REPORTS

— OF THE —

SUPREME COURT

— OF —

CANADA

REPORTER

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ASSISTANT REPORTER

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1894.

JUDGES

OF THE

SUPREME COURT OF CANADA

DURING THE PERIOD OF THESE REPORTS.

The Honourable Sir Henry Strong, Knight, C. J.

" " Télesphore Fournier J.

" " Henri Elzéar Taschereau J.

" " John Wellington Gwynne J.

" " Christopher Salmon Patterson J.

" " Robert Sedgewick J.

" " George Edwin King J.

ATTORNEY-GENERAL OF THE DOMINION OF CANADA:

The Right Honourable Sir John S. D. Thompson, P. C., K. C. M. G., Q. C., &c.

SOLICITOR-GENERAL OF THE DOMINION OF CANADA.

The Honourable John Joseph Curran, Q. C., LL. D.

MEMORANDA.

On the 18th day of February, 1893, Robert Sedgewick Q. C., Deputy Minister of Justice, was appointed a puisne judge of the Supreme Court of Canada.

On the 24th day of July, 1893, the Honourable Christopher Salmon Patterson, one of the puisne judges of the Supreme Court of Canada, died at the City of Ottawa.

On the 21st day of September, 1893, the Honourable George Edwin King, one of the judges of the Supreme Court of New Brunswick, was appointed a puisne judge of the Supreme Court of Canada.

ERRATUM.

Errors in cases cited have been corrected in the table of cases cited.

Page 139, line 6 from the bottom of page. For "Barnard Q.C. for appellant" read "Barnard Q.C. and E. Lafleur for appellant."

A TABLE

OF THE

NAMES OF THE CASES REPORTED

IN THIS VOLUME.

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CASES

DETERMINED BY THE

SUPREME COURT OF CANADA

ON APPEAL

FROM

DOMINION AND PROVINCIAL COURTS

AND FROM

THE SUPREME COURT OF THE NORTH-WEST TERRITORIES.

CONTROVERTED ELECTION FOR THE ELECTORAL DISTRICT OF VAUDREUIL. 1893

*Mar. 7.

HUGH McMILLAN.....APPELLANT;

AND

ANTOINE VALOIS.....RESPONDENT.

ON APPEAL FROM THE JUDGMENT OF PAGNUELO AND DOHERTY, JJ.*

Election petitions—Separate trials—R.S.C. ch. 9, secs. 30 and 50—Jurisdiction.

Two election petitions were filed against the appellant, one by A.C., filed on the 4th April, 1892, and the other by A.V. the respondent, filed on the 6th April, 1892. The trial of the A.V. petition was by an order of a judge in chambers, dated the 22nd September, 1892, fixed for the 26th October, 1892. On the 24th October the appellant petitioned the judge in chambers to join the two petitions and have another date fixed for the trial of both petitions. This motion was referred to the trial judges who, on the 26th October, before proceeding with the trial, dismissed the motion to have both petitions joined and proceeded to try the A.V. petition. Thereupon the appellant objected to the petition being

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*PRESENT:—Strong C.J. and Fournier, Gwynne, Patterson and Sedgewick JJ.

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tried then as no notice had been given that the A.C. petition had been fixed for trial and, subject to such objection, filed an admission that sufficient bribery by the appellant's agent without his knowledge had been committed to avoid the election. The trial judges then delivered judgment setting aside the election. On an appeal to the Supreme Court,

Held, 1st. That under sec. 30 of ch. 9 R.S.C. the trial judges had a perfect right to try the A.V. petition separately.

2nd. That the ruling of the court below on the objection relied on in the present appeal, viz. : That the trial judges could not proceed with the petition in this case, because the two petitions filed had not been bracketed by the prothonotary as directed by sec. 30 of ch. 9 R.S.C., was not an appealable judgment or decision. R.S.C. ch. 9 s. 50. (Sedgewick J. doubting.)

APPEAL from the judgment of Pagnuelo and Doherty JJ. who tried the election petition in this case and avoided the election upon the admission of the sitting member that he had been guilty of bribery by his agents without his knowledge.

Two petitions were presented and filed against the appellant; one by Alphonse Charlebois and one by Antoine Valois the respondent. The former was filed on the fourth day of April, 1892, and served the same day on the appellant. The other was filed on the sixth day of April, 1892, and served on the ninth day of the same month.

Preliminary objections were filed in both petitions and dismissed. General answers were also filed, and on the 22nd September, 1892, by an order of a judge in chambers, the trial of the Valois petition was fixed for the 26th October, 1892, and proper notice given.

On the 24nd October, 1892, the respondent moved a judge in chambers to have the order of the judge fixing the trial for the 26th October enlarged to a later date in order that the two petitions should be bracketed together, and that proper notices of the trial of both petitions together be given. This motion

was referred to the trial judges, and on the 26th October they having heard the counsel on the motion dismissed it and ordered the trial of the Valois petition to be proceeded with. Thereupon the petitioner examined one witness and the appellant filed a written declaration admitting that corrupt practices sufficient to annul his election had been committed by his agents at the said election, and on the evidence adduced and on the appellant's admissions judgment was rendered maintaining the election petition and voiding the appellant's election.

Bisaillon Q. C. for appellant relied on sec. 30 ch. 9 R.S.C. and cited Cunningham on Elections (1).

Choquette Q.C. for respondent contended that the case was not appealable, citing sec. 50 ch. 9 R.S.C., and the *L'Assomption Case* (2); and if appealable the judges at the trial had a perfect right to try the Valois petition separately. Moreover, on the 22nd of September, when the respondent applied to the judge to fix a day for the trial of the case, the appellant should have asked to join both cases for the trial and the judge would have probably granted his request, but he did nothing of the kind; and the judge having fixed the trial to take place on the 26th of October the trial judges were bound to be guided by the order of the judge who had fixed the trial in one case only and to proceed with it.

THE CHIEF JUSTICE (oral).—This appeal must be dismissed. The provision of the statute relied upon, as showing that the petition filed by Charlebois ought to have been tried at the same time as the present petition, is section 30 of the Dominion Controverted Elections Act. I think the last words of the section "unless the court otherwise orders" had precisely the

(1) Pp. 334-5.

(2) 14 Can. S.C.R. 429.

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effect which my brother Patterson has in the course of the argument suggested, namely, that it makes it a matter of judicial discretion whether the petitions shall be ordered to be tried together, or not, and that here we must assume that the judges thought fit, in their discretion, not to order them to be tried together.

Moreover, the Charlebois petition was out of court by reason of the lapse of time, according to the decision of this court in the *Glengarry Case* (1).

But I do not think we have any jurisdiction to entertain this appeal. It is not an appeal from a judgment on any question of law or fact of the judges who tried the election. In order to give jurisdiction to this court there must be some question of law or fact decided by the judge at the trial to be appealed against. This position is incontrovertible. If it should happen that another judge than the one who tries the petition makes an incidental order in the case that order is not appealable. This has been decided here more than once. No appeal lies except where expressly given by the statute, and the statute only confers a right of appeal in two cases: one from judgments on preliminary objections, the allowance of which puts an end to the petition; the other from a judgment on some question of law or fact of the judge who has tried the petition, which means from the decision of a matter of law or fact arising on the trial of the petition.

The appeal must be dismissed with costs.

FOURNIER J. concurred.

GWYNNE J.—I entirely concur. It appears to me there is no appeal at all.

The appeal is not against the judgment of the trial judges but against an alleged irregularity in the procedure antecedent to and leading up to the trial.

(1) 14 Can. S.C.R. 453.

PATTERSON J.—I agree also that we must dismiss the appeal, if not quash it, either one or the other. Our jurisdiction under sec. 50, ch. 9 R.S.C. is to hear appeals in two classes of cases, one from decisions on preliminary objections, and not from all preliminary objections but only from such as put an end to the petition. There is nothing here of that kind. The other from final decisions on any question of law or of fact by the judge who has tried the petition. The objection which is raised here is one entirely on a matter of practice. It is a mistake to read the direction contained in sec. 30 as having such a stringent effect as is contended for by the appellant. It is of a purely directory character. The direction that the two petitions shall be bracketed together, and tried at the same time, is expressly made subject to this, "unless the court otherwise orders." Suppose, if we can imagine such a case, that by oversight the prothonotary does not have the two petitions bracketed together, and one is tried, it surely cannot be argued that the other could not afterwards be tried. Even if the last words in the clause, "unless the court otherwise orders," had been left out, still the provision itself would be directory in its character. One test is: Suppose the application had been made in this case for an order to bracket the petitions to a judge in chambers, and it had been refused, would his decision have been appealable? The appeal now taken is made after the whole case has been tried, but suppose, without waiting for the trial, they had appealed from the decision, we would not have had jurisdiction to entertain it.

The appeal should be either dismissed or quashed.

SEDGEWICK J.—I agree that the appeal should be dismissed but I am not satisfied that an appeal does not lie in a case of this kind. No order was made in

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this case directing the two petitions to be tried separately, and therefore both should have been bracketed and tried together under sec. 30. The doubt which arises in my mind is, that assuming it was the case, was it not a point raised at the trial whether both petitions should be tried together or separately, and therefore appealable under sec. 50 c. 9 R.S.C.? But on the whole and on the merits I think the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors for appellant: *Bisaillon, Brosseau & Lajoie.*

Solicitor for respondent: *F. X. Choquette.*

JOHN V. ELLIS .... APPELLANT ; 1892

AND *Nov. 15.

HER MAJESTY THE QUEEN ..... RESPONDENT. 1893

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK. *Feb. 20

Appeal—Jurisdiction—Criminal proceeding—Contempt of court—Final judgment—R. S. C. c. 135 s. 68.

Contempt of court is a criminal proceeding and unless it comes within sec. 68 of the Sup. Court Act an appeal does not lie to this court from a judgment in proceedings therefor. *O'Shea* v. *O'Shea* (15 P. D. 59) followed ; *In re O'Brien* (16 Can. S. C. R. 197) referred to.

In proceedings for contempt of court by attachment until sentence is pronounced there is no "final judgment" from which an appeal could be brought.

APPEAL from a decision of the Supreme Court of New Brunswick (1) adjudging the appellant guilty of contempt of court but deferring sentence.

After the decision of this court in *Ellis* v. *Baird* (2), the proceedings against the appellant were continued in the Supreme Court of New Brunswick and on report of the clerk of the court, who had been appointed to administer interrogatories to the appellant, containing the answers to such interrogatories the court adjudged him guilty of contempt, but sentence was deferred to admit of an appeal on a bond being given conditional for the appearance of the appellant to receive sentence. From this judgment of the Supreme Court of New Brunswick the present appeal was brought.

Currey for the respondent took a preliminary objection to the jurisdiction of the court to hear the appeal

*PRESENT :—Strong C.J., and Fournier, Taschereau, Gwynne and Patterson JJ.

(1) 28 N. B. Rep. 497. (2) 16 Can. S. C. R. 147.

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on the ground that contempt of court such as that in the present case is a criminal proceeding from which an appeal would not lie, citing *O'Shea* v. *O'Shea* (1); Short & Mellor's Crown Practice (2); Oswald on Contempt (3); *Cox* v. *Hakes* (4).

Weldon Q.C. contra.

Judgment was reserved on the question of jurisdiction and argument on the merits postponed until it was disposed of.

THE CHIEF JUSTICE.—This is an appeal from the Supreme Court of New Brunswick in a proceeding the object of which was to punish the appellant for contempt of court. This proceeding was initiated by a *rule nisi* granted in Easter Term 1887 in the words following:

EASTER TERM, A.D. 1887.

It is ordered that John V. Ellis, the editor and principal publisher and proprietor of the "Saint John Globe" newspaper, a newspaper printed and published in the City of Saint John, at the next Trinity Term of this honourable court do show cause why an attachment should not be issued against him, or why he should not be committed for contempt of this honourable court for writing, printing and publishing in the issue of the said "Saint John Globe" newspaper on the tenth day of March last an article under the caption of "The Queen's Election," and for writing, printing and publishing in the issue of said newspaper of the eleventh day of March last another article under the caption of "Government by Fraud," and for writing, printing and publishing in the issue of said newspaper of the twelfth day of March last another article under the caption of "Queen's County," and wherein are comments, reflections and innuendoes on the applicant George F. Baird on an order of His Honour Mr. Justice Tuck, one of the justices of this honourable court, made on application of George F. Baird for an order *nisi* for a writ of prohibition to prohibit James Steadman, Esquire, the judge of the Queen's County Court, from further proceeding with or to make a recount or final addition of the votes given for said George F. Baird and one George G. King at the election held on the twenty-second day

(1) 15 P. D. 59.
(2) P. 511.
(3) Pp. 5, 19 and 55.
(4) 15 App. Cas. 506.

of February last of a member to represent the electoral district of Queen's County, in the Province of New Brunswick, in the House of Commons of Canada, and on His Honour Mr. Justice Tuck; and in which said articles the said John V. Ellis has been guilty of a contempt of this honourable court in scandalizing this honourable court, and particularly His Honour Mr. Justice Tuck, one of the justices thereof, in calumniating and vilifying said applicant George F. Baird, and in commenting on the matters of said election, said recount, and said order *nisi* for a writ of prohibition in a manner calculated to prejudice and that does prejudice the public before the hearing and judicial decision of said matters, and so as is calculated to prevent said applicant George F. Baird from obtaining a fair and impartial disposal of said matters.

Upon reading the said articles in the newspapers aforesaid, and upon reading the affidavit of George F. Baird, and upon motion of Mr. L. A. Currey.

By the Court.

(Sgd.) T. CARLETON ALLEN,
Clerk of the Crown.

This rule was made absolute in Hilary Term 1888. Thereupon regular proceedings according to the established procedure in contempt matters was taken. An attachment was issued upon which the appellant was arrested and brought into court, whereupon he gave bail. Thereafter interrogatories were administered, and exceptions to those interrogatories having been taken and in some instances allowed, and further answers having been put in by the appellant, a final hearing was had, and on the 13th day of August, 1889, the court found the appellant to be guilty of contempt. No other judgment or sentence was, however, pronounced or passed. The minutes of the court of the 13th August, 1889, are set forth in the appeal book as follows:

Tuesday, 13th August.

PRESENT: Allen C. J., and Fraser J.

THE QUEEN v. JOHN V. ELLIS RE GEORGE F. BAIRD.

Allen C.J., reads judgment of self and reads judgment of Palmer J.
Fraser J., reads his judgment; also reads judgment of King J.
Wetmore and Tuck JJ., no part.

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Defendant found guilty of contempt. Sentence postponed until he has had an opportunity to appeal on entering into a recognizance to appear and receive sentence on the first day of Hilary Term next.

Mr. McLean for defendant asks that the sentence be pronounced and that the execution be stayed until appeal is decided.

Allen C.J. The court is not prepared to pass any sentence; they have not considered it at all.

Mr. Ellis appeared with his sureties and entered into a recognizance to appear and receive sentence on the first day of Hilary Term next.

From the foregoing minute it appears that the judges were unanimous in the conclusion at which the court arrived.

On the hearing of the appeal before this court a preliminary objection to the jurisdiction was taken. It was said that this was a criminal matter in which this court had no jurisdiction to entertain an appeal.

That a proceeding for contempt is a criminal matter seems to be now well established by authority. By the English Judicature Act (1), it is enacted "that no appeal shall lie from any judgment of the High Court in any criminal cause or matter save for some error of law apparent upon the record as to which no question shall have been reserved for the consideration of the said judges under the said Act of the eleventh and twelfth years of Her Majesty's reign."

In the case of *O'Shea* v. *O'Shea* (2) a fine had been imposed by the Queen's Bench Division upon the publisher of a newspaper for a contempt of court in publishing comments upon the proceedings in a divorce action. The party upon whom the fine had been inflicted appealed to the Court of Appeal and the preliminary objection to the jurisdiction was taken that a contempt proceeding such as that in question was a criminal matter in which no appeal would lie. The Court of Appeal, although it had previously entertained, heard,

(1) 36 & 37 V. c. 66, s. 47. (2) 15 P. D. 59.

and adjudicated upon an appeal in a similar case *The Queen* v. *Jordan* (1) gave effect to the objection.

In the case of *O'Shea* v. *O'Shea* (2) it was pointed out in the judgment of the court that there exists a distinction between proceedings in civil contempts, which include proceedings to enforce obedience to orders or writs made or issued in civil actions or matters, and proceedings for criminal contempts the object of which is not enforcement of writs, rules or orders, but the punishment of contumacious behaviour. In the late case of the *Queen* v. *Barnardo* (3), an appeal from an order granting an attachment for non-return to a writ of *habeas corpus* was entertained, the distinction being taken that the original proceeding was not for a punitive purpose, and the same jurisdiction was exercised by the House of Lords in the case of *Barnardo* v. *Ford* (4).

There can be no doubt, upon the authority of *O'Shea* v. *O'Shea* (2), that the case now before us is a criminal matter within the definition of such a proceeding given in that case.

Next we have to inquire what is the limit of the jurisdiction of this court in criminal causes or matters. It is to be premised that this jurisdiction depends entirely on statutory enactments. By the 23rd section of the Supreme and Exchequer Courts Act (Revised Statutes of Canada, ch. 135) it is enacted "that the Supreme Court shall have, hold and exercise an appellate civil and criminal jurisdiction within and throughout Canada." This general provision is not, however, intended as a definition of the jurisdiction of the court in criminal cases so as to indicate that it has jurisdiction in all criminal cases; the definition of the jurisdiction is left to subsequent clauses of the act. Thus

(1) 36 W. R. 797.
(2) 15 P. D. 59.
(3) 23 Q.B.D. 305.
(4) [1892] A.C. 326.

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by section 25 of the same act it is enacted that the court shall have jurisdiction in criminal cases as hereinafter provided. By sections 68 and 69 of the act it was enacted as follows:—

68. Any person convicted of any indictable offence before any court of *Oyer* and *Terminer* or Gaol Delivery, or before the Court of Queen's Bench in the Province of Quebec on its Crown side, or before any other superior court having criminal jurisdiction whose conviction has been affirmed by any court of last resort, or in the Province of Quebec by the Court of Queen's Bench on its appeal side, may appeal to the Supreme Court against the affirmance of such conviction; and the Supreme Court shall make such rule or order therein, either in affirmance of the conviction or for granting a new trial, or otherwise, or for granting or refusing such application, as the justice of the case requires, and shall make all other necessary rules and orders for carrying such rule or order into effect: Provided that no such appeal shall be allowed if the court affirming the conviction is unanimous, nor unless notice of appeal in writing has been served on the Attorney General for the proper province within fifteen days after such affirmance. 38 V. c. 11. s. 49.

