device by way of trade-mark can say that a rival manufacturer is guilty of an infringement when he has adopted a device differing in shape, and announcing in letters equally large and legible, the name of a different firm manuacturing goods at a different place. On this short ground, I think that the appeal ought to be dismissed with costs.

Lord *Kingsdown* says:

My lords, there are two questions to be decided in this case: first, whether the plaintiffs, the present appellants, have proved their allegation that their right to the exclusive use of what is called their trade-mark has been violated by the defendants; secondly, if that fact be established, whether there are such mis-representations made by the plaintiffs in their trade-mark as to disentitle them to protection in a court of equity. The rules of law applicable to both questions are sufficiently clear and simple, though some difference of opinion seems to prevail as to the precise principles on which they rest; and great difficulty is often found in applying (in this as in other matters) known rules to the facts of particular cases.

The fundamental rule is, that one man has no right to put off his goods for sale as the goods of a rival trader, and he cannot, therefore (in the language of Lord *Langdale*, in the case of *Perry* v. *Truefit* (1), be allowed to use names, marks, letters, or other indicia, by which he may induce purchasers to believe that the goods which he is selling are the manufacture of another person." A man may mark his

(1) 6 Beav. 73.

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own manufacture, either by his name, or by using for the purpose any symbol or emblem which comes by use to be recognized in trade as the mark of the goods of a particular person, no other trader has a right to stamp it upon his goods of a similar description. This is what I apprehend is usually meant by a trade-mark, just as the broad-arrow has been adopted to mark Government stores; a mark having no meaning in itself, but adopted by and appropriated to the Government.

The plaintiffs' trade-mark, or what they call such, is of a different description, and, under the second question for consideration, the difference may be material, but for the first question it does not seem to me to be so.

In dealing with this point, it may be useful to consider, firt, what representations, the defendants had a right to make, and next, what representations they actually have made. The leather cloth, of which the manufacture was first invented or introduced into this country by the *Crocketts*, was not the subject of any patent. The defendants had a right to manufacture the same article, and to represent it as the same with the article manufactured by *Crocketts*. And if the article had acquired in the market the name of *Crockett's* leather-cloth, not as expressing the maker of the particular specimen, but as describing the nature of the article by whomsoever made, they had a right in that sense to manufacture *Crockett's* leather-cloth, and to sell it by that name. On the other hand, they had no right, directly or indirectly, to represent that the article which they sold was manufactured by *Crocketts*, or by any person to whom *Crocketts* had assigned their business or their rights. They had no right to do this, either by positive statement or by adopting the trade-mark of *Crocketts & Co.*, or of the plaintiffs to whom *Crocketts* had assigned it, or by using a trade-mark so nearly resembling that of the plaintiffs as to be calculated to mislead incautious purchasers.

These being, as I conceive the rights of the defendants, and the limits of those rights, what is it that they have actually done, and in what respect have they infringed the rights of the plaintiffs?

That depends upon the question, how far the defendants' trade-mark bears such a resemblance to that of the plaintiffs' as to be calculated to deceive incautious purchasers. If we compare the statements of the two trade-marks, there is no statement in the one which can be considered as identical with, or indeed as resembling, the other, except this, that both profess to sell leather-cloth,—a profession which both have a right to make.

The defendants describe their articles as "Leather cloth, manu-

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factured by their manager, late with *J. R. & C. P. Crockett & Co.*," clearly showing that they do not pretend that their cloth is manufactured by that firm, or by any persons who have succeeded in business to that firm. The plaintiffs, on the other hand, describe their article as "*Crockett & Co's.* tanned leather-cloth, patented 24th January, 1856. *J. R. & C. P. Crockett* manufacturers.

Neither in the description of the article to be sold nor of the makers is there anything to be found which could induce any person of common sense to suppose, that in buying the defendant's goods he was buying what had been manufactured by the plaintiffs. But it is said that, in the form of the stamp, the adoption of the American Eagle as an emblem and the collocation of the words "*J. R. & C. P. Crockett & Co.*", there is an obvious imitation of the plaintiff's mark, likely to lead to a mistake of the defendants' goods for the goods of the plaintiffs.

On comparing the two stamps, there does not appear to me to be any such general resemblance as is relied on, nor do I think that there was, in truth, any intention to produce such result, though the intention is immaterial if the result be produced.

I think that the object of the defendants was of another kind; that their object was not to represent their company as the plaintiff's company or their goods as the plaintiffs goods, or to produce any confusion between the two, but to represent themselves as a rival company, manufacturing and selling the same article with the plaintiff's, viz., the leather cloth invented or supposed to have been invented by *Crockett's*, in *America*, and which they desire to recommend to customers, holding out that it is manufactured, not by *Crockett's*, but by persons who, having been in the employment of *Cockett's*, may be supposed to have acquired complete knowledge of their process. Now, these representations are no infringement of the plaintiffs rights; and the purpose which I have supposed, accounts for the similarity, as far as there can be said to be any similarity between the trade-marks of the two companies. The defendants wish to represent that their business consists in manufacturing and selling, not merely leather cloth, but the particular leather cloth invented in *America* by *Crockett & Co.*, and they, therefore, take the name of the *American* Leather Cloth Company. For the same reason they adopt the *American* Eagle as a badge, but their figure has not the smallest resemblance to the same emblem on the plaintiff's representation. For the same reason they refer, in prominent characters, to *J. R. & C. P. Crockett & Co.* for the purpose of shewing that they manufacture the same article which *Crocketts* manufactured, and have the means of using the same processes which

Crocketts used, by the employment of a person who was in the service of these gentlemen.

If this statement be true the defendants are justified in making it; but if it be untrue, however reprehensible the statement may be, it does not constitute a colorable imitation of the plaintiff's trade-mark or amount to an infringement of their rights. I think, therefore, that the plaintiffs have failed in proving the fact which forms the foundation of their case and in establishing any ground for the interference of the court; and that for this reason, if for no other, the appeal must be dismissed.

Lord Chancellor :—

My lords, what is here called by the appellants a "trade-mark," is, in reality, an advertisement of the character and quality of their goods; and dropping for a moment all reference to the incorrect and untrue statements contained in that advertisement. I will take only what is called the "trade-mark," of the plaintiffs and the rival or antagonistic trade-mark of the defendants, and compare them together, taking them as if they were simply, what in reality they are, two advertisements, each affixed by way of label to the articles manufactured by the parties respectively. Now, comparing them merely as advertisements, and taking them in that character alone, and we shall at once find that there are a variety of statements contained in the advertisement of the appellants which are not to be found in any form, direct or indirect, in the advertisement of the respondents.

My lords, this advertisement is the sole foundation of the plaintiff's case, and their allegations must be reduced, in substance to this—that, having advertised and described their goods in a particular manner, the defendants have borrowed their advertisements, and described their goods in substantially the same manner. Let us see, then, whether that is all correct. In the first place, the plaintiffs, in their advertisements, describe their manufacture as "*Crockett & Co.'s* Leather Cloth." The sole denomination applied by the advertisement of the defendants, is "Leather Cloth" (which was perfectly well known, independently of *Crockett & Co.'s* cloth). Further, the plaintiffs state, not only that they make and sell *Crockett & Co.'s* leather cloth, but that it is "tanned leather cloth,"—an allegation to which there is nothing whatever similar or corresponding in the advertisement of the defendants. Further, the appellants represent that their article is the manufacture of *J. R. & C. P. Crockett*, for they are described as the manufacturers. Not only is there nothing correspondent to that in the advertisment of the defendants, but what the defendants assert is simply, not that it is

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manufactured by *Crockett & Co.*, but that it is manufactured by their manager, who was formerly in the employ of *J. R. & C. P. Crockett & Co.* If, therefore, these are regarded as being what in reality they are, representations of two different articles, it is impossible to say that the representation which is contained in the advertisement of the one contains, either identically or substantially, the representations which are contained in the advertisement of the other; and if you drop the statement in words, and take only the symbols employed in the one case and in the other, it will be found that they differ entirely in their character and effect in the two cases. In the one case it will be seen that you have the eagle with the wings fully extended; in the other case you would have that which is called, I believe, in America, the "screaming eagle," armed with his talons, and perfectly different in character and shape from the other. There is also another, which seems to be intended to be a representation of a sparrowhawk, which, again, is very different from the others.

My Lords, I have added these few observations for the purpose of showing, not only that the ground which I took in the court below was a ground sufficient for my decision, but also that the grounds which have now been superadded by my noble and learned friends, and which I regret I did not more fully consider and adopt as the basis of my former judgment, would warrant the same conclusion, and would, perhaps, have tended still more in favor of the defendants. My Lords, I concur entirely in the motion that has been made, that this appeal be dismissed, with costs.