69. Unless such appeal is brought on for hearing by the appellant at the session of the Supreme Court during which such affirmance takes place, or the session next thereafter if the said court is not then in session, the appeal shall be held to have been abandoned unless otherwise ordered by the Supreme Court. 38 V. c. 11, s. 50.

These sections, 68 and 69, were, however, repealed by sec. 2 of 50 & 51 Vic. c. 50, and by the first section of the same act, 50 & 51 Vic. c. 50, the same provisions were in terms re-enacted. The jurisdiction of this court in criminal cases is, therefore, now wholly dependent upon and limited by this section 268 of the Criminal Procedure Act. It is manifest that the present appeal does not come within the terms of this enactment. It is questionable whether the contempt of which the appellant has been convicted is an indictable offence, and moreover the court below were unanimous in their opinions. The conclusion is therefore unavoidable that, the English authority before quoted having established that a proceeding of this

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kind to punish for a contempt of court is a criminal matter, this court has no jurisdiction to entertain the appeal.

In the case of *O'Brien* v. *The Queen* (1) this objection was not taken. The jurisdiction there was considered to be dependent on section 24 of the Supreme and Exchequer Courts Act, which confers a right of appeal from all final judgments, and moreover, had the objection been there taken, it could scarcely have prevailed in the face of the decision of the English Court of Appeal, already referred to, in the case of *The Queen* v. *Jordan* (2), in which the jurisdiction had been assumed and exercised, and which was then the governing authority upon the point, the case of *O'Shea* v. *O'Shea* (3) not having been decided until some time after the judgment in the case of *O'Brien* v. *The Queen* (1) had been delivered. Further, assuming that contempt of court is an indictable offence, the case of *O'Brien* v. *The Queen* (1) was a proper subject of appeal since the judges of the court below were not unanimous.

My brother Patterson has called my attention to a further objection to the present appeal which, in my opinion, is also insuperable. The record appears to be defective. No final judgment has ever been pronounced by the Supreme Court of New Brunswick. All we have before us in the nature of a judgment consists of an extract of the minutes of that court of the 13th of August, 1889, already set forth, in which appears an entry in these words: "defendant found guilty of contempt." This is clearly not a judgment, so that even if in other respects the appeal was admissible this objection would be fatal to it upon the record now before the court.

The appeal must be quashed.

(1) 16 Can. S.C.R. 197. (2) 36 W.R. 797.
(3) 15 P. D. 59.

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FOURNIER J.—Le présent appel est interjeté d'un jugement de la Cour Suprême du Nouveau-Brunswick, déclarant l'appelant coupable de mépris de cour pour avoir publié dans le *Globe* de *St. John*, *N.-B.*, certains articles contenant des assertions injurieuses contre la conduite de l'honorable juge Tuck, dans l'exercice de ses fonctions comme juge de la dite Cour Suprême.

Les faits qui ont amené la publication de ces articles sont en résumé comme suit : Aux élections générales de 1887, M. Baird et George G. King furent mis en nomination comme candidats pour l'élection d'un député pour représenter le comté de Queens dans la Chambre des Communes du Canada. Il y eut votation. A l'ouverture des boîtes de scrutin, le jour de la proclamation, l'officier-rapporteur constata que George G. King avait 1,191 votes, et le dit George F. Baird, 1,130. L'officier-rapporteur au lieu de déclarer élu George G. King, qui avait la majorité des votes, déclara que le dit King n'avait pas été légalement mis en nomination, et que le dit George F. Baird, qui avait la minorité des voix, était dûment élu membre pour représenter le comté de Queens dans la Chambre des Communes.

La raison de cette décision donnée par l'officier-rapporteur est, que bien que la nomination de M. King fût conforme aux dispositions de l'acte des élections, et que le dépôt de $200 exigé par la loi lui eût été payé et qu'il en eût donné reçu, cependant ce paiement ne lui avait pas été fait par l'agent nommé du dit King.

Sur la demande d'un décompte des bulletins faite à James Steadman, juge de comté pour le dit district électoral, le dit juge fixa vendredi, le 11 mars, à 10 heures A.M. au palais de justice à Gagetown, comme le jour et le lieu où se ferait l'examen des bulletins et l'addition finale des votes donnés à la dite élection.

Le neuf de mars à la demande de G.F. Baird, l'honorable juge Tuck émit un ordre *nisi* ordonnant au juge Stead-

man, à George G. King et à T Medley Wetmore, poursuivant le décompte, de montrer cause pourquoi un bref de prohibition n'émanerait pas pour défendre au juge Steadman de procéder au décompte des bulletins et à l'addition finale des votes et à donner un certificat du résultat.

Le juge Steadman se conformant à la loi ouvrit sa cour au jour et lieu indiqués, considérait que le juge Tuck n'avait aucune juridiction pour intervenir dans cette affaire, et que l'acte des élections lui imposait l'ordre de procéder, mais il fût empêché de remplir son devoir par le refus de l'officier-rapporteur de produire les bulletins.

Cette intervention extraordinaire de la part du juge Tuck causa beaucoup d'excitation dans le public et donna lieu, les jours suivants, à la publication dans le *Globe* de *St-John*, des articles qui ont servi de base à la demande d'arrestation de l'appelant pour mépris de cour.

Dans le terme de la Saint-Hilaire cette demande fut accordée. Mais un appel de cette décision ayant été interjeté à la Cour Suprême du Canada, l'appel fut mis hors de cour parce qu'il n'y avait pas eu de jugement final prononcé. Plus tard, après l'interrogatoire de l'appelant et après les incidents qui s'en suivirent, la cour déclara le 13 août 1889 que l'appelant était coupable de mépris de cour.

Ce dernier jugement est maintenant porté en appel devant cette cour. L'intimé prétendant que cette cour n'a pas juridiction pour entendre cette cause, l'audition de la cause n'a en conséquence eu lieu que sur la question de savoir s'il y avait appel à cette cour dans le cas d'une condamnation pour mépris de cour. L'audition sur le mérite de la cause n'a pas eu lieu, de sorte que la cour n'a maintenant à s'occuper que de la question de juridiction.

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Cette question d'appel en matière de mépris de cour a déjà été décidée par cette cour, *In re O'Brien* (1) dans laquelle cette cour a déclaré ce qui suit :—

"The Supreme Court has jurisdiction to entertain such an appeal from the judgment of the Court of Appeal of the Province, not only under sec. 24, subsec. (*a*) of the Supreme and Exchequer Courts Act, as a final judgment in an action or suit, but also under subsec. (1) of sec. 26 of the same Act, as a final judgment in "a matter or other judicial proceeding" within the meaning of sec. 26."

L'intimé prétend aussi qu'un jugement pour mépris de cour, n'étant rendu par la cour que dans l'exercice de son pouvoir discrétionnaire, est déclaré sans appel par la sec. 27, ch. 135. Cette prétention a aussi été avancée dans la même cause. In *re O'Brien* (1), et a été également rejetée ; voir les autorités au même vol. des rapports de la Cour Suprême, pp. 215, 216 *et seq.* Il serait inutile de revenir sur ce point.

La principale objection de l'intimé est que le mépris de cour étant une offense d'une nature criminelle et la sentence de la cour ayant été prononcée à l'unanimité, il n'y a pas d'appel.

Avant d'entrer dans la considération de cette question il faut, je crois, remonter à l'origine de la cause, afin de s'assurer du droit de l'honorable juge Tuck d'interrompre les procédés de l'élection de Queens par l'émission d'un bref de prohibition, et du droit de la Cour Suprême du Nouveau-Brunswick de juger la question de mépris de cour soulevée contre l'appelant à l'occasion de ses articles publiés dans le *St. John Globe*, attaquant la conduite de l'honorable juge Tuck pour l'émission de ce bref.

Comme il a été dit plus haut, le juge Steadman se préparait à procéder, en vertu de la loi électorale, au décompte des bulletins qu'il avait ordonné sur demande à cet effet, lorsque le bref de prohibition lui fut signifié.

(1) 16 Can. S.C.R. 197.

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Il ne put y procéder, parce que l'officier-rapporteur, auquel le bref avait aussi été signifié, refusa de produire les bulletins et déclara élu celui des deux candidats qui avait la minorité des votes. Ce procédé était inouï, et jamais jusque là, une élection parlementaire avait été interrompue par une pareille procédure. La conduite de l'honorable juge Tuck en accordant cette procédure était-elle légale ? La Cour Suprême du Nouveau-Brunswick a soutenu la position qu'il avait prise, et a confirmé la sentence qu'elle avait rendue pour mépris de cour. Je suis forcé à regret de dire que je considère sur ce sujet l'opinion de l'honorable juge Tuck, et celle de la cour, comme également erronées, contraires à la loi et aux décisions des plus hauts tribunaux.

Ce n'est que depuis un temps comparativement assez récent, que la décision des élections contestées, autrefois exclusivement laissée à la juridiction du parlement, a été attribuée aux tribunaux civils, dans le but d'arriver plus promptement à une solution satisfaisante sur les questions au sujet du droit de siéger en chambre. Ce n'était nullement l'intention du législateur de soumettre les procédés en matière de contestation d'élections aux règles qui régissent ordinairement les procédures des cours en matière civile, ni de les soumettre à la revision de ces cours par appel ou par les moyens des brefs de prérogative. Au contraire, toute la procédure à suivre en pareils cas, est tracée en détail d'une manière toute spéciale, et l'on ne peut aller chercher les règles de ces décisions que dans les Statuts qui ont créé cette juridiction, dans les principes constitutionnels, et dans la jurisprudence anglaise au sujet des élections contestées. Cette juridiction est toute spéciale, et n'est point soumise aux règles ordinaires des cours, bien qu'elle soit administrée par les juges qui composent ces cours.

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Cependant une opinion toute contraire a été maintenue par l'honorable juge Tuck et la Cour Suprême du Nouveau-Brunswick.

L'honorable juge en chef Allen dans son opinion s'exprime ainsi au sujet du pouvoir des juges d'émettre des ordres pour bref de prohibition (1)—

There can be no doubt about the general power of this court to grant writs of prohibition to restrain inferior courts from proceeding in matters over which they have no jurisdiction, or where, having jurisdiction, they are attempting to proceed irregularly or improperly. In hearing the application for a prohibition against the judge of the County Court of Queen's, and in granting the rule *nisi* calling upon him to show cause why a prohibition should not issue, Mr. Justice Tuck was acting in his judicial capacity as a judge of this court, and charges made against him, alleging that he was actuated by dishonest and corrupt motives in granting the order which he did, were calculated to interfere with the proper administration of justice, and to bring the proceedings of this court into contempt.

L'honorable Juge Palmer s'est exprimé d'une manière plus formelle sur cette question. Faisant allusion au jugement qu'il a donné sur l'application pour mépris de cour, il a ajouté (2) :

I, however, then gave no opinion whether this court had power to restrain any of the courts created by the Controverted Elections Act from exercising powers which the law did not give them, although I can see no reason why such courts should not be restrained. They are the creation of statutes and have only such power as the statutes gave them, and I think should not be at liberty to usurp any other, and that with regard to them this court is not relieved of its duty to see that they together with all other courts do not exceed their jurisdiction, but I am met with the *dicta* of a very eminent judge in the Centre Wellington Case (3), that prohibition would not lie to such court..... However, one of the judges does say that prohibition does not lie to such courts ; but after the most careful consideration, I came to the conclusion on the argument of that point before us in another case that it does lie, and it would be my opinion in the absence of direct authority.

Ainsi, d'après l'honorable juge, dont l'opinion a été adoptée par ses collègues, les procédures en matières d'élections sont soumises au contrôle des cours provinciales. On va voir par les citations ci-après, des déci-

(1) 28 N. B. Rep. 521. (2) 28 N. B. Rep. 535.
(3) 44 U. C. Q. B. 132.

sions du Conseil privé que cette doctrine est contraire à celle qu'il a promulguée dans les causes de *Valin* v *Langlois* (1) et dans celle de *Théberge* v *Landry* (2). Sur le caractère exclusif de la législation fédérale au sujet des élections voir le langage du Conseil privé dans la cause de *Valin* v. *Langlois* (1). Au parlement fédéral seul appartient la législation au sujet des causes d'élections.

In the present case their Lordships find that the subject matter of this controversy, that is, the determination of the way in which questions of this nature are to be decided, as to the validity of the returns of members to the Canadian Parliament, is beyond all doubt placed within the authority and the legislative power of the Dominion Parliament by the 41st section of the Act of 1847, to which reference has been made; upon that point no controversy is raised.

On ne pourrait affirmer plus positivement le principe que la juridiction en ces matières appartient exclusivement au parlement et à la législation fédérale et n'est pas soumise comme le prétend l'honorable juge Palmer au contrôle des cours provinciales.

Les deux actes de Québec de 1872 et 1875, concernant les contestations d'élections à l'Assemblée législative ont été aussi soumis à la considération du Conseil privé dans la cause de *Théberge* v *Landry* (2). On sait que par ces deux actes, de même que par les actes fédéraux les contestations d'élections à l'Assemblée législative ont été déférées aux tribunaux. Les principes généraux de ces mesures sont les mêmes et elles ne diffèrent que dans les détails. Lord Cairns en parlant de ces deux actes de Québec, s'exprime ainsi :—

These two acts of Parliament, the Acts of 1872, 1875, are acts peculiar in their character; they are not constituting or providing for the decision of mere ordinary civil rights; they are acts creating an entirely new, and up to that time an unknown, jurisdiction which, up to that time, had existed in the Legislative Assembly. A jurisdiction of that kind is extremely special, and one of the obvious incidents or consequences of such jurisdiction must be that the jurisdiction, by whomsoever it is to be exercised, should be exercised in a way that

(1) 5 App. Cas. 115. (2) 2 App. Cas. 102.

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should as soon as possible become conclusive, and enable the constitution of the Legislative Assembly to be distinctly and specially known..... The object which the legislature had in view was to have a decision of the Superior Court, which once arrived at should be for all purposes conclusive.

But there is a further consideration which arises upon this Act. If the judgment of the Superior Court should not be conclusive, of course the argument is that the power which is to be brought to bear to review the judgment is the power of the Crown in Council.

Now the subject matter, as has been said, of the Legislation is extremely peculiar. It concerns the rights and privileges of the electors and of the Legislative Assembly to which they elect members. Those rights and privileges have always, in every colony, following the example of the mother country, been jealously maintained and guarded by the Legislative Assembly. Above all they have been looked upon as rights and privileges which pertain to the Legislative Assembly, in complete independence of the Crown, so far as they properly exist. And it would be a result somewhat surprising and hardly in consonance with the general scheme of the legislation, if, with regard to rights and privileges of this kind, it were to be found that in the last resort the determination of them no longer belongs to the Legislative Assembly, no longer belongs to the Superior Court which the Legislative Assembly had put in its place, but belongs to the Crown in Council, with the advice of the Crown at home, to be determined without reference whether to the judgment of the Legislative Assembly, or of that Court which the legislative assembly had substituted in its place.

Si, comme le dit Lord Cairns dans son jugement, la législature en créant cette juridiction si spéciale avait pour but d'arriver promptement à une décision finale et de faire connaître distinctement le plus tôt possible la composition de la chambre, rien ne serait plus contraire à son intention que d'admettre que la procédure pourrait à tout instant en être interrompue et prolongée par le recours au bref de prohibition ou à d'autres procédures des droits civils ordinaires. Il est clair que l'admission de telles procédures est tout-à-fait illégale comme contraire à l'esprit de la loi.

Avant que la juridiction du parlement sur les élections contestées ait été déférée aux tribunaux, elle était exercée par la Chambre ou ses comités avec la plus scru-

puleuse attention dans le but de maintenir ses droits et privilèges au sujet des élections à l'abri de l'influence de la couronne. Ce serait un résultat extraordinaire, si les lois passées pour mettre la protection de ces droits et privilèges sous la garde d'une cour spécialement créée par le parlement pour cet objet, pouvaient être interprétées de manière à en remettre la décision à toutes les vicissitudes et les longueurs des procédés civils ordinaires. Tel ne peut être le cas ainsi qu'il a été décidé par l'honorable juge en chef d'Ontario *in re Centre Wellington Election* (1) à propos de la demande d'un mandamus pour obliger un juge de comté de faire le décompte des votes en vertu de la 14 Vict. ch. 6, sec. 14. Dans le cas actuel, il est vrai qu'il s'agit d'un bref de prohibition, mais il y a les mêmes raisons de décider que les cours n'ont point de juridiction pour l'accorder. Sur l'effet du changement dans le mode de contester les élections, l'honorable juge en chef s'exprime ainsi (2).—

I am satisfied that the legislation which has provided a new mode of trial of controverted elections, transferring such trial from the House to the Judiciary, has in no way affected the question now before us, and that we have to deal with it as if this important change had never taken place.

The House retains all powers that it has not expressly given up.

When a petition is presented for an undue return, or complaining of no return, it has to be decided by the judges ; and in the course of such inquiry the regularity of proceedings, and the conduct of officials entrusted with the execution of the writs of election, may come in question, just as such matters might have been questioned before the election committee under the old system. But I fail altogether to see what power has been given to a court of law to interpose by *mandamus* or prohibition so as to affect to regulate the proceedings of such officials in the execution of their duties under the election law.

If we can legally do what is asked here, we could with equal right affect to regulate the multitudinous duties prescribed to various persons in the conduct of the election, from the receipt of the writ by the returning officer till its return.

I think we have no such power.

(1) 44 U.C. Q.B. 132. (2) P. 141.

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The argument was based on the alleged general right of this court to order any person to perform a clearly defined statutable duty.

La demande du bref de mandamus fut en conséquence rejetée.

Pour les mêmes raisons la demande du bref de prohibition adressée à l'honorable Juge Tuck aurait dû être rejetée.

De toutes ces autorités, il faut nécessairement conclure que l'honorable juge Tuck n'avait absolument aucune autorité pour l'émission du bref de prohibition ; qu'en conséquence il n'agissait pas judiciairement lorsqu'il a donné l'ordre qui a interrompu les procédés du décompte des bulletins.

La Cour Suprême du Nouveau-Brunswick dans ses procédés pour *contempt* contre l'appelant au sujet de ses articles dans le *St. John Globe*, à propos de l'intervention du juge Tuck l'a au contraire considéré comme ayant agi judiciairement et a, en conséquence, déclaré l'appelant coupable de mépris de cour. Le but de son appel est de faire relever cette condamnation. L'intimé lui répond que nous n'avons pas de juridiction.

Notre juridiction, il est vrai, n'est pas aussi étendue que celle du Conseil privé de Sa Majesté, qui, par l'acte 3 et 4 Guil. 4, ch. 41 a pouvoir par la sec. 3, d'entendre :—

> All appeals or complaints in the nature of appeals whatever, which, either by virtue of this Act, or any law, statute, or custom, may be brought before Her Majesty in Council, from or in respect of the determination, sentence, rule or order of any Court Judge, or judicial officer, &c., &c., shall from and after the passing of this Act be referred by Her Majesty to the Judicial Committee of Her Privy Council.

Ces termes sont tellement généraux qu'ils comprennent certainement les appels pour mépris de cour. C'est en vertu d'une règle de cour que l'appelant a été condamné et il est certain que par cette clause l'appel est donné.

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Mais notre juridiction n'est pas aussi étendue. Par la 23e sec. de l'acte de la Cour Suprême cette cour a juridiction d'appel en matière civile et criminelle dans tout le Canada. Cette juridiction est définie et limitée par les clauses suivantes :—

Appeals in New Trials. Appeal in case of conviction of an indictable offence.—Proceedings thereupon.—When appeal shall not be allowed.

268. Any person convicted of any indictable offence, or whose conviction has been affirmed before any Court of Oyer and Terminer or Gaol Delivery, or before the Court of Queen's bench in the Province of Quebec, on its Crown Side, or before any other Superior Court having criminal jurisdiction, whose conviction has been affirmed by any Court of last resort, or, in the Province of Quebec, by the Court of Queen's Bench on its appeal side, may appeal to the Supreme Court against the affirmance of such conviction ; and the Supreme Court shall make such rule or order therein, either in affirmance of the conviction, or for granting a new trial, or otherwise, or for granting or refusing such application, as the justice of the case requires, and shall make all other necessary rules and orders for carrying such rule or order into effect ; provided that no such appeal shall be allowed if the Court affirming the conviction is unanimous, nor unless notice of appeal in writing has been served on the Attorney-General for the proper Province, within fifteen days after such affirmance :

When appeal must be brought to hearing.

2. Unless such appeal is brought on for hearing by the appellant at the session of the Supreme Court during which such affirmance take place, or the session next thereafter, if the said Court is not then in session, the appeal shall be held to have been abandoned, unless otherwise ordered by the Supreme Court.

Dans la jurisprudence anglaise le mépris de cour est mis au rang des offenses criminelles et, si on a adopté pour sa répression le mode sommaire de procéder par *attachment*, ce n'est pas parce qu'il ne pourrait pas être poursuivi par la voie de l'indictement, mais uniquement parce que ce mode est plus prompt que la voie ordinaire. Dans la cause de *O'Shea* v *O'Shea* (1) pour mépris de cour du même genre que celui dont il s'agit l'appel a été refusé sur le principe que l'offense étant

(1) 15 P. D. 59.

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criminelle la cause ne pouvait être portée en appel. Cette décision est conforme à la sec. 47 de l'Acte de judicature de 1873 (36 & 37 Vic., ch. 66), qui déclare comme suit :—

No appeal shall lie from any judgment of the said High Court in any criminal cause or matter, save for some error of law apparent upon the record as to which no question shall have been reserved for the consideration of the said judges under the said Act of the 11th & 12th years of Her Majesty's Reign.

Il est clair que la Cour d'Appel n'avait pas de juridiction dans ce cas-là, mais la décision confirme le principe que le mépris de cour est considéré comme une offense criminelle.

L'appel à notre cour dans ce cas n'est pas prescrit de la même manière que par l'acte de judicature anglais; au contraire il est positivement accordé mais à une condition. C'est celle d'un dissentement d'opinion dans la cour qui a décidé en première instance. Dans la cause *re O'Brien* citée ci-dessus nous avons entretenu l'appel parce que la condition d'un dissentiment d'opinion dans la cour qui avait rendu le jugement, se trouvait exister. Dans celle-ci, les juges ayant été unanimes dans leur jugement nous ne pouvons intervenir. Nous sommes sans juridiction. C'est pour ce seul motif que je suis d'avis que l'appel soit rejeté (quashed).

TASCHEREAU J.—I concur in the reason assigned by the Chief Justice for quashing this appeal, but would be disposed to give the respondent costs.

GWYNNE J. concurred in the judgment quashing the appeal.

PATTERSON J.—At a parliamentary election for Queen's County in New Brunswick, held in February, 1887, the candidates were George F. Baird and George G. King.

King received the larger number of votes, but the returning officer, holding that King's nomination was not legal, declared Baird duly elected.

A recount of ballots was applied for and an appointment was made by the judge of the County Court for proceeding with the recount.

Thereupon Baird obtained from a judge of the Supreme Court of New Brunswick an order *nisi* calling upon the County Court judge, and King and the applicant for the recount, to show cause before the Supreme Court why a writ of prohibition should not issue to prohibit further proceedings with the said recount, and in the meantime staying such further proceedings.

Before the order *nisi* was returnable certain articles appeared in a newspaper edited by the appellant Ellis which were alleged by Baird to be calculated to prejudice his application for the writ of prohibition. He accordingly obtained from the Supreme Court of New Brunswick, on the crown side, a rule *nisi* calling upon Ellis to show cause why an attachment should not be issued against him, or why he should not be committed for contempt of the Supreme Court for writing, printing and publishing those articles.

The rule *nisi* was issued in Easter Term, 1887, and was made absolute in Hilary Term, 1888, a writ of attachment being issued on the sixteenth of February, 1888.

After execution of the writ of attachment interrogatories were exhibited on the part of Baird and were, after various delays, answered by Ellis who was finally adjudged guilty of the contempt charged against him by the judgment of the Supreme Court, pronounced on the thirteenth of August, 1889, from which the present appeal is brought.

In contemplation of this appeal the court below suspended the pronouncing of sentence on the appellant,

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but required him to have his appeal ready for hearing at the October sittings of this court in 1889. He complied with that condition and is not to be prejudiced by the fact that the case has stood over from sittings to sittings for three full years and has not yet been heard except upon the question of our jurisdiction to entertain the appeal.

That is the only question now to be decided and I think it should be decided against the appellant.

The contempt of which the appellant has been pronounced guilty is a criminal offence.

I need not cite authority for that proposition beyond a reference to the opinion certified to Her Majesty by the Judicial Committee of the Privy Council in *In re Pollard* (1), and to the recent case of *O'Shea* v. *O'Shea* (2).

Now what is our jurisdiction in criminal cases?

We must find the answer to this question in the Supreme and Exchequer Courts Act (3), the sections more particularly bearing upon it being 24, 25 and 68.

Section 24 declares that an appeal shall lie to the Supreme Court in several cases which are enumerated and distinguished by letters of the alphabet from *a* to *g*.

Article (*a*) is wide enough in its terms to include criminal cases—specifying all final judgments of the court of final resort in any province of Canada whether such court is a court of appeal or of original jurisdiction, in cases in which the court of original jurisdiction is a superior court—but I do not construe it as intended to include criminal cases. I think it is intended to include only civil cases. The articles (*b*) to (*f*) obviously refer to proceedings in civil cases only. Article (*g*) specified judgments in cases of proceedings for or upon a writ of *habeas corpus*, but with the express

(1) L. R. 2 P. C. 106, 120. (2) 15 P. D. 59.
(3) R. S. C. c. 135.

qualification "not arising out of a criminal charge," and the same qualification applies to *certiorari* and prohibition which were introduced by a late amendment of the clause (1).

Then section 25 declares that "the court shall also have jurisdiction,—(*a*) in appeals in criminal cases as hereinafter provided" :—The reference is to section 68 under the heading "appeals in criminal cases." That section, as will be noticed when I read it, is not simply an extension of the right to appeal to cases which for some reason, as *e.g.* because they do not originate in a superior court, could not come within the language of article (*a*) of section 24. It is, as I think obvious, intended to embrace the whole jurisdiction of the court in appeals in criminal cases. Let us read the section :

APPEALS IN CRIMINAL CASES.

68. Any person convicted of any indictable offence before any court of *Oyer* and *Terminer* or Goal Delivery, or before the Court of Queen's Bench in the Province of Quebec on its Crown side, or before any other superior court having criminal jurisdiction, whose conviction has been affirmed by any court of last resort, or, in the Province of Quebec, by the Court of Queen's Bench on its appeal side, may appeal to the Supreme Court against the affirmance of such conviction ; and the Supreme Court shall make such rule or order therein, either in affirmance of the conviction or for granting a new trial, or otherwise, or for granting or refusing such application, as the justice of the case requires, and shall make all other necessary rules and orders for carrying such rule or order into effect ; Provided that no such appeal shall be allowed if the court affirming the conviction is unanimous, nor unless notice of appeal in writing has been served on the Attorney General for the proper Province within fifteen days after such affirmance.

That section 24 does not apply to give an appeal in indictable cases is very manifest when we consider that under its terms the crown, as well as the person convicted, would be entitled to appeal, which would be inconsistent with section 68.

(1) 54 & 55 V. c. 25 s. 2.

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But it may be argued that while indictable offences come under section 68 alone, the construction of section 24 is affected by section 68 only with respect to that one class of cases, and that those dealt with in a summary manner, like contempt of court, may still follow the general rule and be appealable in the same way as a civil case.

Such a contention would, in my judgment, misinterpret the statute.

I have noticed the qualification of the right to appeal in cases of *habeas corpus*, *certiorari* and prohibition, or, more properly, the care taken, by expressly excluding applications arising out of a criminal charge, to guard against the idea that section 24 includes criminal cases. I have pointed out that section 25, giving an appeal in criminal cases as provided for by section 68, does so as something that is not given by section 24, and that that appeal, limited as it is to cases where the affirmance of the conviction has not been unanimous, is given to the convict only, and not to the crown or to the prosecutor. There is no indication of intention that in any criminal case there shall be a larger right of appeal, or an appeal in any criminal case that does not fulfil the conditions of section 68.

The case of *O'Shea* v. *O'Shea* (1) touches this aspect of the statute. Section 47 of the Judicature Act, 1873, enacted that no appeal should lie from any judgment of the high court "in any criminal cause or matter, save for some error of law apparent upon the record, as to which no question shall have been reserved for the consideration of the said judges under the said Act of the 11th and 12th years of Her Majesty's reign."

The contempt of court charged in that case was of the same character as that charged in the case before us, and it was held that the fact of the charge being in

(1) 15 P. D. 59.

"a criminal cause or matter," excluded the appeal, no attempt being made to confine the operation of section 47 to cases in which, under the act referred to in that section, a question might be reserved for the consideration of the judges.

I think the objection to our jurisdiction to hear any appeal in a criminal case, except under section 68, is well taken.

That objection is fatal to this appeal, but independently of it the appeal is not one which, in my opinion, we can entertain.

There is no formal ud gment before us, and none has been drawn up.

We have a report of the opinions expressed by judges in the court below, and we have the following extract from the clerk's minute book :—

Tuesday, 13th August.

PRESENT :—Allen C. J. and Fraser J.

THE QUEEN *v.* JOHN V. ELLIS *re* GEORGE F. BAIRD.

Allen C. J. reads judgment of self and reads judgment of Palmer J.

Fraser J. reads his judgment; also reads judgment of King J.

Wetmore and Tuck JJ. no part.

Defendant found guilty of contempt. Sentence postponed until he has had an opportunity to appeal on entering into a recognizance to appear and receive sentence on the first day of Hilary Term next.

Mr. McLean for defendant asks that the sentence be pronounced and that execution be stayed until appeal is decided.

Allen C. J. : The court is not prepared to pass any sentence ; they have not considered it at all.

Mr. Ellis appeared with his sureties and entered into a recognizance to appear and receive sentence on the first day of Hilary Term next.

The vague memorandum that the defendant was "found guilty of contempt" may be sufficient, together with the papers in the hands of the clerk, to enable that officer to prepare a formal adjudication, but by itself it is merely a vague memorandum. I apprehend, however, that without what is called the sentence no *final* judgment can be drawn up.

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The proceeding by attachment, followed by interrogatories, is concisely and satisfactorily explained in Stephens's Commentaries (1), where, as we may note in passing, the method of making a defendant answer on oath to a criminal charge, which is not agreeable to the genius of the common law in any other instance, is said to have been derived through the medium of the courts of equity. Referring to the answering of interrogatories the commentator says:—

> If the party can clear himself on oath he is discharged; but if perjured may be prosecuted for the perjury. If he confesses the contempt the court will proceed to correct him by fine or imprisonment, or both, and sometimes by a corporal or infamous punishment.

In an earlier part of the treatise (2) it was shown that

> All courts of record are the King's Courts in right of his crown and royal dignity; and therefore every court of record has authority to fine and imprison for contempt of its authority; while, on the other hand, the very erection of a new jurisdiction with power of fine or imprisonment makes it instantly a court of record.

The power of the court is thus to award a punishment for the contempt, and that power has not in this case been exercised. The finding that a contempt has been committed may be an essential preliminary to the exercise of the power to punish, but it is only a preliminary or interlocutory step towards the final judgment and the general rule governing our jurisdiction confines it to final judgments.

In the case *In re Wallace* (3), which was an appeal from an order of the Supreme Court of Nova Scotia awarding a punishment for contempt of court, the judicial committee agreed that a contempt had been committed which it was hardly possible for the court not to take cognizance of, but allowed the appeal on the ground that the punishment awarded was not appropriate. So in the present case, if we should agree with

(1) Vol. IV., p. 352. (2) Vol. III., p. 383.
(3) L.R. 1 P.C. 283.

the learned judges who considered the appellant guilty of contempt, and therefore should dismiss this appeal, it would be open to the appellant, or indeed to the respondent (on the hypothesis of the case being appealable under section 24), to appeal again after the final order awarding the punishment.

Then there is a further consideration.

The power to punish for contempt is a discretionary power. That was expressly so decided by our ultimate court of appeal in *McDermott* v. *The Judges of British Guiana* (1) and it is shown by many other cases, among which are *Ashworth* v. *Outram* (2) and *Jarmain* v. *Chatterton* (3).

An appellate court will be slow to interfere with a decision made in the exercise of the discretion of the court of first instance, but such decisions may nevertheless be appealable. That depends on the extent of the jurisdiction of the appellate court. Whether, as a matter of policy, a person aggrieved by an order to commit for contempt, or by the refusal to make such an order, ought to have an appeal, or perhaps a series of appeals, is an abstract question which does not now call for consideration and is not within our province.

What is our jurisdiction ?

Section 27 (4) declares that no appeal shall lie from any order made in any action, suit, cause, matter, or other judicial proceeding made in the exercise of the judicial discretion of the court or judge making the same.

This applies, in my opinion, to an order to commit for contempt.

There is no good reason for reading the section as intended to except orders which cannot come within any of the enabling sections, or as referring only to orders made as matters of practice in the course of an

(1) L.R. 2 P.C. 341.
(2) 5 Ch. D. 943.
(3) 20 Ch. D. 493.
(4) R. S. C. c. 135.

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action, such *e.g.* as an order to put off a trial, or to amend a pleading, or to produce documents, which last mentioned order was held by Malins V. C. in *Lane* v. *Gray* (1) to be discretionary.

The wider scope of the language is shown by the latter part of the section which declares that the exception shall not include certain things which are made appealable by section 24 (*e*), viz., decrees and decretal orders in actions, suits, causes, matters or other judicial proceedings in equity, or in actions or suits, causes, matters or other judicial proceedings in the nature of suits or proceedings in equity instituted in any superior court.

On all these grounds I am of opinion that we should quash the appeal.

Appeal quashed with costs.

Solicitors for appellant: *Weldon & McLean.*

Solicitor for respondent: *L. A. Currey.*

(1) L. R. 16 Eq. 552.

THE CANADIAN PACIFIC RAILWAY COMPANY (DEFENDANTS).... } APPELLANTS;

AND

JAMES FLEMING (PLAINTIFF).....RESPONDENT.

1892
*Nov. 15.

1893
*Feb. 20.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Appeal—Trial by jury—Withdrawal from jury — Reference to court — Consent of parties—Railway Co.—Negligence.

On the trial of an action against a railway company for injuries alleged to have been caused by negligence of the servants of the company in not giving proper notice of the approach of a train at a crossing whereby plaintiff was struck by the engine and hurt the case was withdrawn from the jury by consent of counsel for both parties and referred to the full court with power to draw inferences of fact and on the law and facts either to assess damages to the plaintiff or enter a judgment of non-suit. On appeal from the decision of the full court assessing damages to plaintiff:

Held, Gwynne and Patterson JJ. dissenting, that as by the practice in the Supreme Court of New Brunswick all matters of fact must be decided by the jury, and can only be entertained by the court by consent of parties, the full court in considering the case pursuant to the agreement at the trial acted as a quasi-arbitator and its decision was not open to review on appeal as it would have been if the judgment had been given in the regular course of judicial procedure in the court.

Held, further, that if the merits of the case could be entertained on appeal the judgment appealed from should be affirmed.

Held, per Gwynne and Patterson JJ., that the case was properly before the court and as the evidence showed that the servants of the company had complied with the statutory requirement as to giving notice of the approach of the train the company was not liable.

APPEAL from a decision of the Supreme Court of New Brunswick in favour of the plaintiff on a sub-

*PRESENT:—Strong C.J. and Fournier, Taschereau, Gwynne and Patterson JJ.

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mission of the case to the court both on the facts and the law.

The action in this case was brought to cover compensation for injuries received by plaintiff caused by being struck by an engine of the defendant company at a crossing near the Intercolonial Railway station in the city of St. John. The particulars of the accident are not dealt with by the majority of the court but are fully detailed in the judgment of Mr. Justice Patterson. On the trial the counsel for the respective parties entered into the following agreement:

"It is agreed that the jury be discharged without giving a verdict, the whole case to be referred to the court which shall have the power to draw inferences of fact, and if they should be of opinion upon the law and the facts that the plaintiff is entitled to recover they shall assess the damages, and that judgment be entered as the verdict of the jury. If the court shall be of opinion that the plaintiff is not entitled to recover a nonsuit shall be entered."

Pursuant to this agreement the case was considered by the Supreme Court of New Brunswick sitting *in banc* and decided in favour of the plaintiff. The defendants appealed to this court.

Skinner Q.C. for the respondent took a preliminary objection to the jurisdiction of the court contending that the case having been referred to the court by consent of parties the defendants could not appeal any more than they could if it had been referred to private arbitrators. After hearing counsel for the appellants on this objection the court reserved its judgment and heard argument on the merits of the appeal.

Weldon Q.C. for appellants cited *Cornish* v. *The Accident Insurance Co.* (1); *Rodrian* v. *New York, &c., Railway Co.* (2).

(1) 23 Q.B.D. 453.

(2) 43 Al. L. J. 301.

Skinner Q.C. for the respondent.

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The Chief Justice.

THE CHIEF JUSTICE—This was an appeal from a judgment of the Supreme Court of New Brunswick in an action instituted by the respondent against the appellants to recover damages for an injury received whilst driving along a street in the city of St. John at a point where the Intercolonial Railway, over which the appellants have running powers, crosses the public highway or street on a level, the injury in question having been occasioned by an engine and tender belonging to the appellants, and which was at the time of the accident being worked by the servants of the appellants.