A *fac-simile* of each trade-mark is given in the report, and, comparing them with the exhibits of the cakes of soap in this case, the former are at once seen to bear a much stronger general resemblance to each other than do the latter to each other.

Looking at the trade-marks in this case in the light of the views entertained and expressed by Lord Chancellor *Westbury*, and the two other eminent and distinguished jurists, as above quoted, we should find that in this case there was no imitation of the appellants' trade-mark. Mr. Justice *Cross* very properly says:—

The inscription has no kind of resemblance to that on Mr. *Barsalou & Co.'s* soap, there being but the one word "Laundry" used in common, all the others being different.

In the case of the leather companies both trade-marks

included the figure of an eagle, but it was held that there was such a difference as to their appearance, as to require purchasers to discriminate. It was contended that being figures plainly of an eagle, parties might be deceived, but the three learned judges held there was a sufficient variation. The distinctive features were not, I hold, as great in that case, as would be apparent as between the horse's head and that of the unicorn's in this.

As this is the first case that has come before this court on the subject of trade-marks, and as the matter is one of great importance in connection with the manufacturing and trading interests of the country, I have felt the obligation of dealing fully with the subject and have advisedly arrived at the conclusion that, by sustaining the claim of the appellants, we would put an unnecessary and improper restraint on the industry and trade of the country, and do injustice to the respondents.

I think the appeal should be dismissed and the judgment below affirmed with costs.

TASCHEREAU, J.:—

As well remarked by Mr. Justice *Cross*, in rendering the judgment of the *Quebec* Court of Appeal, "any difficulty in the case arises more from the appreciation and applicability of the evidence to the particular case than doubt as to the principles of law which should govern it."

If I do not misunderstand the reasons given by the learned judge, there can be no dissent from the law as laid down by him, viz., that the imitation of a trade-mark to be illegal must be such as to mislead the public into taking the one for the other. But it is in its application to the facts in evidence in this case, and in its determination that there is here no illegal imitation,

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that I feel constrained to dissent from the judgment appealed from and to adopt the conclusion of the learned judge who gave the judgment in the first instance.

The facts of the case have been summed up by my brother *Fournier*, and it is unnecessary for me to repeat them here. They, in my mind, clearly show that any ordinary purchaser, any one whose attention had not been drawn to the difference between the two soaps, any illiterate person who desired to buy the soap called the "Horse's Head Soap," and who did not known that there was a unicorn's head as well as horse's head soap, might very easily be deceived and take one for the other.

It is sufficient, says the Cour Impériale of *Paris*, (decision of March 21st, 1866, *Sirey* (1)), to consider an imitation of a mark or of a label fraudulent, that the imitation be of a nature to create confusion and to deceive the purchaser, even when there exist certain differences of detail, such as a modification in the denomination of the product, and of the indication of the maker's name.

In the former case there is an indication of the maker's name on the respondent's soap; but what difference is this for a person who cannot read, as is the case with a large number of those who buy these soaps

And as held in another case (2): "In order that there be a fraudulent imitation of a trade-mark . . . . . it is not necessary that the imitation be servile, it is sufficient that it be of a nature to deceive the purchaser."

I refer also to the following cases:—

Blofield v. *Payne* (3); *Seixo* v. *Provezenda* (4); *Singer's* case (5); *Orr-Ewing* v. *Johnston* (6); *Civil*

(1) Vol. of 1866, part 2, p. 263.
(2) *Sirey* Vol. of 1862, part 2, p. 826.
(3) 4 B. & Ad. 410.
(4) L. R. 1 Chy. 192.
(5) L. R. 3 App. Cas. 376.
(6) 13 Ch. Div. 434.

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Service v. *Dean* (1); *MacRae* v. *Holdsworth* (2); *Hall* v. *Barrows* (3); *Edelston* v. *Edelston* (4); *Hall* v. *Barrow* (5); *Read* v. *Richardson* (6); *Barron* v. *Lomas* (7); *Crawford* v. *Shuttock* (8)—a case as this one on trade-marks in the manufacture of soap; *Davis* v. *Reid* (9).

I am of opinion to allow the appeal, with costs, and to restore the judgment given by the Superior Court against the respondent—one hundred dollars, with costs of suit.

Appeal allowed, with costs.

Attorneys for appellants: *Beique & McGoun.*

Attorneys for respondents: *Cruickshank & Cruickshank.*

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*Mar. 23.

*June 18.

CLEOPHAS BEAUSOLEIL, *es-qualité*.....APPELLANT;

AND

TELESPHORE E. NORMAND.....RESPONDENT.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA (APPEAL SIDE).

Agreement to pledge moneys by a debtor, validity of—Articles 1966, 1969, 1970 *C. C.*

G., in 1878, being unable on account of the depression of business to meet his liabilities, applied to his creditors for an extension of time for the payment of their claims, showing a surplus of $6000, after deduction of his bad debts. The creditors consented to grant his request and agreed to accept *G's* notes at 4, 8, 12 and 16 months, on condition that the last of them should

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

(1) 13 Ch. Div. 512.
(2) 2 De G. & S. 496.
(3) 4 De G. J. & S. 150.
(4) 1 De G. J. & S. 185.
(5) 33 L. J. Ch. 204.
(6) 45 L. T. N. S. 54.
(7) 28 W. R. 973.
(8) 13 Gr. 149.
(9) 17 Gr. 69.

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be endorsed to their satisfaction. *N.* (the respondent) agreed to endorse the last notes on condition that *G.* should deposit in a bank in his (*N's*) name $75 per week to secure him for such endorsation, and *G.* signed an agreement to that effect. Thereupon *N.* endorsed *G's* notes to an amount of over $4000, and they were given to *G's* creditors. On 31st July, 1879, *G.*, after having deposited $2,007.87 in *N's* name, in the *Ville Marie Bank*, failed, and *N.* paid the notes he had endorsed, partly with the $2,007.87.

B., as assignee of *G.*, brought an action against *N.*, claiming that the payments made to *N.* by *G.* were fraudulent, and praying that the money so deposited might be reimbursed by *N.* to *B.* for the benefit of all *G's* creditors.

Held,—Affirming the judgment of the Court of Queen's Bench (*Ritchie*, C.J., and *Fournier*, J., dissenting), that the arrangement between *G.* & *N.* by which the moneys deposited in the bank by *G.* became pledged to *N.* was not void either under the Insolvent Act or the Civil Code; there was no fraud on the creditors, nor such an abstraction of assets from creditors as the law forbids, but a proper and legitimate appropriation of a portion of *G.'s* assets in furtherance and not in contravention of the rights of the creditors, giving at the most to the surety a preferential security which could not be said to have been in contemplation of insolvency or an unjust preference.

APPEAL from the judgment of the Court of Queen's Bench for *Lower Canada* (appeal side) rendered on 28th April, 1882, reversing the judgment of the Superior Court and dismissing the present appellant's action.

This action was instituted by the appellant in his capacity of assignee to the estate of *J. P. Godin*, a trader of *Three Rivers*.

In November, 1878, *Godin* became embarrassed and exhibited to his creditors a statement of his affairs shewing that he had a surplus of assets over his liabilities to the extent of $6,000. They signed a written agreement giving him an extension of time to meet his then liabilities, accepting his promissory notes for instalments at four, eight, twelve and sixteen months, those falling due at the last date being endorsed by the respondent *Nor-*

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mand. To induce *Normand* to become his security *Godin* agreed to deposit weekly in the *Banque Ville-Marie* $75 to the credit of *Normand* in trust, which, he *Normand*, was authorized at any time to draw and apply in payment of the paper he had so endorsed for *Godin*. This agreement was reduced to writing and was made known to *Godin's* principal creditor, who took a leading part in getting the extension of time sanctioned by the other creditors (1).

The extension was obtained.

Godin continued to make his payments until July, 1879, by which time he had deposited to the trust fund in *Normand's* name $2,007.87, but, having to succumb to the then prevailing depression, he was, in July, 1879, put into insolvency, whereupon *Normand* withdrew the monies so placed to his credit in trust in the *Banque Ville-Marie* and employed them to liquidate the notes he had so endorsed for *Godin*, but the sum being insufficient for that purpose, he was obliged to contribute about $2,000 of his own means to take up the endorsed notes in question.

Mr. *Geoffrion*, Q.C., for appellant, contended that at the time of the agreement *Godin* was insolvent, within the meaning of art. 17, sec. 23 of the C. C. (*L.C.*), and that the pledge of monies to respondent by *Godin* was contrary to the contract of suretyship entered into by the respondent with the creditors, and could not be valid without their consent, and was made in fraud of their rights; secs. 130, 132, 133 Insolvent Act.

Mr. *Lacoste*, Q.C., for respondent contended that the evidence clearly established that the agreement between *Godin* and respondent was not in contravention of any of the sections of the Insolvent Act, that all the conditions to perfect a contract of pledge having been fulfilled, the moneys deposited by *Godin* in the bank *Ville-*

(1) See p. 720.

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Marie in the name and to the credit of the appellant had been legitimately pledged.

RITCHIE, C. J.:

I think the agreement between *Normand* and *Godin*, not communicated to the creditors, was a fraud on the arrangement by which the creditors gave an extension of time on their claims of 4, 8, 12 and 16 months without interest, the last payment secured by *Normand;* that any agreement by which *Normand* was to be secured out of the assets of *Godin* for his so being surety for such last payment in preference to the creditors, without the same being communicated to them, was a fraud on the creditors. They had a right to assume that *Normand* was a security in addition to the assets of *Godin*, and if he was to be secured out of these assets, whereby the creditors' security for the payment of the first three notes was to such an extent diminished, they had a right to know it. When *Godin* applied for an extension of time the creditors were entitled to the strictest good faith on his part, and on the part of those securing the fulfilment of the undertakings, on the strength of which the extension was to be granted, and if any preferences were to be given, to know the nature and extent thereof, whether to the individual creditors or the sureties of the creditors. The agreement between *Godin* and *Normand* appears on the face of the writing to be dated December, 1878, but it was evidently entered into before the agreement of the 29th November, 1878, for extension of time between *Godin* and his creditors, for that agreement is based on *Normand's* securing the last payment, and on *Normand's* consent to do so, which is made apparent by the defendant's factum, so that in point of fact this agreement between *Normand* and *Godin* wa sactually entered into while *Godin* was unquestionably insolvent and unable

to meet his liabilities. The respondent's factum thus puts it:—

During the month of November, 1878, *Godin*, not being able to collect sufficiently to meet his liabilities on account of the depression of business prevailing at the time, applied to his creditors for an extension of time for the payment of their claims. The creditors consented to grant the demand and agreed to accept *Godin's* notes at four, eight, twelve and sixteen months, on condition that the last of them be endorsed to their satisfaction. *Godin* then applied to the respondent for his endorsation. The respondent first asked for a statement of *Godin's* affairs, and after finding out about the aforesaid surplus, he consented to endorse the last notes of *Godin's* composition, on condition that *Godin* would deposit in the *Ville-Marie* bank, at *Three Rivers* in the name of the respondent, and to secure him for such endorsation, seventy-five dollars every week.

Godin being at the time insolvent, and the creditors being willing to give their debtor time on receiving security for the last instalment, *Godin* had no right to bargain behind the backs of the creditors with a person to become such surety, who must also have known of his inability to meet his engagements and therefore in that sense insolvent, to the detriment of the creditors who were about to grant him the extension of time, by giving the surety such a control over the debtor's assets for his protection, as must necessarily depreciate the security of the creditors in respect of the notes given them for the three first instalments: in other words, entering into such an agreement with the debtor, the creditors were entitled to be informed of everything connected with the arrangement, so that they might be enabled to form an intelligent judgment as to the propriety of acceding or not to it; that no one creditor should obtain an unequal advantage over the other, still less that he who professed to be securing the arrangement in whole or in part should be permitted to do so.

In agreeing to give time without security for the first, second and third instalments, it is not reasonable

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to suppose creditors could have contemplated that the funds out of which the unsecured notes should be paid would be weekly set apart, not to pay these notes as they became due, but to remain in the bank to meet the secured instalment due four months after the time when the last of the three would fall due, and therefore the withholding of the information of this important fact from the creditors was calculated to mislead the creditors ignorant of it into agreeing to that to which they might not otherwise have assented.

There is no room for the contention of defendants that if the security to defendants is not good, his endorsation is not. The one has no dependence on the other at all, endorsement as between the creditors and *Normand* is all right as carrying out *Godin's* and *Normand's* agreement with them, but the security between *Godin* and *Normand*, of which they knew nothing, is all wrong, as a fraud on the creditors.

The communication to Mr. *Linton*, who appears to have been a friendly creditor, and acting in the interest of the debtor rather than the creditors, by no means relieves, in my opinion, the burthen alike on *Godin* and *Normand* of acting in the utmost good faith with all the creditors, and does not relieve a preference to an individual creditor or a surety, a knowledge of which is withheld from the creditors, from being an unjust preference.

The very withdrawal of this amount from his business may have led to or accelerated his final insolvency.

Under these circumstances, I am of opinion, that the appeal should be allowed.

STRONG, J.:—

I am of opinion that the judgment of the Court of Queen's Bench ought to be affirmed.

It is impossible to say that the arrangement between

Godin and the respondent was void under any of the provisions of the Insolvent Act, and it is equally impossible to point out any express provision of the common law, as contained in the Civil Code of *Quebec*, against which it offends.

Then, can it be said to have been in fraud of the creditors of *Godin*? It seems to me very clear that it cannot. By the arrangement with his creditors *Godin* was left free to deal with his assets as he thought fit; subject only to this, that, like every other debtor, he was bound not to make any fraudulent disposition of them so as to defeat the just claims of his creditors. The question therefore is reduced to this, was the agreement to make the deposit of $75 a week, upon the faith of which the respondent became a surety for the last payment, such an abstraction of assets from creditors as is forbidden by law? And that this question must be answered in the negative seems to be plain; since the very object of these weekly deposits was to create a fund for the payment of the creditors. The money raised by it was always intended to be paid to the creditors, and was in the result actually so applied. It is, therefore, a contradiction in terms to say that it was a contrivance in fraud of creditors.

The fallacy of the argument on behalf of the appellant consists in this, it assumes that the surety whom *Godin* was to find to guarantee the last payments was himself to bear the burden of the payments without any recourse to *Godin* or his assets. This is altogether an erroneous assumption, for it is manifest from the very terms of the agreement with the creditors that *Godin* himself was, as is the case in every contract of suretyship, to be the party principally liable, and the surety was only to be liable in the event of *Godin's* default, such an order of liability being necessarily implied in the very words used in the agreement of the 29th November, 1878,

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"the last payment secured by *T. E. Normand* of *Three Rivers*."

The agreement between *Godin* and the respondent therefore merely provided for a proper and legitimate application of a portion of *Godin's* assets, and has resulted in such an application accordingly.

Had an arrangement of a similar nature been made with one of the prior creditors of *Godin*, providing, for instance, that *Godin* should make a deposit for the purpose of creating a fund for the payment of the extension notes of that particular creditor, and had that arrangement not been communicated to the whole body of creditors, such an arrangement would have been clearly in fraud of creditors generally, and the assignee would have been entitled to the money deposited in pursuance of its terms, and to recover from the favoured creditor any sum which might have been paid over to him. But the respondent does not stand in the same position as one of the old creditors who entered into an agreement to give time to the debtor on the implied understanding and agreement between each of them and all the others that all were to be treated on terms of perfect equality. The respondent, on the other hand, comes in subsequently under an agreement made with *Godin* alone, and which the latter was perfectly free to make, provided it did not unlawfully prejudice his creditors, and that it did not prejudice them is apparent from two considerations, for, first, it tended to carry out the arrangement that they were to have security for the last payment; and, secondly, it provided for the formation of a fund out of *Godin's* assets for the purpose of being handed over directly to the creditors in satisfaction of the last deferred payment, to which purpose the moneys accumulated under it have in fact been applied. It was therefore in all respects an agreement in further-

ance and not in contravention of the rights of the creditors under the arrangement made by them with their debtor. Again, when the creditors stipulated for a surety for the last payment, they must have contemplated that *Godin* would, under the general law, be bound to indemnify him, and how, then, can they say that a provision for securing this indemnity to the surety is in fraud of their rights? At the most, it was but to give the surety a preferential security; but there is nothing in the law to forbid such a preference, for it could not be said to have been made in contemplation of insolvency, or an unjust preference.

Altogether, I fail to see any shadow of illegality in the agreement between *Godin* and the respondent.