On the trial of the action and at the conclusion of the evidence the following agreement was come to between the respective counsel of the parties and was entered upon the minutes of the trial:—

It is agreed that the jury be discharged without giving a verdict, the whole case to be referred to the court which shall have the power to draw inferences of fact, and if they shall be of opinion upon the law and the facts that the plaintiff is entitled to recover, they shall assess the damages and that judgment be entered as the verdict of the jury. If the court is of opinion that the plaintiff is not entitled to recover a non-suit shall be entered.

The jury were then discharged.

The court in banc accepted the functions which the parties had delegated to them and assumed the duty of ascertaining the damages, which they assessed at the sum of $300.

The preliminary objection was taken in the respondent's factum, and repeated on the appeal being opened, that there was no jurisdiction to entertain such an appeal.

I am clearly of opinion, both upon principle and authority, that this case is not a proper subject of appeal.

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According to the law and the established procedure of the province of New Brunswick all questions of fact arising in actions at common law are to be tried by a jury, by whom also damages must be assessed, and except by consent of parties the court has no power to dispense with a jury and to exceed its ordinary legal jurisdiction by taking upon itself the decisions of such questions of fact as the assessment of damages. When, therefore, the court in this case undertook to deal with the evidence, to determine the questions of fact, and to assess the damages, it took upon itself to perform the functions of a jury, for which it had no legal or any other authority save the consent and agreement of the parties. The court, therefore, acted as *quasi* arbitrators.

It is well settled by authority that in such cases, where a jurisdiction beyond the ordinary jurisdiction which it has by general law is conferred upon a court of justice by an arrangement between the parties, its decision is regarded as that of a private tribunal constituted by the parties, such as a board of arbitrators, and cannot be reviewed, in appeal or otherwise, as judgments pronounced in the regular course of its ordinary procedure may be reviewed and appealed from.

This principle was acted upon by the Supreme Court of New Brunswick in the case of the *Quiddy River Boom Co.* v. *Davidson* (1), and I am of opinion that that decision was entirely in accordance with many English authorities from amongst which I may select two as being directly in point. I refer to the *Attorney-General of Nova Scotia* v. *Gregory* (2), and *Shortridge* v. *Young* (3).

I think the appeal should be quashed with costs.

(1) 25 N. B. Rep. 580. (2) 11 App. Cas. 229.
(3) 12 M. & W. 5.

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Apart altogether from the question of jurisdiction I should upon the merits, if I had considered them to be open, have been prepared to dismiss the appeal for the reasons stated in the judgment of Mr. Justice King.

FOURNIER J. concurred.

TASCHEREAU J.—I do not dissent on the question of jurisdiction, but if I had to decide the case on the merits I would dismiss the appeal for the reasons given by Mr. Justice King in the court below.

GWYNNE J.—I concur in the judgment prepared by Mr. Justice Patterson.

PATTERSON J.—The plaintiff, who is respondent in this appeal, brings his action to recover damages for injury to himself and to his horse and carriage from a collision with a locomotive of the appellant company on the 17th of March, 1889, charging that the accident was caused by negligence of the servants of the company.

The action was tried at St. John and, after all the evidence on both sides had been given, the following agreement was come to :

It is agreed that the jury be discharged without giving a verdict, the whole case to be referred to the court which shall have the power to draw inferences of fact, and if they should be of opinion upon the law and the facts that the plaintiff is entitled to recover they shall assess the damages, and that judgment be entered as the verdict of the jury. If the court should be of opinion that the plaintiff is not entitled to recover a nonsuit shall be entered.

The case was heard before six judges, two of whom, viz., Mr. Justice Tuck who had presided at the trial and Mr. Justice Fraser, were of opinion that the plaintiff was not entitled to recover, and gave judgments explaining fully the grounds of their opinion. The

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other four judges thought the plaintiff entitled to recover, Mr. Justice Palmer and Mr. Justice King giving their reasons at length, and the Chief Justice and Mr. Justice Hanington expressing their concurrence, and damages were assessed at $300.

The appeal is from that judgment.

A preliminary question was raised on the part of the respondent as to the right to appeal from a judgment given in pursuance of the agreement which I have read. For the appellant it was answered that the amount of damages was not questioned, but only the right of the plaintiff to recover, or, in other words, the liability of the defendants for the negligence charged against them.

I notice that in the court below Mr. Justice Palmer who discussed the amount proper to be assessed as damages after he had dealt with the question of liability, and who suggested that it would be better if such questions as the assessment of damages were left to the jury, concluded his judgment with the following observation :

> The parties made another difficulty by leaving the case to the court by agreement, the power we are exercising is that conferred upon us by such agreement ; and not such as is so conferred by law, for in the latter of which only is there any appeal. See *Quiddy River Boom Co.* v. *Davidson* (1).

The learned judge here refers, as I understand him, to the assessment only. In the case he cites it had been agreed that the court should assess damages in place of the jury, and the parties were properly held to the amount assessed under that agreement. Setting aside this matter of the assessment, the agreement is in effect the familiar reservation of points for the court with a consent that the court shall draw inferences of fact.

The right to appeal from the decision of a common law court upon a point reserved at the trial was first

(1) 25 N. B. Rep. 580.

given in England by the Common Law Procedure Act of 1852, and in Upper Canada where there was a court of appeal it was given in 1857 (1).

Those enactments gave a right of appeal in all cases of rules to enter a verdict or non-suit upon a point reserved at the trial. Such reservations, which could only be by consent of the litigant parties, were very commonly accompanied by a consent that the court should have power to draw inferences of fact as a jury might have done, and it never was supposed, as far as I am aware, that that consent extended only to the court of first instance. Had any such idea existed we should doubtless find it noticed in the books of practice. I believe we may look in vain for any such thing in those books, and I do not doubt that examples to the contrary abound in the reports. When the point was in discussion I happened to think of, and I mentioned, one of those examples which occurs in *Moeller* v. *Young* (2) decided in 1855, where, on a reservation of leave to move, authorizing the court to draw inferences of fact as a jury might do, the Court of Exchequer Chamber, differing from the Court of Queen's Bench as to the proper inferences of fact, reversed the decision of that court.

In the case before us there was no difference of opinion among the judges who took part in the decision concerning any of the leading facts. Those facts, by which I mean actual occurrences as distinguished from inferences of fact, are practically undisputed. From those facts a majority of the judges inferred that there was negligence for which the defendants were responsible which caused the injury to the plaintiff; a minority inferred the contrary. Under the circumstances, and having regard to the consent, we need not trouble ourselves with the inquiry whether the con-

(1) 25 V. ch. 5 s. 14.

(2) 5 E. & B. 7 and 755.

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clusion depends on inferences of fact or of law, or partly of fact and partly of law. The question is whether, in view of both the law and the facts, the defendants have been properly condemned.

The line of the Canadian Pacific Railway terminates outside of the city of St. John, and the company's trains enter the city from the west upon the track of the Intercolonial Railway. On the 17th of March, 1889, an engine of the company with its tender was proceeding backwards along the Intercolonial line towards the station for the purpose of taking out a train. The track crosses a street in St. John called Mill Street, and at that crossing the collision occurred after dark or between eight and nine o'clock. There are gates at the crossing, on each side of the railway, which are usually lowered when an engine or train is about to pass, and raised up at other times. It happened, however, that on this 17th of March the gates could not be lowered because the frost had made the machinery unworkable. That seems to have been a not unusual occurrence, and when it happened the practice was for a man to warn travellers when a train was coming, by means of a flag in the daytime and a light at night. The man whose duty it was to do this was the same man who attended to the semaphore. When an engine approaching from the west whistled for the semaphore the man would lower it by means of the apparatus in a small building at the crossing, and then station himself with his flag or his light as near as possible to the centre of the crossing. He did so on the occasion in question, and seeing the plaintiff approaching with his vehicle he swung his light and shouted to the plaintiff, but failed to attract his attention. Mr. Justice Palmer, who thought the plaintiff was entitled to recover, states his view, formed from reading the evidence, that the plaintiff did see the light but attached no importance

to it as it conveyed no meaning to him, and probably did not particularly notice it, or had forgotten it when he stated in the witness-box that he did not see it.

The plaintiff says, also, that he did not hear the bell of the locomotive ringing, but the evidence left no doubt in the mind of any of the judges that the bell was duly rung.

With great respect for the learned judges who formed the majority in the court below I think their reasoning proceeds upon a faulty principle. The tenor of it appears from the judgment of Mr. Justice King who prefaces his remarks upon the facts by quoting some general observations made by English judges in three cases, *Cliff* v. *Midland Ry. Co.* (1); *Stubley* v. *London & N. W. R. Co.* (2) and *Davey* v. *London & S. W. Ry. Co.* (3). I do not think those cases bear out the application, in circumstances like those before us, of the doctrines indicated by the passages quoted. I may allude by and by to the cases or some of them.

The learned judge then refers to some provisions of the Railway Act 51 V. ch. 29 (D.). One of these is contained in sec. 187 which empowers the Railway Committee of the Privy Council, if it appears to it expedient or necessary for the public safety, from time to time, with the sanction of the Governor in Council, to authorize or require a company whose railway crosses a street or public highway at rail level or otherwise to protect such street or highway by a watchman or by a watchman and gates or other protection. That provision is a repetition of the law contained in s. 74 of R. S. C. ch. 109. It assumed its present form in 1884 under 47 V. c. 11 s. 3, but existed in more general words—the watchman and gates not being specifically mentioned—in the Consolidated Railway Act 1879, in

(1) L. R. 5 Q. B. 258. (2) L. R. 1 Ex. 13.
(3) 12 Q. B. D. 70.

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sec. 48, and in the same section as re-enacted in 1883 by 46 V. c. 24, s. 4; but, as the learned judge remarks, it did not apply to the Intercolonial Railway. He also refers to section 256 of 51 V. ch. 29 which embodies the long standing and familiar provision for the ringing of the bell or sounding of the whistle, which provision is also contained in the Government Railways Act, R. S. C. ch. 38, s. 36; and to s. 259 which, like s. 28 of the Government Railways Act, limits the speed at which an engine may pass through a thickly peopled neighbourhood to six miles an hour, and sec. 260, another old provision corresponding to sec. 29 of the Government Railways Act, and requiring that whenever any train of cars is moving reversely in any city, town or village, the locomotive being in the rear, a person shall be stationed on the last car in the train who shall warn persons standing on or crossing the track of such railway of the approach of such train.

This last mentioned provision applies only to a train of cars, and the six miles an hour mandate was not violated by the engine that struck the plaintiff, as its speed was not over five miles an hour.

The learned judge then remarks:—

> There was therefore no breach by the defendants of any statutory obligations; and if they are to be made liable at all it must be because, having regard to all the circumstances of the case, they omitted that reasonable degree of care which the law justly requires of those who, in the exercise of their rights, are using an instrument of danger.

I should not myself deduce from the considerations set out by Mr. Justice King and by Mr. Justice Palmer the conclusion that there was want of reasonable care on the part of the company. The reasoning by which they reach that conclusion seems to me to cast on the railway company the duty of absolutely averting all risks from the most careless of wayfarers, and to make the occurrence of an accident proof that some duty was neglected by the company. Still, the conclusion being

a conclusion of fact founded to a great extent on opinion, I should be slow to interfere with it were it not that it seems to me to err in applying to our railway companies the same rules that govern in England, without sufficient regard to the differences created by our legislation.

The English Railway Clauses Consolidation Act (1) requires the erection of gates at level crossings of turnpike and carriage roads, which as a rule are to be kept shut except when required to be opened to let horses, &c., pass along the highway, and provision is also made for gates at footpaths which cross the railway; but the questions of duty and negligence in the mode of running trains have to be dealt with on general principles, without any such statutory guide as we have in the enactments which prescribe the precautions to be observed with moving trains.

Those enactments define the duty of the railway company, and, in such situations as a level crossing of a highway, inform the public what signals of danger may be expected.

The position in England is stated in a few words by Lord Justice Bowen in his judgment in *Davey* v. *London and South-western Railway Company* (2) :—

> There is no statute law, he says, as regards the obligations of a railway company with respect to a level crossing, so far as I know, and the learned counsel for the appellant admitted as much. It seems to me that whether a railway company has or has not taken the proper precautions with regard to the speed at which, and the warning accompanied by which, their trains pass on a level crossing must be in each case a question of fact. A level crossing in a prairie where you see twenty or thirty miles on each side is very different from a level crossing outside the mouth of a tunnel, or a level crossing in a street, and you must look at each case, and all the facts of the case, before you make up your mind what the railway company ought to do.

(1) 8 & 9 V. c. 20. ss. 45 & 61. (2) 12 Q. B. D. 70, 76.

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The difference under our system is very marked. The obligations of the company are defined by statute law. They are framed for all cases, and are not, as in England, a question of fact in each case. Our rule may prescribe more than may, in supposable cases, be absolutely required, as in the instance of a prairie where, as put by the Lord Justice, one can see from afar if there is any one to be warned by the whistle or the bell, while in other situations, as *e.g* at the crossing of Mill Street in St. John, the rule provides for an effective warning and one which is intended as a sufficient protection to travellers who use ordinary vigilance in approaching the railway.

It is the duty of the traveller to exercise such ordinary vigilance. Many decisions illustrate that proposition and none more clearly than that in *Davey* v. *London and South-western Railway Co.* (1) where the servants of the railway company negligently omitted to give warning of the approach of the train by either sounding the whistle or displaying a flag which was provided for the purpose, but the plaintiff was nonsuited because with ordinary vigilance he ought to have seen the train.

The legislature having prescribed the precautions to be taken at level crossings, we have no right to hold those precautions insufficient and to throw it open to the jury on every trial to find, *ex post facto*, that something more ought to have been done in the case that for the moment excites their sympathy. Whatever is proper for the court to do in this case, under the consent, would of course have been proper for the jury to do if the case had been left to them. A remark of Pigott B. in *Stubley* v. *London and North-western Railway Co.* (2) that there would be no limit to the liability of railway companies if it were left loosely to juries

(1) 12 Q.B.D. 70. (2) L.R. 1 Ex. 13, 20.

in every case to say whether further precautions ought to have been taken is as true in this Dominion as in England.

The accident in Stubley's case occurred on a public footpath which was crossed on a level by the railway. In obedience to the Railway Clauses Consolidation Act, 1845, the company had a swing gate at the crossing on each side of the line, placed at some distance from the rails. A woman who was about to cross the line waited until a train passed, and then, crossing the line, was killed by a train on the further track which she had not perceived. Mr. Justice Blackburn, before whom the action was tried, reserved leave to the defendants to move to enter a nonsuit, and subject to that leave, he told the jury to assume for the purposes of the day, and only for that purpose, that the law casts upon the company the duty of taking all reasonable precautions for the purpose of protecting the passengers from risk, including that of keeping a watchman to warn passengers of the approach of a train if, from the nature of the traffic at that place, that was a reasonable practice; and he left to the jury the questions: Was there negligence on the part of the company? And could the deceased with reasonable care on her part have avoided the accident? Under that direction the jury found a verdict for the plaintiff, adding that they were of opinion that at that crossing there ought to be reasonable precautions taken by the company beyond what they had taken. Against the motion for a nonsuit on leave reserved it was contended that it was open to the jury to consider that further precautions, such as having a watchman at the crossing, ought to have been taken by the company, the peculiar features of the crossing being of course dwelt upon, chiefly that sixty trains a day passed there, and that a person at the gate through which the deceased had come was prevented by a bridge

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from seeing a train more than thirty yards off in one direction, though, when still nine feet from the line, he could see 300 yards each way. The court, consisting of Pollock C.B. and Bramwell, Channell and Pigott BB. unanimously held that there was no case for the jury, and a nonsuit was accordingly entered.

The case of *Stapley* v. *London, Brighton & South Coast Railway Co.* (1) was tried shortly before Stubley's case before Pollock C.B. whose charge was relied on for the plaintiff at the trial in Stubley's case, and it was argued and decided a week later than Stubley's case by the same judges, Bramwell B. excepted. The railway there crossed a carriage way, and the statutory duty was to have gates across the road and to keep them shut. There were proper gates, and there was also a turnstyle for foot passengers. It happened, however, that from a temporary derangement of the service, partly arising from the death of the man who had charge of the gates, one of the gates was left open and without an attendant. While this was so a foot passenger walked on to the line and was killed by a train. The neglect of the statutory duty to keep the carriage gate shut was held to justify a verdict against the company. The rules of the company provided that before opening the gates the gateman was to satisfy himself that no train was in sight, and the fact that the gate was open and no gateman there was held to be an intimation to the foot passenger that no train was in sight. Channel B., giving the judgment of himself and of Pigott B., said :—

> The case depends upon the principle of *Bilbee* v. *London, Brighton and South Coast Railway Co.* (2)—(which case had been held not to govern *Stubley* v. *London & North-western Railway Co.*)—We adopt the opinion there expressed by Erle C.J., that we ought not to impose any undue burdens on railway companies that are not imposed on them by Act of Parliament, and we do not say that a railway company must keep

(1) L. R. 1 Ex. 21.

(2) 18 C. B. (N. S.) 584.

servants at every crossing. At the same time we concur in the view presented to us by Mr. Manisty, that the company are not to be exempt from using due and ordinary care, although their statute gives them the right of crossing public ways on a level.

This last observation brings us back to our immediate point that, with us, the statute which permits the railway to cross a highway at the level expressly declares what shall be done to give warning of the approach of a train. That is just what in the Stapley case would in all probability have been held to be all that could reasonably be required. It is in that case stated as a fact that "the engine driver of the train sounded no whistle until the accident was actually taking place."

It is said, and the judgment of the court below proceeds on the idea, that some level crossings may be peculiarly dangerous, and that at them the statutory signals may be insufficient.

That is, in my opinion, a consideration for the legislature, and not, under our system, for the court or jury To hold otherwise would be to give a right to the jury in every case, even when the statutory signals are put beyond denial, but the traveller pays no more attention to them than the plaintiff in this case did to the bell that was rung or to the signalman's lantern, to say that the crossing was peculiarly dangerous and more ought to have been done; saying that, perhaps, on evidence which, as put by Bramwell L.J. in *Jackson* v. *Metropolitan Railway Co.* (1) would not be allowed to make any body or person liable but a railway, or perhaps a tramway, or may be a steam-boat company.

But this subject of the peculiar character of some crossings, and the necessity for special protection at such places for travellers on the highway, has not been overlooked by our legislature, as the jurisdiction given to the railway committee of the Privy Council proves.

(1) 2 C. P. D. 125, 133.