I am also of opinion, for the reasons given in the judgment of Mr. Justice *Tessier*, in the Court of Queen's Bench, that at the time of the insolvency, the respondent had, pursuant to art. 1970 of the civil code of *Quebec*, acquired, through the delivery of these moneys to a third party (the bank) a right of "gage" which, not being, for the reasons before given, tainted with any illegality, gave him a valid preference over the assignee as representing the general body of creditors. The case of *exparte Bunell* (1), resembles the present case in every particular, and is an authority for the present decision.

In my judgment, this appeal must be dismissed with costs.

FOURNIER, J.:

En 1878, *J. P. Godin*, marchand de la ville de *Trois-Rivières*, forcé de suspendre ses paiements, fit avec ses créanciers un concordat par lequel ceux-ci consentirent à accepter le paiement de leurs créances respectives par versements à 4, 8, 12 et 16 mois de date, mais

(1) 1 Ch. D. 537.

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sans intérêt. Suivant les termes de l'arrangement, (*the last payment secured by T. E. Normand of Three Rivers,*) le paiement du dernier versement devait être garanti par l'Intimé. Ainsi pour compléter ce contrat if fallait le concours de trois différentes parties contractantes, savoir : parties de première part, les créanciers de *Godin* ; partie de la seconde part, *Godin* lui-même ; enfin, de la troisième part, l'Intimé, comme caution. Toutes ces parties y donnèrent leurs concours, d'abord les créanciers en accordant les délais et la remise demandés, *Godin* en les acceptant et l'Intimé en fournissant la sûreté requise. Conformément à cet arrangement, *Godin* remit à ses créanciers, les billets promissoires, payables aux échéances convenues. Les derniers portaient, suivant la convention, l'endossement de l'Intimé. L'obligation par lui contractée comme caution et endosseur est générale ; il n'y a été apporté aucune restriction quelconque, si ce n'est la limite du montant du cautionnement fixée à un quart du passif de *Godin* représenté par les billets portant l'endossement de l'Intimé. Mais celui-ci, avant même de se porter caution, avait, à l'insu des créanciers, fait avec *Godin* l'arrangement suivant :—

Nous soussignés convenons de ce qui suit : Moi *Joseph Philippe Godin,* m'oblige envers *Télesphore Eusèbe Normand,* à verser tous les samedis durant une année à dater du premier décembre courant, une somme de soixante-quinze piastres, dans le fonds d'économie de la Banque Ville-Marie, portant intérêt, pour garantir d'autant le dit *T. E. Normand* de divers endossements faits en ma faveur pour mon bénéfice au profit de mes créanciers et de moi, les dits endossements se montant à la somme de quatre mille sept cents piastres, payable par billets à seize mois de la date du vingt novembre mil huit cent soxiante-dix-huit. Le dit dépôt sera fait au nom de *T. E. Normand in trust,* le dit *T. E. Normand* aura le droit de retirer le dit argent et le payer à compte de ses endossements de manière à le libérer ainsi que moi, de ses dits endossements, les intérêts perçus sur le dit argent soit de la Banque Ville-Marie ou par le rachat des dits billets

sera pour le bénéfice du dit *Godin*, ce à quoi moi le dit *T. E. Normand* m'oblige.

Signé en double à *Trois-Rivières*, décembre 1878.

T. E. NORMAND.
JOS. PHI. GODIN.

Lors de la remise des billets portant l'endossement de *Normand* (l'Intimé) aucun des créanciers ne connaissait l'existence de cette convention. Un seul, *Linton*, en fut informé, mais après l'exécution complète et finale du concordat.

En vertu de cette convention la somme de $2,360 avait été retirée du commerce de *Godin* et déposée en banque au nom de *Normand in trust.*

Godin ne paya que le premier versement de sa composition; à l'échéance du second il tomba de nouveau en faillite. Le jour même et pendant les quelques jours qui précédèrent cette seconde faillite, *Normand* retira le montant des dépôts et l'employa à acquitter pour partie la dette qu'il avait cautionnée. L'appelant ayant été nommé syndic à cette faillite intenta une action contre l'Intimé pour le faire contraindre à rapporter à la masse en faillite de *Godin* les deniers ainsi déposés et retirés par lui. En outre de ces faits l'appelant allègue que lorsqu'il donna ses endossements, l'Intimé connaissait l'état de faillite de *Godin*, que c'était en considération du délai accordé que cet endossement avait été exigé pour les derniers paiements;—que l'arrangement particulier au sujet des dépôts avait été fait à l'insu et en fraude des créanciers, que l'Intimé n'était créancier de *Godin* ni à l'époque de l'arrangement ni lorsqu'il a retiré le montant de ces dépôts frauduleusement détournés de la masse des biens du failli:—que leur convention à ce sujet était contraire aux termes de l'arrangement fait avec les créanciers, et que les paiements faits à l'Intimé par ces dépôts avaient l'effet d'anéantir la garantie qu'il avait lui-même donnée aux créanciers.

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L'Intimé a plaidé que la convention attaquée était une des conditions auxquelles il avait consenti à se porter caution pour *Godin*; qu'elle n'avait pas été tenue secrète, et que certains créanciers de *Godin* en avaient été informés, qu'avec les argents ainsi déposés et par lui retirés de la banque, il avait payé des billets de *Godin* endossés par lui, se montant à une somme excédant celle reçue de cette manière. Il niait aussi la fraude imputée.

Par sa réponse à ce plaidoyer, l'appelant a nié que les créanciers eussent été informés de la convention en question; que l'information reçue par quelques-uns d'entre eux ne pouvaient lier les autres; que cette convention particulière entre *Godin* et l'Intimé aurait dû être portée à la connaissance de toutes les parties à l'acte de *Godin* avec ses créanciers.

La preuve établit les faits allégués par l'appelant. Celle faite par l'Intimé a prouvé qu'un seul des créanciers, M. *Linton*, avait eu connaissance de cette convention, mais après la signature du contrat comme le fait voir l'extrait suivant du témoignage :—

Question :—Did he (*Godin*) mention to what condition *Normand* consented to become security for him? Answer :—He did *subsequently*, after his agreement had been pretty generally signed.—Question :—Was it completed when he mentioned this? Answer :—*I think so*, as far as my memory goes, it was practically completed.... Question :—Did *Godin* tell you that he was to make a deposit of $75.00 every week to the credit of *Normand* for the security of the payment of the last note indorsed by *Normand*? Answer :—I cannot tell you exactly the sum, *but I understood from him that he was to deposit at stated intervals.*—Question :—Did you agree to this? Answer :—I consented. There was no agreement required. [At page 19 of the case the same witness answers as follows in cross-examination :] Question :—Did you inform any of the other creditors of *Godin* of his intent of depositing money as you have above stated? Answer : No.

Godin, dans sa déposition, répond affirmativement à la question suivante :—

Si je vous comprends bien, M. *Linton* est le seul de vos créanciers, à qui vous avez donné l'information des conditions de M. *Normand*? R.—Oui, monsieur.

Par cette preuve il est évident que *Linton* a été le seul informé qu'il devait être fait un dépôt; mais il n'a pu dire si ce dépôt devait être fait au nom de *Godin* ou de *Normand*. Encore n'a-t-il su cela qu'après l'exécution du concordat. Il y a consenti, ajoute-t-il. Mais il n'y a rien dans son témoignage qui fasse voir qu'il consentait à ce que ces dépôts fussent faits en déduction du cautionnement de *Normand*. Dans tous les cas, c'est un fait positif que le consentement, quelle qu'en soit la portée, n'a été donné que par lui seul et par aucun autre créancier; et il n'était non pas le plus fort, mais un des plus forts créanciers. Aucun des autres n'a eu connaissance de cette convention. L'assertion contraire, faite à ce sujet par l'hon. juge *Cross*, est en contradiction évidente avec la preuve. Au surplus la connaissance que *Linton* avait de cette convention particulière ne pouvait lier que lui seul. Il n'était pas l'agent des créanciers, car ceux-ci ont agi personnellement dans cette transaction.

La cour de première instance présidée par l'hon. juge *Sicotte* a donné gain de cause à l'appelant. La Cour du Banc de la Reine a été divisée, deux juges étant pour la confirmation, et trois pour l'infirmation, le jugement a été en conséquence infirmé.

L'hon. juge *Cross* est d'opinion que la convention entre *Godin* et l'Intimé n'est ni une fraude, ni même une préférence. Cela pourrait être vrai si les faits de la cause permettaient d'adopter le point de départ de son argumentation: la solvabilité de *Godin*. L'hon. juge fait à ce sujet les remarques suivantes:

On the statement on which *Godin* made terms with his creditors, he had at the time a surplus, a fact which has not been disputed. The creditors by their agreement with him in effect *consented to*

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his being considered solvent, consequently with the power to deal with, and to dispose fairly of his own estate.

As being solvent, it was quite competent for him to bargain with a person to become his surety, and even to give that person a consideration for becoming such surety. The obligation of that surety, was not that in any event he should himself pay without reference to *Godin's* estate; but that *Godin* would himself pay out his own estate, and that if he failed to do so, he the surety would make good the deficiency which *Godin* had failed to pay by his own exertions, with his own means, and out of his own estate.

C'est sur l'excédant apparent de l'actif sur le passif dans l'état soumis à ses créanciers, que deux des hon. juges s'appuient pour dire que *Godin*, lors du concordat avec ses créanciers n'était pas insolvable. Cependant il était forcé de suspendre paiement, et au lieu de rencontrer ses dettes à leur échéance, il demandait un délai de seize mois, avec réduction de l'intérêt. Le commerçant qui se trouve dans cette condition est en faillite; c'est indubitable. *Pardessus* (1), en parlant de la différence qu'il y a entre la déconfiture et la faillite, dit très positivement que le commerçant qui a suspendu ses paiements, quel que soit l'excédant de son actif sur le passif est en *faillite.*

Indépendamment de cette différence tirée de celle des personnes qui peuvent devenir insolvables, la faillite diffère essentiellement de la déconfiture. La première est un état de cessation de paiement, sans distinction s'il provient d'une insolvabilité réelle et absolue, ou seulement d'un embarras momentané. *Quelque soit l'actif d'un commerçant fut-il dix fois au-dessus de son passif, s'il cesse de payer, il est en faillite.* Au contraire, s'il est exact dans ses paiements; si, par un crédit toujours soutenu, il fait constamment honneur à ses engagements, dut-il dix fois plus qu'il ne possède, il n'est pas *en état de faillite.*

Ainsi le commerçant est *failli* lorsqu'il ne possède plus de crédit, qaund même il aurait plus de biens que de dettes, ce qui n'est pas impossible. On a vu des commerçants avoir pour un million d'immeubles, et au plus 300,000 francs de dettes, être cependant constitués en faillite, parce qu'ils ne payaient pas aux échéances.

La faillite, d'après le code civil, art. 17, sec. 23, est l'état

(1) 4 Vol. p. 579 No. 1321.

d'un commerçant qui a cessé ses paiements. C'est le cas aussi d'après la loi de faillite de 1875, sec. 4, qui autorise les créanciers à procéder en liquidation forcée contre un débiteur qui a cessé de rencontrer ses engagements à leurs échéances. Si au lieu d'adopter les procédés de la sec. 4 que la position de *Godin* aurait justifiés, les créanciers ont préféré s'entendre à l'amiable et accepter la garantie de *Normand*, cela ne change pas sa position de commerçant qui a cessé ses paiements. Sans cette garantie il eût été mis en liquidation forcée comme le fait voir le télégramme du 27 décembre :—

If extension notes are not forwarded at once we shall send an assignee.

D'ailleurs le fait d'avoir réuni ses créanciers pour faire un compromis avec eux enlève tout doute sur la question de son insolvabilité, puisque d'après la sec. 3 de la loi de 1875, c'est précisément l'un des cas où un commerçant doit être considéré en faillite. "Un débiteur, dit-elle, sera (*shall*) considéré insolvable, s'il a convoqué une assemblée de ses créanciers dans le but de composer avec eux." *Godin* en convoquant comme il l'a fait ses créanciers pour prendre des arrangements avec eux s'est constitué en faillite. Cela n'est pas discutable.

Quant à l'argument en faveur de la solvabilité de *Godin*, tiré du fait que son actif excédait le passif, la citation ci-dessus de *Pardessus* le réduit à néant.

Mais, disent encore les hon. juges, les créanciers par leur arrangement l'ont considéré comme solvable. L'hon. juge *Cross* dit :

The creditors by their agreement with him in effect consented to his being considered solvent, consequently with the power to deal with, to dispose fairly of his own estate.

L'hon. juge *Tessier* dit :

A l'époque de ce cautionnement le débiteur n'était pas en faillite, l'état de faillite est créé par le statut, c'est une condition statutaire ;

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les créanciers n'ont pas voulu le déclarer en faillite,—ils ne l'ont déclaré que seize mois après.

La conduite des créanciers fait voir au contraire qu'ils ne considéraient pas *Godin* comme solvable lors du concordat. Avec l'expérience qu'ils ont de ces sortes d'affaires ils ont cru ne devoir estimer son actif qu'à 75 p. c. du passif, en exigeant pour les autres 25 p. c. le cautionnement de l'Intimé. Si *Godin* est alors redevenu solvable et capable de contracter de nouveau pour les fins de son commerce, c'est grâce à cet arrangement. Pouvait-il en détruire les conditions et rester solvable. Du moment qu'il détruisait la garantie des 25 p. c. qui avait eu l'effet de le rendre solvable, il cessait de l'être et retombait dans la position où il se trouvait avant la signature du concordat. C'est clairement ce qu'il a fait par sa convention particulière avec l'Intimé. Il n'était au pouvoir ni de *Godin* ni de *Normand*, sa caution, de faire aucune transaction quelconque tendant à diminuer l'effet du cautionnement donné aux créanciers.

Le principe sur lequel est bâsé le jugement de la Cour du Banc de la Reine, est qu'un commerçant sorti de l'état de faillite par un concordat est habile à faire toutes sortes de contrats pour son commerce. L'appelant n'entend pas contester cette proposition—bien que formulée d'une manière aussi générale, elle ne soit pas sans exception—mais il en conteste l'application à cette cause. *Godin* pouvait sans doute faire des contrats,—mais avait-il le droit de les annuler, modifier ou rendre illusoire seul et sans le consentement des autres parties avec lesquelles il avait contracté ? Lui et l'Intimé pouvaient-ils seuls détruire l'effet du cautionnement donné suivant la convention faite avec les créanciers. C'est un principe élémentaire en matière de convention que pour les annuler ou modifier il faut le consentement de toutes les parties qui y ont pris part. Cette convention ayant été faite à l'insu de tous les créanciers, excepté un seul,

peut-elle modifier d'une manière quelconque les engagements résultant du concordat? Evidemment non. Il faut aussi ne pas oublier que les lois concernant le cautionnement, ne permettent pas à la caution de faire aucun acte qui puisse avoir l'effet de diminuer les sûretés stipulées par les créanciers. Ce serait le résultat inévitable de cette convention particulière si elle doit recevoir son exécution.

En effet, du moment que *Normand* prenait à leur insu sur l'actif les sommes qu'il avait déposées, les créanciers cessaient d'être assurés du paiement de leurs créances. Les sûretés données et convenues se trouvaient diminuées d'autant, en violation des conditions stipulées.

L'hon. juge *Cross*, dans la partie ci-dessus citée de son jugement, a fait encore l'observation suivante au sujet du cautionnement de *Normand*:—

The obligation of this surety, was not that in any event he should himself pay without reference to *Godin's* estate, but that *Godin* would himself pay out of his own estate, and that if he failed to do so, he the surety would make good the deficiency which *Godin* had failed to pay by his own exertions, with his own means, and out of his own estate.

Où l'hon. juge a-t-il trouvé la preuve de la restriction qu'il met aux obligations résultant du cautionnement de *Godin*? Je n'ai pu la trouver nulle part. Bien au contraire, il n'a été fait à ce cautionnement et aux obligations qui devaient en résulter aucune autre restriction que celle du montant, comme le démontrent les termes dans lesquels il a été stipulé:—

The last payment to be secured by *T. E. Normand.*

L'obligation de *Normand* est donc générale d'après la convention. La restriction indiquée par l'hon. juge existe-t-elle dans la loi en faveur de la caution? Je ne crois pas que l'hon. juge ait voulu exprimer cette opinion, car on verra par les autorités citées ci-après qu'elle n'est pas fondée en loi. L'obligation résultant

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du cautionnement peut bien être limitée, mais il faut s'en expliquer. Si dans le cas actuel, les créanciers eussent été, avant de contracter, informés que *Normand* ne consentait à être la caution de *Godin* qu'aux conditions stipulées entre eux et qu'ils eussent accepté en connaissance de cause, ils ne pourraient certainement pas attaquer cette convention. Ils auraient alors fait une convention différente de celle qu'ils prétendent avoir faite. Au lieu de la garantie additionnelle de *Normand*, qu'ils ont exigée, ils seraient en réalité restés seulement avec leur recours personnel contre *Godin* et la garantie de son fonds de commerce. Mais est-ce bien ce qu'ils ont voulu faire ? Certainement non.