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If the ordinary safeguards are deemed insufficient in a particular locality, the means are thus provided for super-adding a further duty to that cast on companies by the general rules.

The remark of Lopez J. in *Brown* v. *Great Western Railway Co.* (1) that—

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> the law with regard to negligence has somehow or the other got into a lamentable state of confusion,

though well founded in view of English decisions touching accidents at level crossings, ought not to have so much force under our more definite system; but it is to be feared that the confusion will become worse confounded if a jury may always say that, though the statute or the order of the railway committee was faithfully obeyed, yet something more ought to have been done.

The opinions on which the judgment in review is based turned a good deal on reasonings from the fact that there were gates at the crossing, and the other fact that they would not work that night. It does not appear that the gates were put there under any statutory obligation. It is not suggested that the defendant company put them there. Even if the railway had been the property of that company no obligation to protect the street by gates could be recognized without proof of an order of the railway committee, nor could it be said that such an order had been disobeyed unless its terms were in evidence.

The gates were no doubt put there by the Minister of Railways in connection with the Intercolonial Railway, and they were in charge of the officials of that railway and not of the defendant company. They were even not put there under any statutable obligation. The duty to maintain and use them was a self imposed duty. I do not know that a railway company exercis-

(1) 52 L.T. (N.S.) 622.

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ing running powers over the line of another company is liable for an injury to a stranger caused by the default of the company owning the railway, as it might be liable on a contract to carry. *Thomas* v. *Rhymney Railway Co.* (1); *Great Western Railway Co.* v. *Blake* (2). But if by any process of reasoning, the duty assumed by the government with regard to the gates at the crossing could be attributed to the defendant company, it would still be in the character of a self imposed duty, and on the principle on which the case of *Skelton* v. *London and North-western Railway Co.* (3) was decided, the neglect of it would give no ground of action.

In that case the railway company had, in obedience to the statute, placed swing gates on each side of the railway across a public footpath. The statute did not require that those gates should be fastened, but they were usually fastened by rings attached to the gate posts and it was the duty of the signalman who was stationed near to let down the rings by means of a lever, and so fasten the gates whenever a train was approaching. One morning one gate was, through the neglect of the signalman or from the ring failing to catch the gate, left unfastened, and a man passed through and was killed by a train which he had not perceived. The action was under Lord Campbell's Act, and the plaintiff was nonsuited. I shall read one or two short passages from the judgments, which bear on the points made in the present case concerning the gates and touch also a suggestion that the defendant company ought to have adopted special precautions because a high fence made it somewhat difficult to see an engine approaching Mill Street from the west until one was very near the railway.

(1) L.R. 6 Q.B. 266. (2) 7 H. & N. 987.
(3) L.R. 2 C.P. 631.

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Bovill C.J. said :

If the crossing was rendered dangerous by obstructions to the view, it only made more incumbent upon him to take due care. There is no evidence, however, that the deceased took any care or caution whatever, and it was owing to this want of caution on his part that the accident occurred. It is upon precisely similar grounds that Bramwell B. bases his judgment in *Stubley* v. *London and North-western Railway Co.* (1).

Willes J. said :—

I should be prepared to decide this case on the grounds stated by my lord had I not a still clearer opinion on the other part of the case. Actionable negligence must consist in the breach of some duty. Here it is not pretended that the defendants had acted improperly in the management of the trains, and the gates fulfilled all the requirements of the statute, so that the plaintiff has to rely on the self-imposed duty, as it is called, or precaution, as I should call it, of keeping the gates shut when trains were passing * * The precaution must have been wholly voluntary, and it would be much to be deplored if the defendants' liability were increased by their taking additional precautions, whether from motives of humanity or discretion. Such, however, is not the case. If a person undertakes to perform a voluntary act, he is liable if he performs it improperly, but not if he neglects to perform it. Such is the result of the decision in *Coggs* v. *Bernard* (2).

Montague Smith J. :—

"The first question is whether there is any duty which the defendants discharged negligently. It is conceded that there is no such statutable duty, since the gate was a proper one. * * But it is said that the defendants voluntarily took upon themselves to fasten the gate when a train was approaching, and that its being open, therefore, amounted to an invitation to the deceased to cross the line. I think, however, that that is not the true inference to be drawn from the evidence. It was not proved that the gate was invariably fastened when there was danger, and therefore, putting it at the highest, it amounts to this, that when the gate was unfastened there was probably no train passing. That was not sufficient to absolve a foot passenger from the duty of taking the ordinary care which he would otherwise be bound to do, and it was the want of care on the part of the deceased which was the cause of his death, and not any default on the part of the defendants."

(1) L.R. 1 Ex. 13.

(2) 1 Sm. L. C. 6th ed. 177.

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But although the defendants were not responsible for the closing of the gates, there is another way of stating the charge against them, and that is that their engine was driven across the highway without due precautions being taken for the safety of travellers. Put in other words it amounts to this: the crossing was dangerous unless the gates were down; grant that it was the duty of the Intercolonial Railway people to lower the gates, still you should not have crossed, knowing as you did that the gates were up, without seeing that adequate protection was substituted. This is, after all, a change only in the form and not in the substance of the charge, and in this shape it is answered by what I have said. The precautions taken by the man who signalled with his lantern and by shouting, were, in my judgment, a sufficient warning had the plaintiff, who knew he was approaching the railway, been on the alert as a man of reasonable intelligence and prudence would have been. There was no duty towards him to have the gates closed or to substitute any other method of protecting him against his own imprudence. The only obligation on the defendants was to ring the bell and to keep down the speed of the engine to under six miles an hour, and that duty they fulfilled

I have not referred to American decisions, and I do not think we should gain much certainty with regard to the principles I have discussed from doing so.

In the excellent and useful treatise on Railway Accident Law by Mr. Patterson of Philadelphia (1), the author notes several decisions of the courts of Illinois and New York as authorities for the proposition that when the railway has followed the statutory directions as to giving signals, &c., it has discharged its whole duty in the premises, and other decisions in

(1) Patterson on Railway Accident Law p. 162 s. 164.

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New York and Massachusetts where the doctrine is held that compliance with such statutory regulations does not necessarily relieve the railway from the necessity of taking such additional precautions as are essential to the safety of passengers on the highway. The learned author thinks the latter the sounder doctrine.

I am not familiar enough with the railway legislation of the different states of the Union to know how far the railway committee of our Privy Council resembles in its power and its functions any tribunal there existing. The power which it possesses cannot, as I have endeavoured to maintain, be left out of consideration as an important datum in the present controversy, and whether the statutory duties of a railway company in the particular in discussion are simply those defined by the general rule, or whether they are supplemented by an order of the committee, I am satisfied that no principle properly deducible from the current of English decisions requires us to hold that, in this Dominion, the question of duty in the premises is in every case an open question for the jury.

We are dealing, as it is scarcely necessary to say, only with the precautions for the safety of the public in general, to be observed at all local crossings or at particular crossings where special precautions have been enjoined by the constituted authority, and not with the different subject of duty towards an individual who is seen to be in a position of peril like the donkey in *Davies* v. *Mann* (1). The rule acted on in that case of course applies to railway companies, but it does not come in question upon the facts before us.

In my opinion we should allow the appeal.

Appeal quashed with costs.

Solicitors for appellants: *Weldon & McLean.*

Solicitor for respondent: *Geo. A. Davis*

(1) 10 M. & W. 546.

GEORGE P. BROWN ....APPELLANT; 1893

AND *Mar. 6.

DAME ROSE D. LECLERC.... .....RESPONDENT. *May 1.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA (APPEAL SIDE).

Loading of steamer—Accident—Neglect of usual precaution—Liability of employer.

Where two stevedores are independently engaged in loading the same steamer and, owing to the negligence of the employees of the one, an employee of the other is injured, the former stevedore is liable in damages for such injury.

The failure to observe a precaution usually taken in and about such work is evidence of negligence. Gwynne J. dissenting.

APPEAL from the judgment of the Court of Queen's Bench for Lower Canada (appeal side) (1) affirming the judgment of the Superior Court, which awarded two thousand dollars damages to the respondent.

The respondent, the wife of one Joseph Gravel, who was killed on the 2nd August, 1888, while working on board the steamer "Alcides" of the Donaldson line, by falling from the main deck into the hold, brought an action in damages against the owners of the steam-ship, the employer of the deceased and the present appellant, claiming $6,000 damages from them for her husband's death; on the ground that one or all three were responsible.

By the evidence given at the trial it appeared that on the day of the accident the appellant, a stevedore, had men engaged in loading the steamer with sacks of flour. The loading of this cargo was effected by

* PRESENT:—Strong C.J., and Fournier, Taschereau, Gwynne and Sedgewick JJ.

(1) Q. R. 1 Q. B. 234.

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means of a steam winch, but at the same time one Lee, another stevedore, had men engaged in loading cattle. While the loading of the flour was going on, and when the time came to fasten the cattle in the compartments near the hatchway No. 2, Lee's men asked appellant and his men to suspend the loading of the flour for ten minutes or a quarter of an hour, but appellant refused.

The deceased, Joseph Gravel, one of Lee's men replacing one Joinette also employed by Lee, was placed at the end of the hatchway No. 2 with a lighted lantern to enable the men who were driving the cattle on the ship to fasten them in the compartments, and while he was still there in the discharge of his duty a load of flour, to which no rope was attached to guide it in its descent, was allowed to swing over the width of the vessel, and, being lowered outside of the hatchway on the return movement, the load struck him and precipitated him to the bottom of the hold, and six days later Gravel died from the effects of the injury. There was also evidence that Lee's men had notified Gravel that he was in a dangerous position, and that there was no necessity for his standing in such a dangerous position.

The Superior Court, whose judgment was affirmed by the Court of Queen's Bench, held that the appellant alone was liable, and awarded the respondent $2,000 damages.

Geoffrion Q.C., for appellant, contended that the death of Gravel had not been caused by reason of any fault, negligence or want of skill, but because Gravel had been placed in a dangerous position by his employers while the appellant was loading flour.

Bonin Q.C., for respondent, contended that the evidence fully justified the findings of the courts below,

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that the accident was due to the want of skill on the part of appellant's employees and the neglect to observe the usual precautions taken in loading flour with steam winches.

THE CHIEF JUSTICE was of opinion that the appeal should be dismissed for the reasons given by the court below.

FOURNIER J.—Cet appel est d'un jugement rendu par la Cour du Banc de la Reine, à Montréal, confirmant le jugement de la Cour Supérieure du district de Montréal, en date du 11 mars 1890, qui avait condamné l'appelant à payer à l'intimée la somme de $2,000 de dommages, avec frais d'action.

Les faits suivants ont donné lieu à l'action. L'intimée est la veuve de Joseph Gravel, qui fut tué pendant qu'il travaillait au chargement du steamer Alcides le 2 août 1888.

Le soir de l'accident Gravel se tenait sur le pont du steamer avec une lanterne à la main, pour éclairer les hommes employés par John Lee, à placer et attacher dans les compartiments placés sur le pont, les animaux que celui-ci faisait mettre à bord du steamer. Dans le même temps l'appelant faisait un chargement de fleur à bord du même steamer.

La fleur était prise sur le quai par une grue à vapeur pour être déposée, par l'écoutille, dans la cale du vaisseau, mais par une manœuvre maladroite une certaine quantité de sacs de fleur fut descendue trop vite en dehors de l'écoutille, et dans son mouvement de retour vint frapper Joseph Gravel et le précipita au fond de cale d'une hauteur de vingt pieds. Le malheureux fut relevé plus mort que vif et mourut au bout de quelques jours des suites de l'accident.

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La question est de savoir si la mort de Gravel a été causée par la faute de l'appelant ou par celle des personnes qu'il employait au chargement de sa fleur.

Il ne peut y avoir aucune difficulté sur la cause immédiate de l'accident. L'appelant reconnaît dans son plaidoyer que Gravel a été renversé et jeté à fond de cale par les sacs de fleur qu'il faisait mettre à bord. Après avoir dit que Gravel se trouvait dans un endroit dangereux, il ajoute : " C'est dans cet endroit qu'il " aurait été frappé par les sacs de farine dans leur " mouvement de retour vers la dite écoutille et préci- " pité dans le fond de la cale du dit steamer."

De chaque côté de l'écoutille n° 2 se trouvait des compartiments pour les animaux et lorsque le temps de les y placer fut arrivé, Lee et ses employés, comprenant le danger qu'il y avait à placer ces animaux pendant que se faisait aussi le chargement de la farine, demandèrent à l'appelant de suspendre son chargement pour dix minutes ou un quart d'heure, mais Brown refusa cette suspension de dix minutes pour la raison que le steamer devait laisser le lendemain matin.

Si Brown était à la rigueur dans son droit en refusant de suspendre son chargement pour permettre l'embarquement des bœufs sans danger pour les hommes qui y travaillait, il était aussi de son strict devoir de prendre toutes les précautions ordinaires pour ne pas mettre en danger la vie de ceux que le chargement des bœufs forçait de travailler de chaque côté de l'écoutille. Il devait alors prendre les précautions nécessaires pour arrêter le mouvement de balancier des charges de farine qu'il avait jusqu'alors laissé faire sans grand danger. Mais depuis que le chargement des bœufs était commencé il devait voir à ce que la descente des sacs dans l'écoutille fut dirigée de manière à ne pas mettre en danger ceux qui travaillaient de chaque côté.

Avec de la prudence et de l'habileté de la part de celui qui conduisait l'engin de la grue, on pouvait facilement éviter l'accident, mais comment Brown pouvait-il espérer trouver ces qualités chez un ancien charretier qui, de l'endroit où il était placé ne pouvait voir Gravel ni ceux qui travaillaient avec lui. Les mouvements de départ, d'arrêt ou de descente des sacs étaient exécutés sur les ordres d'un autre employé qui se tenait sur les ballots de foin placés sur le pont et qui ne pouvait voir ce qui se passait en bas. Les arrangements étaient certainement imprudents et maladroits et ne pouvaient faire autrement que de causer un accident.

Il ne pouvait y avoir d'accident en prenant les précautions ordinaires pour faire descendre les sacs de farine directement dans la cale du vaisseau. C'est le mouvement de balancier qui leur était donné qui a été la cause de l'accident. Ce mouvement eut pu être contrôlé par une amarre attachée d'un bout aux sacs et de l'autre bout retenue à terre, au moyen de laquelle on aurait dirigé la charge jusqu'à son arrivée au-dessus de l'écoutille où elle aurait pu être descendue sans inconvénient. Cette manœuvre est constamment usitée dans les ports et c'est une grande faute que de ne pas y avoir eu recours surtout dans un temps où il se faisait un double chargement sur ce steamer dont le pont était rempli d'ouvriers pressés d'en finir le chargement.

L'appelant prétend que l'accident n'est arrivé que par la faute de Gravel, pour avoir changé de place avec un nommé Joinette. Le foreman de Lee, Clerany, avait donné l'ordre à Gravel de distribuer dans les différentes stalles, les cordes qui devaient servir à attacher les animaux. Cet ouvrage fini aucun autre ouvrage ne lui fut assigné en particulier. Il devait faire comme les autres prendre l'ouvrage qu'il y avait à faire. Après

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avoir distribué les cordes, il se mit à attacher des animaux, mais devenant effrayé il alla trouver Joinette qui tenait une lanterne pour éclairer les hommes et lui demanda de changer de place avec lui. Joinette y consentit. Il se plaça à l'endroit où était Joinette et il y était encore lorsqu'il fut renversé à fond de cale. Il devait rester à cet endroit particulier pour éclairer ceux qui attachaient les animaux dans les stalles et aussi le chemin par lequel on faisait entrer le bétail dans le steamer. Gravel devait se tenir près de l'écoutille, afin de ne pas empêcher les animaux d'arriver. Joinette dit que c'est là qu'il s'était placé lui-même et qu'il n'y avait pas de danger là. Il était à son poste, par nécessité, dans l'exercice de ses fonctions et non pas volontairement lorsqu'il fut frappé. Gravel était tout aussi qualifié qu'un autre pour tenir la lanterne et son âge n'était pas un obstacle à l'exécution de cette fonction.

L'accident est arrivé non parce que Gravel était à l'extrémité de l'écoutille, mais parce que le conducteur de l'engin de la grue avait par inattention, négligence et imprudence fait balancer en rond les sacs de fleur en les hissant trop haut et trop vite et en les abaissant avant qu'ils fussent vis-à-vis l'écoutille. C'est là qu'ils devaient être déposés au lieu de balayer le pont. Gravel remplissait son devoir et il avait droit de s'attendre que les sacs ne l'atteindraient pas, et ils ne l'auraient pas frappé si le chargement eut été fait avec la prudence et l'habileté ordinaire.

Par ces motifs, je suis d'avis que l'appel doit être renvoyé avec dépens.

TASCHEREAU J. concurred with Fournier J.

GWYNNE J.—I do not think that the appellant can be made responsible in the present action unless it can be shown that the death of the deceased was occa-

sioned by some act or default of the appellant amounting to the neglect of some duty owed by him to the deceased. There was no such duty owed by reason of any relationship existing between the appellant and the deceased. The latter was not in the employment of the appellant in the work in which he was engaged as a stevedore in loading the steamer "Alcides" with sacks of flour. While the appellant's men were lawfully engaged in that employment the deceased was placed (not by the appellant, nor even with his permission, but on the contrary, against his will, in the dangerous position in which he was when he met with the accident which occasioned his death,) by a person employed to put cattle on board of the same steamer.

The position in which the deceased was placed by his employers was known to them to be a place of danger. The only reason for its being a dangerous place which is suggested was the possibity of the occurence of the very accident which did take place, namely: the possibility of the deceased being struck by a sack of flour swinging round and striking him while in the process of being put on board the vessel. The deceased appears to have been so stricken and to have been thrown into the hold by a sack of flour which, not having been caught and stopped by appellant's servants so as to drop directly into the hold, swung outside, and so struck the deceased. He was thus killed by the very accident occurring, the possibility of which occurring caused the deceased and his employer to know that the place where the deceased was put by his employers, was dangerous. If it was dangerous to any of the men employed in putting the cattle on board, to put them on board while the appellant continued to be engaged at the work for which he was employed, the appellant can not be blamed for an occurrence consequential upon the so

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putting the cattle on board, and which but for the so putting them on board would not have occurred.

The appellant's not having adopted measures (not at all necessary for the safety of the persons employed in putting the sacks of flour on board,) but which might have prevented the accident happening to the deceased which caused his death, if when the appellant undertook the employment in which he was engaged, he could and should have foreseen that any person would be, or was likely to be, lawfully where the deceased was placed by his employer, cannot in my opinion, constitute a default amounting to neglect of any duty owed by the appellant to the deceased, whose presence where he was when he came to his death was not only not foreseen, so far as appears, but under the circumstances in which the deceased appears to have been placed there, was against the will of the appellant. Under those circumstances I do not think that the appellant can be held to be responsible in this action for the unfortunate occurrence which caused the death of the deceased. This appeal therefore in my opinion should be allowed.

SEDGEWICK J. concurred with the majority of the court that the appeal should be dismissed with costs.

Appeal dismised with costs.

Solicitors for appellant: *Geoffrion, Dorion & Allan.*

Solicitors for respondent: *Taillon, Bonin & Dufault.*

WILLIAM H. STEPHENS (PLAINTIFF)...APPELLANT ; 1893

AND *Mar. 9, 19.
*May 1.

AARON GORDON AND JOHN GORDON (DEFENDANTS)..... ... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FROM ONTARIO.

Agreement, construction of—Way—Timber—Removal of, necessary.

The plaintiff was the owner of a farm of about a mile in breadth and five-sixths of a mile in length. About two-thirds of the farm was heavily wooded, and the rest of it was cleared and cultivated. The defendant became the purchaser of the trees and timber upon the land, under an agreement, which provided among other things, that the purchaser should have "full liberty to enter into and upon the said lands for the purpose of removing the trees and timber, at such times and in such manner as he may think proper," but reserved to the plaintiff the full enjoyment of the land "save and in so far as may be necessary for the cutting and removing of the trees and timber." To have removed the timber through the wooded land at the time it was removed, it would have involved an expenditure which would have possibly amounted to a sacrifice of the greater portion of the timber.

Held,—Affirming the judgment of the court below, that the defendants had a right to remove the timber by the most direct and available route, provided they acted in good faith and not unreasonably, and the reservation in favour of the plaintiff did not minimize or modify the defendants' right under the general grant of the trees, to remove the trees across the cleared land. Gwynne J., dissenting.

APPEAL from the judgment of the Court of Appeal for Ontario (1) reversing the judgment of Boyd C., in the Chancery Division.

The appellant (plaintiff) was the owner of a farm of some 500 acres of land, in the 8th concession of Chat-

* PRESENT :—Strong C.J., and Fournier, Taschereau, Gwynne and Sedgewick JJ.

(1) 19 App. R. Ont. 176.

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ham. About a third of the whole tract was cleared and cultivated, and the rest was heavily wooded. In 1887 the plaintiff sold under an agreement to one A. Tierce, who afterwards assigned to the respondent, the trees and timber upon the land, except black ash and white oak then standing growing and being upon the said land, with a proviso that it should be removed within a certain period. The deed under which the respondent cut and hauled the timber contained the following way-leave for taking the timber :

"The said party of the second part, his agents, servants and workmen, with or without horses, carts, wagons or sleighs, shall at all times within three years from the said first day of March now next, have full liberty to enter into and upon the said lands, and to fell the said trees and timber in such manner as he or they shall think fit, and cut and convert the same into such convenient logs, bundles or stacks as he or they shall think proper, with full liberty to bring horses, cattle, wagons, trucks, carts and sleighs in and upon the said land for the purpose of removing the said trees and timber, at such times and in such manner as he or they may think proper." And also the following covenant for title: "And the said party of the first part for himself, his heirs, executors and administrators, covenants, promises and agrees to and with the party of the second part, his heirs, executors, administrators and assigns, that he has a good title to (sic) fee simple to the said lands, and good right, full power, and absolute authority to sell and dispose of the said timber and trees, and that they are free from all encumbrances of any kind whatsoever."

The deed also contained the following covenant on the part of the purchaser :—

"The said party of the second part for himself, his heirs, executors, administrators and assigns, covenants

with said party of the first part, his heirs, executors, administrators and assigns, that whenever he commences cutting on any portion of said lands he will lumber said lands clean, except said black ash and white oak, and that said party of the first part, his heirs or assigns, shall have the full and free use and enjoyment of the said land during said three years, without any interruption on the part of said party of the second part, his executors, administrators or assigns, or his or their workmen, servants or agents, save in so far as may be necessary for the cutting and removing of said trees and timber."

In July, 1890, while the respondent had still till the end of the year to cut and remove timber, the appellant sued the defendants for unnecessarily tearing down the plaintiff's fences and hauling timber over his crops and otherwise injuring his property and causing damage, and obtained an interlocutory injunction. The defendant denied the wrongful acts complained of, and said that he could not remove the timber advantageously without great additional expense and delay without going through the plaintiff's fields to some extent, and that he did so with as little damage to the plaintiff's property as possible, and also claimed he had a right to do what he did, and he counter-claimed for the loss suffered by reason of the injunction.

At the trial it was shown that the lumber could have been hauled to the public roads without hauling across the cleared land, but at a greater cost and expense, and the Court of Chancery held that the timber under the agreement had to be taken away by the defendant without causing any interruption in the use of the cultivated part by the plaintiff. The Court of Appeal on the contrary held that the timber might be taken across the cleared land.

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M. Wilson Q.C. for the appellant:—At the the time of the institution of the proceedings, there were lumber roads within the wooded land and also cross roads, and we contend that reading the covenant and the grant of way-leave together, the respondent had no right to cross over the cleared lands and growing crops. Under the written agreement we only had to show that it was not necessary for the purchasers to cross our crops, and this question of fact the Chancellor found in our favour, and moreover prevented us from giving more evidence on this question of fact.

It was of course necessary to cross the cultivated lands in order to remove a small portion of the timber which was surrounded thereby, but that is not in question in this action.

But even if the agreement is to be construed as giving the defendants the right to cross over plaintiff's crops and interfere with his use and enjoyment of the farm lands in every case where he could not reasonably avoid doing so in their (defendants') interest, and if the word "necessary" is to be read as "reasonably necessary for the convenient and beneficial removal of his timber," then we contend that the plaintiff was prepared at the trial to show, and should be now allowed to show that it was not reasonably necessary even in that sense to cross and destroy the plaintiff's crops at the time and place in question, and that no man of ordinary judgment and prudence would have injured and sacrificed the crops (as defendants were about to do and were restrained from doing) for the trifling benefit that would be gained thereby. In fact there would be no gain even to the defendants thereby because the old existing ways and timber roads were good and convenient for the use of the defendants.

D. McCarthy Q.C. for the respondent:—The agreement in question is a grant in the most unqualified

tems, of all the trees and timber save the two kinds specified, on the appellant's lands in question, and with this grant there is expressly provided an unlimited lease or license respecting the removal of the timber.

There is no restriction, either by express provision or by implication, by which the respondent was limited to any part of the lands comprised in the description, lots 21, 22 and south-west half of 23, either as to ingress, use or egress, for the purpose of removing the timber; and there is, on the contrary, the express provision that all such shall be as the respondent may think proper. The effect of the covenant forming part of the agreement, is merely to provide for the use by the appellant of the lots subject to the interruption necessary for the purposes of the respondent, under the grant, and leave or liberty expressed in the agreement. The covenant clearly must, under the agreement and all the circumstances, be construed as subject to the grant and leave and as bearing the meaning reasonably necessary, and I submit that the proper construction of the portions of the agreement now under discussion is that put upon them by the learned judges of the Court of Appeal.

While submitting that under the terms of the instrument respondent was clearly entitled to pass over any part of the lots mentioned, I also contend that in the case of a more limited construction of his rights herein, he was acting legally, and within his powers, in using the way which the appellant sought to restrain him from using, because it was a way necessary for the most convenient enjoyment of the grant, under the authority of *Morris* v. *Edgington* (1). And especially is the convenience of the grantee to be considered where, as in the present case, an unreasonable amount of labour and expense is required to render any other way available for use, *i. e.*, labour and expense disproportionate

(1) 3 Taunt. 24.

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and excessive in comparison with the value of the grant, *Pettingill* v. *W. Porter* (1). As to their being a right of way in the case of timber, there is no question; Plowd. Com. 16.

Further, on the construction of the instrument, I also contend that to warrant the appellant in placing the restriction he has sought to place on the use of a way by the respondent, he should have made an express provision in the instrument defining the way. "In the case of a way by grant the language of the instrument can be referred to, and it is of course for the Court to construe that language and in the absence of any clear intention of the parties, the maxim that a grant must be construed most strongly against the grantor, must be applied." *Williams* v. *James* (2).

Wilson Q.C. in reply referred specially to *Dand* v. *Kingscote* (3).

THE CHIEF JUSTICE and FOURNIER and TASCHEREAU, J.J., concurred with SEDGEWICK, J.

GWYNNE J.—The plaintiff in the month of February, 1887, was seized in fee simple of lots 21 and 22 and the west half of lot 23 in the township of Chatham, which said lots of land were bounded on the north and south by concession roads On the north part of lot 22 adjoining the concession road there, was situate his dwelling house and garden with a farm yard and suitable buildings thereon. He had about 30 acres of land adjoining, cleared, fenced in and under cultivation, of which about one half was situate on the north end of lot No. 22, and the other half on the north end of lot No. 21, which latter consisted of meadow, in the midst of which some few elm trees still remained stand-

(1) 8 Allan 1 (Mass.) (2) L.R. 2 C.P. 581.
(3) 6 M. & W. 187.

ing; the residue of the above lots consisted of wood lands wherein was standing a great variety of timber trees. Through this forest part there were several old bush or lumber roads leading from the public highways on either side back into the woods which had been made and had been in use for many years by persons to whom the plaintiff had sold the privilege of cutting down and removing timber trees there growing for the purpose of hauling the timber when cut from the woods to the public highways and so to market. Being so seized of such bush and cleared land an agreement under seal was upon the 19th day of February, 1887, entered into by and between the said plaintiff of the first part, and one Alexander Tierce of the second part, whereby it was covenanted and agreed as follows:

The said party of the first part, for and in consideration of the payments hereinafter mentioned to be made to him, hereby grants, bargains, sells and assigns all the trees and timber except black ash and white oak now standing, growing, lying or being in and upon that certain parcel of land and premises situate, lying and being in the township of Chatham, in the county of Kent, in the province of Ontario, containing by admeasurement acres, be the same more or less, and being composed of lots twenty-one, twenty-two and the south-west half of lot twenty-three in the eighth concession of the said township of Chatham, to have and to hold the said trees and timber to the said party of the second part, his heirs, executors, administrators and assigns, to and for his and their sole and only use; provided, however, that they remove the same within three years from the first day of March now next, after which date all trees or timber not removed shall revert to and be the property of the said party of the first part, his heirs, executors, administrators and assigns.

The said party of the second part, his agents, servants and workmen with or without horses, carts, wagons or sleighs shall at all times within three years from the said first day of March now next, have full liberty to enter into and upon the said lands and to fell the said trees and timber in such manner as he or they shall think fit, and cut and convert the same into such convenient logs, bundles or stacks as he or they shall think proper, with full liberty to bring horses, cattle, wagons, trucks, carts and sleighs in and upon the said land for the

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purpose of removing the said trees and timber at such times and in such manner as he or they may think proper.

Then followed a covenant by Tierce for payment of a specific sum for the said trees and timber in the manner therein stated; then a covenant by the plaintiff that he had a good title to the lands whereon the said trees were growing, and full right and absolute authority to sell the said timber; then came the clause following, viz.:—

> The said party of the second part, for himself, his heirs, executors, administrators and assigns, covenants with the party of the first part, his heirs, executors, administrators, that whenever he commences cutting on any portion of the said lands he will lumber said lands clear, except said black ash and white oak, and that said party of the first part, his heirs and assigns, shall have the free use and enjoyment of the said land during the said three years without any interruption on the part of the said party of the second part, his executors, administrators or assigns, his or their workmen, servants or agents, save in so far as may be necessary for the cutting and removing of said trees and timber.

The residue of the agreement it is unnecessary to set forth, as it has no bearing upon the present case. In or about the month of January, 1889, Tierce assigned all his interest in the said contract to the defendant, Aaron Gordon. In the month of January, 1890, the time for the termination of the contract being then shortly approaching, the defendant, in consideration of the further sum of $500.00, paid by him to the plaintiff, procured from the plaintiff an extention of the time appointed in the agreement of the 19th February, 1887, for the removal of the timber thereunder until the 30th day of March, 1891. In the month of June, 1890, the defendant, for the first time apparently, asserted a right to haul timber which he had cut down in the woodland lying south of the plaintiff's cultivated land through his meadow to the concession road at the north end, and to pull down the plaintiff's fences for the purpose, and he accordingly did so, and there-

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by, as the plaintiff contended, much damage had been done to his meadow, as well by cattle thereby getting into his meadow through the broken down fences as by the hauling of the timber through the meadow. Against this contention and conduct of the defendant the plaintiff remonstrated, but without effect, for the defendant persisted in the assertion of the right which he claimed, and continued to assert it by hauling the timber so cut in the woods south of the plaintiff's cleared land, not only through his meadow on the north end of lot 21, but also through a crop of beans which he had growing on the north end of lot 22, and so through the plaintiff's farm yard to the concession road; and for that purpose took down divers of the fences and gates of the plaintiff. In short, the contention of the defendant was, and still is, that he had perfect right by the terms of the contract of the 19th February, 1887, to haul the timber cut by him in the woods south of the plaintiff's clearance, through any part of the plaintiff's cleared land that was most convenient to the defendant, qualified only by the condition that he should do no more damage to the plaintiff's crops on such cleared land than was reasonably and necessarily attendant upon the hauling timber through them to the road.

Upon the 15th day of July, 1890, the plaintiff commenced an action against the defendant by a writ issued out of the Common Pleas Division of the High Court of Justice for Ontario, by an endorsement upon which writ the plaintiff claimed an injunction and damages upon the ground that the defendant, as assignee of the said agreement of the 19th February, 1887, had unlawfully and without authority, and in a manner which was wholly unnecessary for the removal of timber, cut under the said agreement, entered upon, the plaintiff's cleared and tilled land with men and

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horses, &c., and had broken down the plaintiff's fences, destroyed his crops, left his farm open to cattle, and otherwise greatly and unnecessarily injured the plaintiff and threatened to continue so to do. Upon the 16th July, 1890, the plaintiff obtained upon affidavit, an interim injunction against the defendant's interference with the plaintiff's said cleared land until the 18th of said month of July, or until the motion to continue the said injunction to be made on that day should have been disposed of or until the court should make further order to the contrary. At this time the few elm trees which remained standing in the meadow had not been cut down, and the only contention existing between the plaintiff and the defendant was as to the right claimed by the defendant, to haul the timber cut down by him in the forest land, lying south of the plaintiff's cleared land, through the cleared land to the concession road, and so the interim injunction operated only as it was intended to operate against defendant's hauling such timber across the plaintiff's cleared land and the crops growing therein. Upon the said 18th of July the motion to continue the said injunction came up for argument before Mr. Justice Falconbridge, who, after having heard the case argued upon affidavits filed on both sides, in pronouncing judgment expressed his opinion to be that the evidence enormously preponderated in favour of the plaintiff's contention that the brush roads through the woods by which as the plaintiff insisted that all timber cut in the woods south of his cleared land if hauled to the concession road on the north end should be hauled, could have been used by the defendant, and that this was the only way which was in contemplation when the extension of time was granted to the defendant, and that it in fact was but about 50 rods longer than the way taken by the defendant across the plaintiff's

cleared land, however, to prevent serious injury happening to the defendant by his continuing the injunction, he added as follows:

On plaintiff undertaking to allow the defendant Aaron Gordon, if he wishes to use the way already offered by plaintiff over that indicated by D.H.K. or D.H.E., on McGeorge and Flater's plan filed on this motion, and on plaintiff also undertaking if required to grant a further reasonable extension of time for taking off the timber for the sum of $50, the injunction will be continued to the hearing with usual undertaking by defendant as to damages. Injunction dissolved as to the timber surrounded by meadow which defendants can take off by a way which will be convenient for them and do as little injury as possible to the plaintiff.

The plaintiff alleges that he never did give or consent to give, and that he was never asked by the defendant to give any undertaking to grant to the defendant any further extension of time for taking off the timber, and that he never took out an order upon the judgment of Mr. Justice Falconbridge, nor did he accept the terms and conditions thereof, and that in point of fact no order was ever issued upon the said judgment, however, the defendant never did thereafter haul over the plaintiff's cleared land, any timber cut down in the woods south thereof. The way indicated in the judgment of Mr. Justice Falconbridge by the letters D. H. K. and D. H. E. were ways which the plaintiff had offered to allow the defendant to haul his timber along, and which was across a portion of the plaintiff's cleared land, but which was in fallow, and where the hauling of timber could do no damage, but this offer of the plaintiff the defendant had declined to accept, insisting upon his claim of right to cross the plaintiff's clearance wherever was most convenient to the defendant as afore is mentioned.

The case was brought down for trial before the Chancellor of Ontario in the month of November, 1890, when the contention on behalf of the plaintiff was:

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1st. That under the agreement of the 19th February, 1887, the defendant had no right to cross the plaintiff's cultivated land, except for the purpose of removing the elm trees growing in the meadow, when they should be cut down, as to which there was no contestation, that timber not having been then yet cut; and

2nd. That even if the agreement did give the defendant the right to haul out the timber cut in the wood south of the plaintiff's cultivated land, over such cultivated land the defendant had exercised such right in a wanton, unreasonable and unnecessary manner.

The defendant's contention was the direct converse of both of these propositions. After the plaintiff had produced three witnesses in support of his case, and while he had several witnesses in court which he said he intended to call, the learned counsel for the defendant asked the learned Chancellor to rule upon the construction of the contract before any more witnesses should be called, this the learned Chancellor did, and held that as to the timber cut outside of the cleared land, it was the duty of the purchaser of the timber to haul out that timber through the bush land, without any interruption with the use of the cleared land by the proprietor, and he declined to hear the further evidence which was offered by the plaintiff. The learned counsel for the defendant proceeded to produce evidence upon the part of defendant at great length, and after hearing all the witnesses called by the defendant, twelve in number, the learned Chancellor again pronounced his judgment, affirming his former expression of opinion as to the construction of the contract, adding that as the injunction to which he held the plaintiff to have been entitled had served its purpose, he did not intend to continue it, and he asked the learned counsel for the plaintiff whether, if the

season should turn out to be such that the defendant could not remove the timber within the time specified in the agreement for extension of time made in January, the plaintiff would object to its being removed during the dry season in the following summer through the woods, to which the plaintiff's counsel answered that the plaintiff could not consent thereto, and he again insisted that he had a large number of witnesses in court which he desired to call in support of his contention, to which the learned Chancellor replied that he knew that, and that his intention was to shut out that evidence, as, if his law as to the construction of the contract was right, he did not want to hear it, and that he would rule finally upon the case for the purpose of excluding further evidence. He then gave his reasons at large for the judgment he had pronounced as to the construction of the contract and upon the evidence as it had been taken, and he concluded by expressing the opinion that on the undertaking which, as he said, he understood had been given before Judge Falconbridge, he thought the defendant should have until the termination of the dry season in the following summer to remove the timber, upon payment of $50. To this suggestion and to any further extension of time the plaintiff, through his counsel, refused to consent, whereupon the learned Chancellor said that he considered there had been an acceptance of Judge Falconbridge's judgment, and an acting upon it for the benefit of the plaintiff, and he pronounced judgment accordingly, which, as formally drawn up, is as follows :—

Dated 26th November, 1890.