Ils ont au contraire voulu s'assurer 25 p. c. en sus des 75 p. c. garantis par le fonds de commerce et ils ont fait une convention en tout semblable à celle au sujet de laquelle *Ponsot* (1) fait les remarques suivantes, en parlant de cautionnement de partie de la dette :—

> Quelle était d'ailleurs l'intention du créancier en se faisant donner par le débiteur une caution qui répondit de partie de la dette? Evidemment son intention était de faire garantir jusqu'à concurrence de la somme cautionnée, de la perte que lui ferait éprouver l'insolvabilité partielle du débiteur. Ainsi par exemple supposons que *Primus*, en prêtant à *Secundus* une somme de 100,000 frs. eût exigé l'intervention d'un tiers qui s'oblige, comme caution, au paiement de la dite somme jusqu'à concurrence de 25,000 francs. Qu'a voulu *Primus* en exigeant un pareil cautionnement? Prévoyant le cas où *Secundus* ne pourrait payer plus de 75,000 francs, il a voulu pouvoir demander à la caution les 25,000 francs qui lui resteraient dus. Mais il n'est pas présumable qu'il ait entendu que la caution serait libérée pourvu que le débiteur lui payât 25,000 francs.

C'est une convention absolument semblable à celle-ci que les créanciers ont fait en exigeant de l'intimé son cautionnement pour 25 pour cent du passif de *Godin*. C'est à cette condition qu'ils se sont déssaisis du fonds de commerce et de tous les autres biens de *Godin*. Mais l'auraient-ils faits si *Normand* leur eût dit "Je suis la

(1) Du Cautionnement No. 345.

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caution de *Godin* pour 25 pour cent du montant de vos créances, mais à la condition que je prenne de suite sur les biens de *Godin* même, le montant que je vous garantis. Je n'entends pas vous payer sur ce cautionnement un seul denier de ma bourse. Ce que je paierai sera tiré de la masse en faillite qui vous appartient." La réponse à une telle déclaration eut été sans doute—"Nous ne voulons pas de cela—la garantie que vous nous offrez nous appartient déjà. C'est notre bien. Ce que nous voulons, c'est une garantie additionnelle." Si *Normand* l'eût refusée, tout arrangement eût sans doute été fini. Car il n'est pas possible de supposer que les créanciers eussent accepté une semblable condition qui aurait eu l'effet de rendre illusoire la garantie demandée. Ils eussent sans doute préféré procéder à la liquidation. C'est pour cette raison que *Normand* s'est bien gardé de n'en rien dire ; *Godin* seul en a parlé à *Linton*. En se portant caution, sans faire de conditions spéciales avec les créanciers pour restreindre l'effet de son cautionnement, *Normand*, qui est notaire de profession connaissait toute l'étendue de l'obligation qu'il contractait. Il en a limité le montant seulement, mais quant à ce montant son obligation légale était de payer pour *Godin* si celui-ci ne payait pas lui-même.

Il n'est guère utile d'ajouter d'autres autorités à ce sujet. Il comprenait l'étendue des obligations résultant de son cautionnement. Il devait savoir, comme le dit *Laurent* (1), "que le cautionnement est un acte de disposition ; en effet la caution s'oblige à payer sans rien obtenir, en compensation des risques qu'elle court, ni du créancier, ni du débiteur. Elle dispose de ce qu'elle s'oblige de donner au créancier, car payer, c'est disposer." Il est clair que la convention particulière est contraire à la nature du cautionnement ainsi expliqué. L'obligation de la caution étant de *donner au cré-*

(1) Voir C. C. art. 1929, 1936. (2) Vol. 28, p. 169.

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ancier ce à quoi elle s'est obligée. Ce serait anéantir pour partie, cette obligation si elle prenait sur les biens du débiteur au détriment du créancier non complètement désintéressé, une partie de ce qui est nécessaire pour s'acquitter. Ce serait diminuer l'effet de son obligation. Ce serait aussi, en même temps, donner et retenir,—ce qui ne se peut.

Le principe que la caution ne peut faire aucun acte qui puisse avoir l'effet de diminuer les obligations résultant de son cautionnement, a été plusieurs fois sanctionné par les tribunaux. La doctrine à ce sujet est si bien résumée dans un article cité au Journal du Palais, 1842 (1), qu'il n'est guère possible d'entretenir de doute sur ce point après en avoir lu l'extrait suivant :

.....qu'aux termes de l'art. 2011 C.C. celui qui se rend caution d'une obligation se soumet envers le créancier à satisfaire à cette obligation si le débiteur n'y satisfait pas lui-même ; que de la nature et de l'objet du cautionnement, des termes de cette article, des principes généraux du droit et des règles de l'équité, il résulte que le créancier est fondé à s'opposer à tout acte, à résister à toute prétention de la caution qui pourrait avoir pour résultat de porter atteinte à l'intégralité de ses droits contre le débiteur principal, et de l'empêcher de tirer de l'actif du débiteur toutes les ressources qu'il peut présenter ; que c'est par une application de ce principe que l'art. 1292, du même code dispose que la subrogation établie par l'art. 1251 contre le débiteur principal en faveur de la caution qui a payé le créancier ne peut nuire à celui-ci lorsqu'il n'a été payé qu'en partie.

La même doctrine a été suivie dans un autre arrêt rapporté par *Devilleneuve* et *Carrette* (2), où on lit ce qui suit :—

.....un falli qui a obtenu un concordat avec des termes pour le paiement des dividendes, vend à réméré son fonds de commerce à l'un des créanciers concordataires et néanmoins continue à exploiter ce fonds de manière à tromper ses créanciers anciens et nouveaux sur sa solvabilité. Un tel acte de vente doit être annulé comme fait en fraude des créanciers, (C.C. 1167.)

Le commerçant dans ce cas était aussi habile à faire

(1) Vol. 39, p. 659.

(2) Vol. 15, p. 356 et 351.

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toutes sortes de transactions que *Godin* pouvait l'être dans le cas actuel. Cependant cet acte est considéré comme un dol à l'égard des créanciers auxquels il n'a pas été communiqué. N'en doit-il pas être de-même de la convention particulière entre *Normand* et *Godin* ? La différence c'est que dans le cas actuel les créanciers sont trompés avant le concordat et que dans l'autre ils le sont après. Quant à l'effet sur la transaction, il est le même.

Pour confirmer le principe que la caution ne peut rien faire qui puisse rendre son obligation illusoire on peut encore référer à la cause de *Whitney* v. *Craig et Craig* opposant (1). Dans cette cause, le défendeur *Craig* avait fait une composition par laquelle il devait payer ses créanciers en 7 versements, dont les trois derniers seuls étaient garantis par le cautionnement de *L. D. Craig* l'opposant. Ce dernier avait stipulé avec les créanciers eux-mêmes qu'il aurait, pour ce qu'il serait tenu de payer, préférence sur les effets que le défendeur possèderait alors. La caution, l'opposant, paya d'avance les trois derniers versements qu'elle avait garantis, afin de réclamer le privilège stipulé contre les créanciers qui n'avaient pas encore été payés des premiers versements. Il fut colloqué,—mais sur contestation, sa collocation fut rejetée par le jugement de la cour Supérieure pour les motifs suivants :

The creditors had a manifest interest in getting security for the three last instalments, having only the personal undertaking of the defendant, and the security on the goods for the other instalments. If the pretentions of the opposant were maintained, he would take the proceeds of their very goods, and the security intended to be given would be merely illusory. We cannot put such a construction on the clause as to sustain this.

Ce principe doit recevoir son application dans cette cause. La convention particulière de *Normand* et de

(1) 7 L. C. R. 272.

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Godin a clairement pour effet de rendre le cautionnement illusoire, en violant en même temps le principe que la caution ne peut jamais venir à contribution avec le créancier qu'elle a cautionné. Prendre d'avance, même sous forme de gage, comme l'a fait *Normand*, partie des biens du failli qui étaient la sûreté des créanciers, c'était plus que venir à contribution, c'était anéantir son cautionnement,—ce qu'il ne pouvait faire sans le consentement des créanciers. C'était, dans tous les cas, se payer de son cautionnement au détriment des créanciers cautionnés, en diminuant leurs garanties, —ce que, d'après les autorités ci-dessus citées, il ne pouvait faire.