This action coming on this day for trial in the presence of counsel for both parties, and hearing read the pleadings, and upon hearing *part of the evidence* adduced on behalf of the plaintiff and *all of the evidence* adduced on the part of the defendants, *but without hearing* the *further evidence* offered by the plaintiff *in reply* and upon hearing what was alleged by counsel.

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1. This court doth order and direct that upon payment of the sum of $50 on or before the 30th day of May, 1891, to the plaintiff or his solicitors, the defendants do have the privilege of going upon the said lands during the months of June, July, August and September, A.D., 1891, for the purpose of removing the timber in the manner and by the ways mentioned in the agreement referred to in the pleadings, the defendants by their counsel undertaking not to interfere with the plaintiff's use and enjoyment of the cultivated portions of the said lands, save only to such extent as may be necessary for the removal of timber surrounded by cultivated lands which cannot otherwise be reached, and in the removal of the last mentioned timber, undertaking to do as little damage to such cultivated portions as possible, under the circumstances.

2nd. And this court doth order and adjudge that this action be referred to the Master of this Court at Chatham to inquire and state what damages the plaintiff has sustained by reason of the defendants having unlawfully and without authority hauled timber, logs, bolts and cordwood across the cleared or cultivated portion of the plaintiff's land and thereby injured the plaintiff's growing crops, and also what damages, if any, done by the defendants to the plaintiff's fences, and black ash in the statement of claim referred to, and also what, if anything, is due to the defendant in respect of his counter-claim.

3rd. And this court doth reserve further directions and the question of costs until after the said master shall have made his report.

R. O'HARA,
Deputy-Registrar.

Both the defendant and the plaintiff appealed from this judgment to the Court of Appeal for Ontario, the defendant insisting, among other reasons of appeal stated by him, that the construction placed by the learned Chancellor upon the agreement is erroneous, and that the rights of the defendant being, as the defendant contended they were, given by express grant over the whole of the lands, the entries made by them (on the plaintiff's cultivated land) for the purpose of removing the timber were justified, and submitting that upon the evidence he was entitled to have the plaintiff's action dismissed with costs and the defendant's counter-claim allowed with costs, with a reference as to the amount and as to the damages suffered by the

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interim injunction, or in any event that there should be a new trial with costs to be paid by the plaintiff; and the plaintiff insisting, among other things, that the learned Chancellor had no jurisdiction to alter the agreement between the parties by giving the extension of time for removal of the timber purported to be granted by the decree or judgment, for that the plaintiff never had consented to the same, and that the clause purporting to give such extension of time should be struck out of the judgment.

Upon these appeals the Court of Appeal for Ontario ordered and adjudged that the appeal of the defendant should be allowed with costs, and that that part of the judgment of the learned Chancellor, whereby it was adjudged that the plaintiff should have a reference to inquire and state what damages he has sustained by reason of the defendant's having unlawfully and without authority hauled timber, logs, bolts and cordwood across the cleared and cultivated portion of the plaintiff's land and thereby injured the plaintiff's growing crops, should be and the same was thereby reversed, and the plaintiff's claim for damages in respect of said matters should be dismissed, and that the injunction granted on the interlocutory application therefor by the plaintiff and at the trial should be and the same was thereby dissolved; and it was further ordered and adjudged that the plaintiff should pay to the defendant the general costs of the action forthwith after taxation.

And it was further ordered and adjudged that the said judgment of the learned Chancellor should be further varied by directing that the reference ordered by the said judgment to ascertain what damages, if any, had been done by the defendant to the plaintiff's fences and black ash should be confined to acts of negligence wantonly done by the defendants in excess

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of authority, and shall not embrace injury unavoidably done in felling the timber, unless caused wantonly or carelessly by the defendant, and that the costs of such reference should be reserved until the master shall have made his report.

And it was further ordered and adjudged that the counter claims of the defendant should be the subject of reference to the master, and should include also the claim for timber taken and used by the plaintiff, unless it is established to the satisfaction of the said master that there was an agreement between the defendant and the plaintiff that the same should not be paid for, *and shall also include* the claim for damages alleged to have been suffered by the defendant by reason of the said injunction; and it was further ordered and adjudged that the costs of the said counter-claim should be reserved until after the said master shall have made his report.

The plaintiff had I think just ground of appeal against the first paragraph of the formal judgment of the Divisional Court which ordered and directed that the defendant should have an extension of time until the end of the month of September, 1891, for the purpose of removing the timber. Such a direction was wholly beyond the jurisdiction of the learned Chancellor to make without the express consent of the plaintiff who, as appears by the record, instead of giving such consent expressly objected to any such adjudication being made and to the jurisdiction of the learned Chancellor to make it. The learned Chancellor appears to have considered himself warranted in directing that clause to be inserted in the decree or judgment of the court by reason of what was contained in the judgment as pronounced by Mr. Justice Falconbridge when the matter of the injunction was argued before him in July, 1890. But what Mr. Justice Falconbridge did really

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amounted to no more than announcing to the parties, that upon the plaintiff undertaking to allow the defendant Aaron Gordon, *if he wishes*, to use the way which the plaintiff had already offered him, and which was indicated by certain letters upon a map or plan filed on the argument, and upon the plaintiff also undertaking *if required*, to grant a further reasonable time for taking off the timber for the sum of $50, the injunction should be continued to the hearing. This was announced as a suggestion to the parties by the learned judge, and it does not appear to have been accepted and acted upon by either the defendant or the plaintiff. Aaron Gordon does not appear to have ever expressed a wish to use the way which had been formally offered to him by the plaintiff and refused by him, nor to have asked for any further extension of time for removal of the timber as was suggested by Mr. Justice Falconbridge that he should before the plaintiff should be called upon to give an undertaking for an extension of the time as might be required ; and further there is no evidence whatever that the plantiff ever was asked to give or did give, but on the contrary the plaintiff alleges and he is not contradicted, that he never was asked to give or did give, any undertaking or consent to any further extension of time for removal of the timber being given to the defendant. If indeed the plaintiff had procured an order to issue in the terms of the learned judge's suggestion and served such order on the defendant, it might perhaps have been competent for the learned Chancellor to have treated such an act of the plaintiff as an undertaking to grant a reasonable time and to have given jurisdiction to the learned Chancellor to direct what would be such reasonable time, but no order ever was made or issued in the matter, and in view of the express refusal of the plaintiff at the trial to consent to any further extension

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of time and to the learned Chancellor having any jurisdiction as to alter the contract existing between the parties, and to insert in his judgment any order for the extension of time as he expressed an intention of doing, it must, I think, be admitted beyond all question that this clause in the formal judgment of the court, inserted upon the authority of the learned Chancellor, was wholly beyond his jurisdiction and that of the court and was erroneously inserted and should have been expunged from the judgment by the Court of Appeal for Ontario; and as we are obliged to pronounce the judgment which should have been pronounced by that court, that clause must be expunged even now from the learned Chancellor's judgment as having been *ultra vires*, whether the plaintiff shall or shall not derive any benefit from its being expunged at this late period when the extended time has elapsed and the defendant has enjoyed the benefit of its having been inserted in the formal judgment of the court. For this reason alone, I think the present appeal must be allowed to this extent and with costs, but the judgment of the Court of Appeal is in my opinion erroneous in other respects and should be reversed.

It orders and adjudges that the counter-claims of the defendant shall be the subject of reference to the Master and shall include the claim for timber taken and used by the plaintiff unless it shall be established to the satisfaction of the Master that there was an agreement between the defendant and the plaintiff that the same should not be paid for; and shall also include the claim for damages alleged to have been suffered by the defendant by reason of the injunction.

With respect to these counter-claims it appears that the learned Chancellor received all the evidence offered by the defendant in support of them—they were as follows:

1st. For certain elm timber alleged to have been taken by the plaintiff and converted to his own use.....$ 100.00

2nd. Estimated damages caused by plaintiff forbidding defendants and their employees to remove timber and threatening arrest for tresspass—loss of wages.. 100.00

3rd. Estimated loss to logs by reason of injunction..... 340.00

4th. Estimated damages to 67 cords by injunction..... 83.75

5th. Estimated damages by stoppage of mill at Dresdon owing to want of stock, which defendants were prevented from hauling and by defendants being prevented fulfilling contracts entered into by Aaron Gordon..... 1,576.25

As to the first of the above items it is to be observed that if ever it was a real claim it had arisen before the plaintiff in January, 1890, granted to the defendant the further extension of time for removing the timber of one year and that never did the defendant assert or pretend to have any claim for such timber until after the plaintiff had commenced the present action ; and the learned Chancellor after hearing everything that both the plaintiff and defendant, had to say upon the subject and all the evidence offered by the latter, came to the conclusion that it should not be allowed and in express terms he disallowed it, and this was not an item in any manner depending upon the construction of the contract of February, 1887.

As to the 2nd and 5th of the above items they are obviously not claims in respect of which any amount could be allowed by way of damages ; and as to the 3rd and 4th items they are claims for damages alleged to have been occasioned by the injunction, all which

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damages are apart from the counter-claim, expressly referred to the Master by the judgment of the Court of Appeal. In the event of the judgment of the Court of Appeal, to the effect that the construction put by the learned Chancellor upon the contract of the 19th February, 1887, was erroneous, being maintained, as all damages sustained by the defendant by reason of the injunction are expressly referred to the Master there does not seem to be any reason or justice in referring to the Master the claims made in the counter-claim—either under the 3rd and 4th items, (all damages in respect of which are claimed only as occasioned by the injunction) or under items, 1, 2 and 5 which amount to $1,756.25; and of thus reopening anew at great and unnecessary expense matters in respect of which the learned Chancellor received all the evidence offered by the defendant in support of them and after hearing such evidence, exercised his deliberate judgment by expressly disallowing them, and by ordering the counter-claim to be dismissed with costs; a direction which seems to have been overlooked by the deputy-registrar who signed and issued the formal judgment of the court. It is much to be regretted I think, that the learned chancellor said anything in his judgment as to a reference of the counter-claim to the master at all. Having heard all the defendant's witnesses upon the counter-claim, there does not appear to have been any necessity or reason whatever for referring to the master matters upon which the learned chancellor himself had formed a clear judgment, and upon which it was not only competent for him to have pronounced, but upon which, I think, that under the circumstances he should have pronounced final judgment, so as to avoid subjecting the parties to the great expense of a repetition before the master of evidence taken at great length before the learned chancellor

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himself. Reading the learned chancellor's judgment directing the dismissal of the counter-claim with costs on the higher scale, I cannot but think that the direction that either party might if desired have a reference to the master was made inadvertently, and certainly I am of opinion that after the learned chancellor upon hearing all the evidence offered in support of the counter-claim had formed and expressed the deliberate judgment that it should be dismissed, there should not have been any reference of the counter-claim to the master. Even as to the plaintiff's claim, I must say that, in view of the opinion formed by the learned chancellor as to the utterly extravagant nature of that claim, a reopening of it before the master should not in my opinion have been authorized. The learned chancellor, it is true, refused to hear certain witnesses which the plaintiff had in court, and wished to call, but he did hear from the plaintiff himself a very full and particular statement of the nature and character of all the damages claimed by him to have been suffered by him under every item of his claim and from the plaintiff's own evidence he was satisfied that the plaintiff's demand was extravagant in the extreme. After attributing the whole contestation to bad temper occasioned by the defendant forcing a way through the plaintiff's crops notwithstanding his remonstrances, and to angry words which passed between the plaintiff and the defendant's son upon the subject, he says:—

> He, that is the defendant, resolved to force his way through the cultivated land. There has been no denial of what Stephens said upon that point, that he and young Gordon came directly to loggerheads. Young Gordon forced his way through. That is the origin of this unfortunate litigation, unfortunate because there is very little at stake as far as Stephens is concerned except a vindication of his right to have his cultivated land. His damage has been comparatively small, although that will be a matter of investigation afterwards *if Mr. Wilson* (the plaintiff's attorney) chooses to pursue it. Then he adds: But

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this litigation having begun in this way, it seems to me that Mr. Stephens and Mr. Gordon have taken the occasion of raking a great deal into this controversy that does not belong to it. There are four heads of damage claimed by Stephens. There was the drain blocked in May, 1889; I should say he has no case as to that. There is the black ash used for skids and destroyed by bad cutting of other trees. I should say, so far as we have gone, he has sustained no substantial damage on that—claims for fences injured—I should say he was sustained no substantial damage on that head. Then as to the going through the meadow and bean field, he says there is no dispute that the road was pushed there against his will, and I think some damage was occasioned, but his idea of $1,300 is absurd.

The defendant admitted that the plaintiff had suffered some damage upon this head for which he was willing to pay, but he contended that it was very small. The learned Chancellor proceeded thus:

I propose to give $25 with leave to Mr. Stephens to go into the Master's office *to increase his damage.*

If Mr. Stephens should have exercised this leave he must have done so at the risk of costs, and, as it appears to me, the leave was limited by the learned chancellor to the damages to the meadow and bean field for which alone the $25 was granted. Then as to the defendants counter-claim, the learned chancellor proceeded thus:

Then, on the other hand, there is the claim for the elm removed for building. It seems to me there is no claim substantially; there was the loose agreement with Mr. Tierce, and it appears that all that elm was removed before the bargain was made for the extension of time. Then was the time to have advanced this claim. So I propose to give no damages in respect of that elm, and on the whole the damages will be limited to $25 with the right *to either party* to go into the Master's Office to *increase* or *diminish* these if he pleases.

What the learned Chancellor meant by this last sentence I cannot but think was that the plaintiff, if he pleased, might incur the risk of going into the master's office to increase the $25 allowed by the Chancellor, or the defendant in like manner to diminish that sum, but that in other respects the judgment of the learned Chancellor was final, and final also as to the amount

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allowed for damages to the meadow and bean crop, unless either party desired to go into the master's office for the single purpose of increasing on the one side or on the other of diminishing the amount of $25 allowed for such damage. Then, as to the injunction and declaration of right, the learned Chancellor said:—

> The injunction was directed to the crossing the cultivated land; there is no necessity for a declaration of right now, because no further crop can be put in. I do not propose to continue the injunction for that reason. I do not propose to grant the declaration of right. I think the defendant had no right to cross the growing crops.

Then, at the close, he gives directions as to the form of the judgment of the court for the guidance of the registrar in drawing up that judgment, as follows:—

> Judgment for $25.00 damages and costs on the lower scale; dismiss counter-claim with costs on the higher scale. Allow, pursuant to undertaking, the defendant the dry season of next summer for removal of timber on payment of $50.00, either party to have a reference as to damages, in which event all costs reserved.

If anything was meant by this last sentence other than that either party, if he pleased, might have a reference for the purpose, on the one side, of increasing and on the other of diminishing the sum of $25 allowed by the learned Chancellor for damages done to the meadow and the bean crop, it should not, in my opinion, having regard to the above extracts from the learned Chancellor's judgment, have constituted part of his directions given for drawing up the formal judgment of the court, nor should the case, under the circumstances, have been thrown at large into the master's office, as if the learned Chancellor had not himself formed any judgment upon the evidence laid before him.

Upon the construction of the contract the Court of Appeal has differed wholly from the learned Chancellor, and has adopted the construction contended for

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by the defendant, namely, that by the contract the plaintiff had granted to the purchaser of the timber growing in the forest land outside of the plaintiff's cleared land full right, at his pleasure and as suited his convenience, to haul the timber cut down in such forest land across the plaintiff's growing crops in his cleared land and through his farmyard by the routes by which the defendant did haul such timber, provided that in so doing he did no more damage than was reasonably consequential upon and necessarily attendant upon the hauling of the timber by these routes through plaintiff's crops. Upon this point of construction the learned Chancellor pronounced his judgment as follows:—

I should say that as to all the land which is outside the cleared land—in the bush—it was the business of the person buying the timber to take it out without interfering with the use and enjoyment of the cleared land by the proprietor. If it is impossible to get it out by means of the road to the rear or the shanty road then it becomes necessary to go on another road but until it becomes necessary to encroach (that is on the cleared land) it should not have been done and I should think there was no right to do it. And again he said: "What is granted is not land at all, it is trees and timber—in other words it does not necessarily relate to 500 acres but to so much of the 500 acres as relates to the trees being sold."

Then as to the 2nd clause of the contract and the last words thereof namely, "at such times and in such manner as he or they may think proper," he said that in his judgment the meaning of that clause was that the defendant might go on the land where the trees were and fell the said timber and haul away and remove such timber "at such times and in such manner" as defendant might choose, that he did not think the words "in such manner" related to the way of ingress or egress at all but to the manner in which the defendant might handle the timber.

Then he dwelt upon the covenant that the plaintiff should have full and free use and enjoyment during

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the three years without any interference, &c., &c., save in so far as might be necessary for the cutting and removing the said trees and timber; and upon this covenant he comments as follows:—

He (that is the plaintiff) is to have full and free use and enjoyment without any interruption except in so far as may be necessary, it does not say in so far as may be convenient but uses the word necessary and I think when we look at the locality we find a very clear meaning may be given to these words; while the land is generally composed of timber and cultivated land separated from each other by a fence, there are some parts of the timbered land within the enclosure. There is one clump of trees entirely surrounded by cultivated land so that it is not physically possible to get that timber without crossing the cultivated land and at that point it is necessary to interfere with Stephens' enjoyment to reach that place. Then as to the timber outside of the cleared land he says: "it is not necessary to cross the cultivated land he (the plaintiff) is to have the free use of that unless it is necessary to interfere with it for the purpose of cutting and removing. As to the timber which abuts on it (the cleared land) there is no necessity. As to the other timber there is the necessity; so that construction, it seems to me, is the one which must govern."

With this construction the Court of Appeal differed entirely and held that by the contract the plaintiff granted to the purchaser of the timber full power, if he found it more convenient or economical, to haul the timber cut in the forest land over the plaintiff's meadows and bean field, by the route which he did, subject only to the rule *sic utere tuo*—that under the contract, the defendant had full right to adopt such routes of haul whether over the wood land or over the cleared land as would enable him, from time to time, to get the timber and take it away most beneficially, and that "the only restriction to which he was subject was the rule *sic utere tuo*, which would require him to exercise his right in a reasonable manner and without doing any wanton or unnecessary mischief," that he might carry some of the timber over the cleared land and the rest through the woods, causing no unnecessary injury, and the court was of opinion that the covenant

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that the plaintiff had good title to the lands confirmed this view, but that title, as its context shows, was inserted simply for the purpose of confirming the vendee in the right granted by the contract to the timber sold; and finally the court held that what he did, in hauling timber cut in the forest outside of the cleared land through the plaintiff's meadow and through his bean crop and through his farmyard by the route which he did, was not unreasonable, and was quite within his rights, and they therefore dismissed the plaintiff's claim upon that head and held that he never had any right to the injunction.