La loi reconnaît sans doute à la caution un recours en indemnité contre le débiteur; mais dans l'exercice de ce recours, celle-ci ne peut jamais venir en concurrence avec le créancier cautionné, ni faire aucun acte qui puisse porter atteinte à l'intégralité de ses droits contre le débiteur. Mais il faut remarquer que ce recours n'est accordé qu'à la caution qui a payé le montant de son cautionnement, et pas avant, excepté en quelques cas. *Normand* n'avait rien payé et n'était pas créancier de *Godin* lorsqu'il a commencé à tirer du fonds de commerce les deniers avec lesquels il prétend acquitter son cautionnement.

Quelle est la condition sous laquelle la caution a droit à un recours contre le débiteur? L'article 2028 (2) répond qu'elle a un recours quand elle a payé. C'est donc le paiement qui est le principe de son action recursoire (1).

L'article 1953 de notre code, donne aussi en quelques cas une action à la caution contre le débiteur avant qu'elle ait payé. Le cas de faillite est un de ceux-là; mais même dans ce cas, elle ne peut jamais venir en concurrence avec le créancier cautionné. *Laurent* (3):

(1) *Laurent* Vol. 28, No. 227. (2) C. C. 1948.
(3) Même vol., No. 253.

En second lieu, la caution peut agir en indemnité contre le débiteur, lorsque celui-ci a fait faillite ou est en déconfiture.

On suppose que le créancier, trouvant une pleine garantie dans le cautionnement, ne se présente pas à la faillite pour être payé, ou ne poursuit pas le débiteur en déconfiture pour être colloqué avec les autres créanciers. Si le créancier se présente, il va sans dire que la caution ne peut pas se présenter; car la faillite ne peut pas admettre deux fois la même créance, ce serait vouloir que le débiteur paie deux fois, ce qui est absurde. La Cour de *Montpelliers* l'a ainsi jugé. La question est discutée par *Ponsot* (1) et il conclut aussi qu'admettre la caution à contribution en concurrence avec le créancier cautionné on admettrait deux fois la même créance au passif de la même faillite.

Duranton (2) développe au long les raisons pour lesquelles la caution ne peut être admise à concourir avec le créancier. Il dit comme *Ponsot* que ce serait faire figurer deux fois la même créance dans les distributions faites sur le débiteur, " et cela, contre tous les principes et le simple bon sens." Cette opinion est soutenue par celle de *Pardessus* (3).

L'autorité de *Troplong* (4), est au même effet.

Il ne peut donc y avoir conflit entre le créancier et la caution. Celle-ci n'a de droit contre son débiteur qu'après avoir payé ou désintéressé le créancier. Dans le cas actuel, il est évident que les $2,360 que l'Intimé a tirées du fonds de commerce de *Godin* étaient la propriété de celui-ci. *Normand* dit qu'il les a employés à payer son cautionnement. C'est donc en réalité *Godin* et non lui qui a fait ce paiement. Il doit donc être considéré fait en déduction non du cautionnement mais à l'acquit de la dette non cautionnée, pour le paiement de laquelle le fonds de commerce était la seule garantie. C'est en réalité un paiement fait par *Godin* lui-même auquel appartenait cet argent, bien que les deniers

(1) Du Cautionnement No. 266. (2) Cour de Droit Commercial, tom. 4, No. 1214.
(3) Vol. 18, No. 360.
(4) No. 396, Du Cautionnement p. 349.

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soient parvenus aux créanciers par les mains de *Normand* c'est un à-compte donné par *Godin*.

Les à-comptes payés par le débiteur sont plutôt censés éteindre la partie non cautionnée que la partie cautionnée. Le créancier n'a exigé le cautionnement que pour se prémunir contre le cas de non paiement. Le fidéjusseur ne saurait trouver dans ces à-comptes une exception dont il puisse profiter (1).

Sur le tout, j'en suis venu à la conclusion qu'il faut considérer *Godin* comme étant en faillite le 29 novembre 1878, date du concordat ; que la convention particulière entre lui et l'Intimé ne peut être justement appréciée sans prendre en considération l'état de faillite de *Godin* et qu'en conséquence, elle constitue une injuste préférence sur les biens du failli, et qu'admettre la validité d'une pareille convention, ce serait effectivement reconnaître à l'une des parties à un contrat le droit de se délier de ses engagements, sans le consentement de l'autre ;—que cette convention est encore contraire aux principes du droit civil qui ne reconnaissent pas à la caution le pouvoir de faire aucun acte diminuant les droits du créancier cautionné, ni de venir en concurrence avec lui à moins qu'il n'ait été complètement désintéressé. Qu'en conséquence les $2,360, prises sur les biens de *Godin* et déposées dans une banque d'où elles ont été retirées par l'intimé, doivent être rapportées à la masse en faillite.

HENRY, J. :

To ascertain the true merits of this case, it is necessary to look at the position of *Godin* in the month of November, 1878, when these arrangements were completed. At that time it is shown that the assets amounted to $23,000, after making deductions for all doubtful and bad debts. It is also shown that he owed about $16,000, and therefore he had good assets, not

(1) *Troplong* Du Cautionnement No. 501.

available at the time, but subsequently available, to the extent of $6,000 over and above all his liabilities. He felt, like the inhabitants from one end of the Dominion to the other, the depression of the time, and he felt the difficulty of collecting in what was due. Under the circumstances, he said to his creditors "I have plenty of means to pay, but I cannot realize. I want time from you—if you think proper to give it—to realize my assets." The creditors consented on the terms which have been mentioned. Now, it is said that man was bankrupt. I cannot think so. It is true, the Insolvent Act says that a man who is not able to meet his engagements may, by his creditors, be made a bankrupt, but if a man comes to his creditors and says "the times are bad, I want you to give me time to pay, I have plenty to pay you, but I cannot convert it," that does not make a man a bankrupt; on the contrary, if they had attempted to put him in bankruptcy he could have resisted it. He could have said, "I have plenty to pay my debts," and I doubt if a court would decree bankruptcy in such a case. He stood, then, as I take it, a free agent. He goes to his creditors and agrees with them to make his payments in four equal instalments—four, eight, twelve and sixteen months. They agree to this and to withdraw any claim whatever they had over his property, and they took his own personal security, and they could have had no claims against his property for twelve months, at all events until the third note fell due. That man was not in the position of a bankrupt; he was in the position of one who had felt the bad times, like possibly a good many of his own creditors, and wanted a little further time, but the creditors said "we would like to have the last payment good." They felt perfect security for the first three, but they said sixteen months is a long time, and we want security. He goes to *Normand* and says: "I have

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plenty to pay every man I owe; will you go security for $4,000 for the last instalment, which falls due in 16 months?" *Normand* says: "I will do so, provided you will make provision to meet that payment by paying $75 a week into the bank." Was there fraud in that? I think not. There was a man who asked no deduction from any of his creditors. He only wanted a little time to collect in his assets. Where is the fraud? It does not come within any denomination of fraud under the Insolvent Act. But we are told there are a number of French authorities which show that a party who goes security for another, as *Normand* did in this case, must pay, and he has no right to make an arrangement of this kind to secure himself. I have looked at a number of the authorities which have been shown to see if that principle is recognized, and I have read and considered the authorities cited, but I fail to see the applicability of the doctrines there found, or any of them, to the case now under consideration. I need not take up time by reading them, but I have made an estimate of the decisions in all these cases referred to, and I find there is not one of them which touches this case. Nearly the whole of them go to show that a party who is a surety shall not rank on the estate—*Normand* cannot recover on the estate. In one case the bankrupt made a sale of his stock in trade to one of these parties, but retained the possession and dominion over the goods and stock in trade himself, and was the means of deceiving all his other creditors and those who gave him advances, and the court decided that was fraud—and it was fraud. There the transaction was with one of the creditors who agreed with all the others that they should come in and take a common position with him. Therefore it was fraud on his part. The different circumstances of this case are then apart from all of those to which I have referred. But it is said that this man made this

arrangement privately—without communicating it to the creditors. In the first place, I consider there was no fraud in it, and I do not consider there was any obligation in him to do so. If the creditors ascertained that *Normand* was willing to give security, it was for them to ascertain what terms *Normand* was entering into. If they chose to take *Normand* as security without enquiring into the transaction between him and *Godin*, then I take it they cannot accuse *Normand* of fraud.

But there is evidence that *Linton*, who is a partner of one of the firms who are the creditors, and the largest of the firms, knew all about it and approved of it, and it is not unreasonable to suppose that he communicated his knowledge to the other creditors. If, therefore, they knew of it and did not object to it, the subsequent assignee of the estate could not come in and say that these parties claim that that is a fraud.

But, as I said before, the Insolvent Act of the Dominion supersedes all other laws on the subject. As I take it, there are certain provisions in the statute, and unless there is legal and actual fraud proved (which of course vitiates all contracts,) we must look to that statute. There is a provision made there against preferential assignments to creditors, and there are other provisions made by which a party cannot convey away his estate without value for it; and again, there are other provisions for protecting creditors, and the legislature therefore provided all that was necessary to guard creditors. Now, under all these circumstances, I must say, I can see no fraud, moral or legal, on the part of *Normand*, or on the part of *Godin*. Suppose a man owes another $5,000, and he goes to his neighbor and says to him "I owe such a party so much, and if I find security he will give me time to pay it." The other says: "I will give you the money if you will

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give me security." He says: "I will do so; I will give you a chattel mortgage on all my estate." I cannot see fraud in that. The party has the security he wants, and if he wants any stipulation from his creditor not to go outside and pledge his property, it is his duty not to receive that security until he makes the necessary enquiries. I can see no fraud here, and I do not think the appellant has made any case for our consideration. I think the appeal should be dismissed, and the decision of the court should be sustained.

TASCHEREAU, J.:

This action has been instituted by the appellant in his capacity of assignee to the estate of one *Godin*, a trader at *Three Rivers*. During the month of November, 1878, *Godin*, not being able to collect sufficiently to meet his liabilities, on account of the depression of business prevailing at the time, applied to his creditors for an extension of time. He fyled with that application an exact statement of his affairs, which showed a surplus of $6,000, after deduction of his bad debts, and of $13,000, including these bad debts.

His creditors consented to grant him the extension demanded, and agreed to accept his notes at four, eight, twelve and sixteen months, on condition that the last of them should be endorsed to their satisfaction.

Godin then applied to the respondent for his endorsation.

The respondent first asked for a statement of *Godin's* affairs, and subsequently consented to endorse the last notes of *Godin's* composition, on condition that he (*Godin*) would deposit in the *Ville Marie* Bank, at *Three Rivers*, in the name of him (the respondent), and to secure him for such endorsation, seventy-five dollars every week.

The agreement reads in the following terms:

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Nous, soussignés, convenons de ce qui suit: "Moi, *Joseph Philippe Godin*, m'oblige envers *Telephore Eusèbe Normand*, à verser tous les samedis, durant une année, à dater du premier décembre courant, une somme de soixante-quinze piastres, dans le fonds d'économie de la banque *Ville-Marie*, portant intérêt, pour garantir d'autant le dit *T. E. Normand*, de divers endossements faits en sa faveur pour mon bénéfice au profit de mes créanciers et de moi, les dits endossements se montant à la somme de quatre mille sept cents piastres, payables par billets à seize mois de la date du vingt-neuf novembre, mil huit cent soixante et dix-huit. Le dit dépôt sera fait au nom de *T. E. Normand in trust*, le dit *T. E. Normand* aura le droit de retirer le dit argent et le payer à compte de ses endossements de manière à le libérer, ainsi que moi, de ses dits endossements; les interêts perçus sur le dit argent soit de la banque *Ville-Marie* ou par le rachat des dits billets sera pour le bénéfice du dit *Godin*, ce à quoi le dit *T. E. Normand* s'oblige.

Signé en double à *Trois-Rivières*, Décembre 1878.

Jos. Ph. Godin,
T. E. Normand.

The respondent in conformity with this agreement endorsed *Godin's* notes to an amount of over $4,000, and these notes were delivered to *Godin's* creditors through Mr. *Linton*, a merchant of *Montreal*. *Godin* continued to carry on business and obtained new advances from the same creditors, but on the 31st July, 1879, he was put into insolvency, the first only of his composition notes having been paid. Some time after the assignment, the respondent withdrew from the *Ville-Marie* bank the amount which had been deposited in his name weekly by *Godin*, amounting to $2,007.87 and paid the notes which had been endorsed by him. Besides the amount of this deposit so made to his credit and which he had withdrawn as aforesaid, he had to furnish out of his own funds an amount exceeding two thousand dollars to meet these endorsed notes. This suit was instituted by the assignee to compel *Normand*, the respondent, to return to the mass of the estate the amount of these deposits so received by him from the bank. It is alleged in the declaration that the arrange-

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ment between the respondent and *Godin* was made secretly and with intent to defraud *Godin's* creditors.

By the judgment of the Superior Court, the respondent was condemned to reimburse to the assignee the amounts so deposited in the banks by *Godin*, but this judgment was reversed in the Court of Queen's Bench, and the assignee's action dismissed. The assignee now appeals from the judgment of the Court of Queen's Bench. I am of opinion to dismiss his appeal.

The *considerants* of the judgment appealed from so completely, in my mind, resume the whole case, that I cannot do better than to quote them:—

Considering that in November, 1878, *Jos. P. Godin* obtained an extension of time from his creditors, his estate then showing a surplus over and above what was necessary to pay all his creditors, and by virtue of said extension and by law he became and was entitled to manage his own estate and affairs, and to enter into and make all legitimate contracts permissible to a merchant doing business on his own account;

Considering that the contract by him at the time entered into with the now appellant, by which the latter became security for and endorsed his promissory notes for the last instalment which he was to pay to his then creditors, and by which *Godin* undertook to deposit weekly in the banque *Ville-Marie*, at *Three Rivers*, in the name and to the credit of the appellant in trust seventy-five ($75.00) per week, as a pledge and security against his endorsement, was a legitimate contract which the said *Godin* had a right to make with the appellant;

Considering that the monies deposited by *Godin* under and in virtue of said contract became pledged to the appellant to secure him against his said endorsement, and did not fall into the estate of the said *Godin* on his subsequent insolvency which occurred on the 31st day of July, 1879, and that the same were subsequently withdrawn by the appellant and by him applied in payments so as to liberate him *pro tanto* from his said endorsement;

And for these reasons the Appeal Court dismissed the assignee's action.

This reasoning is, in my opinion, unanswerable.

The allegations of fraud and concealment of the

transaction are, I may at once remark, entirely disproved. *Godin* and *Normand* acted in perfect good faith.

The appellant seems to take it for granted that if the respondent had not got this amount from *Godin*, the creditors would have got it. But *quid constat* that it would have been so? *Godin*, as the Court of Queen's Bench well remarks, after the extension of time given to him in 1878, remained the sole master and manager of his stock in trade and property of any nature. These $2,000, if he had not deposited them in *Normand's* name, he might have lost in speculation, or in any other manner whatever. *Normand* had guaranteed that this sum would be, with another, paid by *Godin* to the creditors. *Godin* paid it to *Normand*, who, in turn, handed it back to the creditors. What else can the creditors ask? They got the sum of $2000 in its entirety, but now, they ask *Normand* to pay them from his own pocket, another sum of $2000. How can they ask this? *Normand* never promised that if *Godin* paid these $2000, he, *Normand*, would pay over to their creditors another $2,000 of his own moneys, besides the $2,000 he had to pay for the balance of the notes. That would be equivalent to saying that he was surety for $6,000, whilst he was surety for $4,000 only. He got *Godin* to pay $2,000, and he paid the other himself out of his own pocket. He thus fulfilled his obligation in its entirety. The judgment of the Court of Queen's Bench is right, and the appeal must be dismissed.

GWYNNE, J.:—

I agree that this appeal must be dismissed. When the creditors entered into the conditional agreement with him in November, 1878, to the effect that if he would get *Normand* to endorse the last of the series of notes which they agreed to accept from *Godin* in settlement of their demands upon him, so as to enable him,

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notwithstanding his previous default, to continue carrying on his business as a solvent trader, they gave him, as it were, *carte blanche*, as such to go and treat with *Normand* in order to procure his consent to become endorser for him upon the last of such series of notes.

It was not to have been expected that *Normand* should consent to endorse *Godin's* notes without any consideration for his so doing, so as to protect himself against loss. That he should have insisted upon the terms contained in the agreement which is now assailed as fraudulent within the meaning of the Insolvent Act was very natural, and the agreement so made was good and valid: such a transaction has in it no ingredient of fraud which would render it void within any of the provisions of the Insolvent Act, and *Normand* cannot be deprived of the benefit of the conditions which constituted the sole consideration upon and for which he consented to incur, and did incur, the responsibility incident to his endorsing *Godin's* notes.

Appeal dismissed with costs.

Solicitors for appellant: *Geoffrion, Rinfret & Dorion.*

Solicitors for respondend: *Lacoste, Globensky & Bisaillon.*

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