In this view I am unable to answer and am of opinion that the construction put upon the contract by the learned Chancellor is the true one. I can add little to what appears to me to be the sound reasoning of the learned Chancellor. In his observations upon the words "in such manner" as they are used in the second clause of the contract I entirely concur. It cannot be contended that by these words a right of way over the cleared land is expressly granted, and if not, there is not a syllable in the contract from which a grant of a right of way over the cleared land for hauling the timber cut in the forest land can be collected. The application of the maxim *sic utere tuo*, &c., as it has been applied by the Court of Appeal for Ontario, involves the assumption of the whole question which is in issue, namely, whether the vendor of the timber on the forest land granted to the vendee thereof any right of way over the cleared and cultivated land for removing the timber cut upon the forest land? If any such way was granted either impliedly as a way of necessity, or by express grant then only could the maxim *sic utere tuo* apply; but the question is, was any such way granted either impliedly or expressly? The cases to which reference

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has been made have no application upon such a question. Thus in *Newcomen* v. *Coulson* (1), there was an express grant to the allottees of certain allotments made under an inclosure act of a right of way and liberty of passage for themselves and their respective tenants and farmers, as well on foot as with carts, carriages, horses, &c., from the common highway to their respective allotments, over the east end of the allotments, doing as little damage, &c., and that the way should be always eleven yards wide, but was not to be a right of way to any one but the allottees, their tenants, &c. The owner of one of the allotments commenced building houses on his allotment and was proceeding to lay down a metalled road where there had been only an ordinary cart track, and it was held that the allottees were not confined to the way for agricultural purposes only, but were entitled to make a substantial road way suitable to the purpose to which the land was in course of being applied. In this state of facts Jessel, M. R., laid down what may be admitted to be undoubted and unquestionable law, viz.: that the grantee of a right of way has a right to enter upon the lands of the grantor over which the way extends for the purpose of making the grant effective, that is to enable him to exercise the right granted to him.

> If, he says, you grant to me over a field a right of carriage way to my house, I may enter upon the field and make over it a carriage way sufficient to support the ordinary traffic of a carriage way, otherwise the grant is of no use to me.

So in *Taylor* v. *St. Helen's* (2), there was an express grant of all water-courses, dams and reservoirs upon certain lands of the grantor, and also all streams flowing into and feeding the said water-courses, dams and reservoirs, all of which were shown on a plan annexed to the grant, reserving liberty to the grantor to use the

(1) 5 Ch. D. 133. (2) 6 Ch. D. 264.

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water or overflow water from the dams and reservoirs, and the question was whether this grant was confined to the water-courses, channels, streams, &c., shown on the plan, and of such water as should find its way by those channels in the condition in which they then were, to the reservoirs; or whether it was a grant of all water which should fall on the land in heavy rains so as to entitle the grantee to deepen the channels, streams, &c., so as to retain all such last mentioned water in the reservoirs, and it was held that that grant was not a grant of all the water so falling upon the land, but of the waters flowing through the channels, &c, in the condition in which they were at the time of the grant.

In *Cannon* v. *Villars* (1), the case was of an agreement for a lease of a piece of land to which the lessee could have no access, except by a lane and gateway of the defendant, the grantor, and it was stipulated that the plaintiff should not obstruct the gateway, except for purposes of ingress and egress. It was held that the plaintiff, the lessee, had an implied right of way through the gateway for the reasonable purposes of his business. Jessel, M. R. there again states the law, which is not questioned by the appellant in the present case.

> If, he says, we find a right of way granted over a metalled road, with pavement on both sides existing at the time of the grant, the presumption would be that it was intended to be used for the purpose for which it was constructed. Again, if we find a right of way granted along a piece of land capable of being used for the passage of carriages, and the grant is of a right of way to a place which is stated on the face of the grant to be intended to be used for a purpose which would necessarily or reasonably require the passing of carriages, there again it must be assumed that the grant of the right of way was intended to be effectual for the purpose for which the place was designed to be used, or was actually used. I agree, he says, entirely with the argument on the part of the defendant, that where you find an express right of way granted (for there is no question about a way of

(1) 8 Ch. D. 415.

necessity), it is a mere question of construction as to what the extent of the right of way granted is.

In *Bolton* v. *Bolton* (1) it was decided that when a grantee is entitled to a way of necessity over another tenement belonging to the grantor and that there are more ways than one to the tenement granted, the grantee is entitled to one way only and that the grantor may select which.

In *Dand* v. *Kingscote* (2) the case was of a grant of fee farm land excepting and reserving out of the grant all mines of coal *together with sufficient way leave and stay leave* to and from said mines and the question was whether under this reservation the grantor had a right to construct a railway for the purpose of carrying the coals from the mines.

Pennington v. *Galland* (3) was the case of a conveyance of a piece of land *together with all ways* and roads to the land belonging or appertaining, and the question was as to which of two ways had passed under the grant. There the court said (4):

A man having a close surrounded with his land grants the close to another in fee for life or years, the grantee shall have a way over the grantor's lands *as incident* to the grant, *for otherwise he could not have any benefit from the grant*, and this way which would be the most direct and convenient, which we think we may properly *assume to be* the one in question in the present case. This is founded on the legal maxim, *quando aliquis aliquid concedit id concedere videtur, et sine quo res concessa uti non potest*, which though bad Latin, is, we think good law.

In *Espley* v. *Wilkes* (5) the case was of a lease of land described as bounded on the east and north by "newly made streets" and on the south and west "by the premises of the lessor and his tenants" (through which there was no way). A plan was endorsed on the lease upon which the locus of the new streets was shown and was marked "new streets" and it was held that

(1) 11 Ch. D. 968.
(2) 6 M. & W. 174.
(3) 9 Exch. 8.
(4) P. 12.
(5) L. R. 7 Ex. 298.

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under the lease a right of way over the land marked "new streets" passed to the lessee.

It is useless to refer to more, they are all similar and the law of none is disputed: what is contended by the appellant is that they have no application to the present case where the question is, whether any way was granted either by implication as of necessity or by express grant over the plaintiff's cultivated land for hauling through the plaintiff's crops and farm yard, timber cut on the forest land that there was no way as of necessity *i.e.* by implication, is concluded beyond all question by the evidence and the finding thereon of the learned Chancellor. To establish an express grant of such right of way which was so unnecessary and would be so injurious to the plaintiff the language by which such a grant is shown must, in my opinion, be most unequivocal, and so clear as to exclude all doubt; and the sole question is: whether such an express grant can be collected from the instrument; not (assuming such a grant) what would be a reasonable exercise of the right of way if granted—the question being as to right of way over the cleared land for hauling the timber cut in the forest land, we may consider the case regardless of the fact that there were the few elm trees standing in the plaintiff's meadow. The first clause of the contract then merely grants all the trees and timber, except black ash and white oak growing and being upon lots 21, 22 and the west half of 23 in the township of Chatham—now the trees and timber so sold were situate upon say 470 acres of forest land, the residue of the lots or about 30 acres in all being in actual cultivation, in the occupancy of the plaintiff. The grant and sale of the timber and trees upon these 470 acres passed an interest in the 470 acres upon which the trees and timber were to such an extent as was necessary to give to the vendee of the

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trees and timber the full benefit and enjoyment of his purchase and to enable him to enter upon every part of such 470 acres and to cut down and remove the timber there being at such times and in such manner as to the purchaser might seem fit during the specified period named for the cutting and removal of the timber, but such grant passed no interest in, or right of entry upon the 30 acres of cleared land—the grant of timber upon the 470 acres of forest land gave no right of way whatever over the 30 acres unless the situation of the 470 acres where the timber sold was, was such that a way of necessity over the 30 acres must be held to have been granted for hauling the timber from the 470 acres. The evidence shows that the timber cut on the 470 acres could have been and for very many years had been hauled out through the forest land alone without any interference with the cleared land, so that there could not be held to be, nor has there been, any assertion of a right of way as of necessity over the cleared land. I do not understand the judgment of the Court of Appeal to be rested at all, upon the defendant having a way, over the cleared land for hauling timber from the 470 acres outside of the cleared land as a way of necessity—what they hold is that the contract expressly granted to the purchaser of the timber the right to haul the timber cut on the forest land outside of the cleared land across the cleared whenever and at whatever points suited his convenience and presented the most beneficial and cheapest mode for his conducting his business, and that the defendant, as assignee of the contract, had such right; but between a right of way exerciseable as suited the convenience of the defendant and a right of way as of necessity, there is a vast difference. Under the first clause therefore of the agreement I must say that it appears to me to be very clear that no right of way over the 30

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acres of cleared land either as of necessity or otherwise has been granted for hauling the timber cut upon any part of the 470 acres. Then the second clause of the contract grants no more right of way over the 30 acres of cleared in relation to the timber upon the 470 acres than was granted by the first clause, unless the words "in such manner" as used in that clause could be construed into a grant of a right of way over the cleared land for hauling the timber cut on the 470 acres of forest land—a construction for which it is in my opinion impossible to contend. The only lands which the 2nd clause relates to, and authorizes the vendee of the timber to enter upon are the "said" lands in the first clause referred, namely the land situate on the lots 21-22, and the W.½ of 23 upon which the timber was growing and being, and not upon the whole of the said lots, that is to say in so far as the question under consideration is concerned, the 470 acres. The clause, in my opinion, grants no right of entry whatever upon the 30 acres of cleared land save for the single purpose of cutting and removing the few elm trees growing in the meadow. The construction therefore put upon the contract by the learned Chancellor was the correct one. But I think that with the view of preventing the parties continuing this litigation at an expense which if not seriously detrimental to both parties would be enormously disproproportionate to any real damage sustained, the judgment in the action should be varied so as to be more in conformity with the learned Chancellor's view of the damage sustained by the plaintiff.

Although the learned Chancellor did refuse to hear some witnesses which the plaintiff had ready to call, I do not think the plaintiff has been prejudiced thereby, they could not have presented the plaintiff's claims more favourably for him than he did

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himself and upon the plaintiff's own evidence the learned Chancellor had no difficulty in coming to the conclusion that all should be disallowed except the damages sustained by the hauling of timber through the hay and bean crops, and that as to these damages the claim of the plaintiff was preposterous in the extreme, and that the sum, which the learned Chancellor said he allowed for that damages, was liberal, and so satisfied does the learned Chancellor appear to have been that the sum of $25 which he allowed for such damage was ample that he was of opinion that the plaintiff should have costs only upon the lower scale.

Then as the defendant's counter claim assuming the learned Chancellor's judgment as to the construction of the contract to be correct, as I think it is, there was no claim cognisable but that for the elm taken by the plaintiff, which claim the learned chancellor, after hearing all the witnesses the defendant had including himself, came to the deliberate conclusion of disallowing. Under these circumstances concurring in the learned Chancellor's construction, I think we shall best consult the interest of both parties to this litigation if we pronounce the judgment in the action according to the view which, the learned Chancellor has so clearly expressed, would in his opinion do complete justice in this unfortunate expensive litigation; the claims for damages in which, in his opinion, are founded upon temper and not upon any substantial injury beyond what he expressed himself of opinion should be allowed.

While therefore I think we must allow this appeal with costs, I think the judgment in the action should be varied so as to be as follows. Disallow all the plaintiffs' claims for damages except for the wrongful entry upon and hauling of timber, &c., across the plaintiff's crops, enter judgment for the plaintiff for

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$25, in respect of such damages with costs upon the lower scale, dismiss the defendant's counter claim with costs, but I cannot see that the plaintiff should have the cost of such dismissal upon any higher scale than that prescribed by the learned Chancellor as the scale upon which the costs of the action should be allowed to the plaintiff. In this manner I think the judgment will be, as it should be, according to the views expressed by the learned Chancellor.

SEDGEWICK J.—On the 19th February, 1887, the plaintiff, who was the owner of a rectangular block of land containing five hundred acres, in the township of Chatham, in consideration of the sum of $6,000 sold to one Alexander Tierce all the trees and timber, except black ash and white oak, growing thereon, allowing him until the 1st of March, 1891, to remove them. The agreement provided that Tierce should at all times during this period

> Have full liberty to enter into and upon the said lands, and to fell the said trees and timber in such manner as he should think fit, with full liberty to bring horses, cattle, waggons, carts, trucks and sleighs in and upon the said land for the purpose of removing the said trees and timber, at such times and in such manner as he might think proper; and, further, that the grantor, Stephens, should have the full and free use and enjoyment of the said land during said three years, without any interruption on the part of Tierce, his workmen, servants or agents, save in so far as might be necessary for the cutting and removing of said trees and timber.

In January, 1889, Tierce assigned his rights under the agreement to the defendant, Aaron Gordon, such assignment being recognized by the plaintiff, and he, Gordon, for the sum of $500, obtained an extension of one month beyond the time allowed to Tierce, to remove the trees. At the time of the agreement the land in question consisted partly of cultivated land and partly of wood land. The cultivated land was on the

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northerly and central portion of the block, and was, speaking roughly, bounded on the front by the concession road, and was surrounded on all other sides by the wood land. It was all enclosed by fences. Inside these fences, however, and wholly surrounded by cultivated lands, there was a considerable quantity of grown timber, admittedly sold under the agreement, which it was physically impossible to remove, except by crossing the cultivated fields. Before the agreement in question timber had been taken to some extent from off the land, and through the woods there existed the wood roads or ways which had been temporarily made and used for this purpose, but no other road or way existed. The purchaser of the timber was therefore obliged, in order to its removal, to make roadways for himself, using the existing ways through the woods so far as they suited his purpose

At first there was no difficulty between the parties. The timber for the most part was being cut on the easterly portion of the block, and the convenient way to remove it was to haul it northward through uncultivated land, the land on which the trees were being cut, to the concession road on the north, without touching any portion of the cultivated land. But as the work progressed, as it became necessary to cut and remove the timber which was growing further west and to the south of the plaintiff's tilled land, the defendants found that it was not in their interest to haul it by the same way as the timber just cut by them had been, but rather that they should take it direct from where it was cut or skidded to the concession road on the north, involving, however, the necessity of their temporarily removing fences and of their crossing over and damaging, to some extent, the grass and bean fields of the plaintiff.

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Upon their attempting to carry this design into effect suit was brought and an interim injunction obtained restraining them therefrom. The plaintiff's statement of claim contained other grounds of action, and sought damages for other alleged breaches of the agreement, but the learned Chancellor before whom the case was tried held, and I think correctly, that the plaintiff had failed to establish some of them and ordered a reference in regard to others.

At the trial the Chancellor decided that the defendants, in order to the removal of the timber, were obliged to remove the same through the bush or uncultivated land, and that their attempt to remove it or any part of it (save that part wholly surrounded by cultivated land, as before mentioned) through the cultivated land was a trespass, and he assessed the plaintiff damages at $25, allowing a reference with a view of enabling the plaintiff to prove before the master that his damages were in excess of the amount awarded. The defendants appealed to the Court of Appeal, where the judgment of the learned Chancellor was reversed by a unanimous decision, the appeal court being of the opinion that the learned Chancellor's view as to the construction of the agreement upon which the action was brought was erroneous, and that the defendants were within their rights under it in crossing the plaintiff's cultivated lands, as disclosed in the evidence.

And this is the question now before this court. The plaintiff contended from the first that, as a matter of law, the defendants, under no circumstances, had a right to cross the cultivated land; that upon a true construction of the agreement he was under an obligation to remove the timber, if he removed it at all, through the bush land. And the learned Chancellor, during the progress of the trial (and before the plaintiff had

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finished his case or the defendants had offered any evidence), says:—

I should say there should be a declaration of right that this timber was to be taken at such times and in such a manner as Gordon might think proper, but without any interruption in the use of the cultivated part by the plaintiff. I shall rule that as a matter of law.

And this ruling he confirmed at the close of the case, but he stated at the same time (and I suppose such statements may be regarded as findings) that the defendants could not remove the timber at the time they were attempting to do so by the old snake road—the road through the bush insisted on by the plaintiffs—without a great expenditure of money, and that Mr. Gordon took the course he did, in crossing the cultivated land, to save the great expense which would probably amount to a sacrifice of the greater amount of the timber were he compelled to resort to the much longer and more circuitous mode of egress through the bush.

The rights of the defendants depend solely upon the agreement, and the question involved is as to its true construction. To reach that, resort may I think be had to those principles of law governing cases where there is simply the grant of lands or growing timber in or surrounded by lands of another, without further agreement as to use, or otherwise, considering at the same time whether and to what extent these principles are limited or modified by the express agreement of the parties in the present case.

In Rolle's abridgment (1) it is stated:—

If I have a field enclosed by my own lande on all sides, and I alien this close to another, he shall have a way to this close over my land as incident to the grant, for otherwise he cannot have any benefit by the grant, and the grantor shall assign the way where he can best spare it.

The grant of a thing passes everything included therein, without which the thing granted could not be had. If a man grant or reserve wood, that implies liberty to take and carry it away.

(1) 2 Rolle abr. tit. Graunt.

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There is some obscurity and perhaps confusion in the cases, which are not numerous, as to the direction of the way. But in *Pinnington* v. *Galland* (1), where a number of cases on the question are cited, it was held that the grantee was entitled to a way that would be the most direct and convenient for him. So in *Oldfield's case* (2), it was resolved that where A had an acre of land which was in the middle and encompassed with other of his lands, and enfeoffs B of that acre, B shall have a convenient way over the lands of the feoffer, and he is not bound to use the same way that the feoffer uses. From this case two points are gained: first, that the way must be convenient for the grantee, and secondly, that though the grantor may have been in the habit of using a particular path, the grantee is not necessarily bound to accept the same, but may have another if that is not convenient.

In *Pearson* v. *Spencer* (3) the court distinctly recognized the principle that the way must be convenient for the grantee; and in the *Wimbledon and Putney Commons Conservators* v. *Dixon* (4), Mellish L.J., after referring to a grant of a right of way, where the way was not defined, says:—

> If the owner of the servient tenement does not point out the line of way, then the grantee must take the nearest way he can. If the owner of the servient tenement wishes to confine him to a particular track, he must set out a reasonable way, etc.

In *Hawkins* v. *Carbines, et al.* (5), the question was whether the way used by the defendants was in excess of their rights, and the court held that the question was one for the jury—a question of fact as to what was the ordinary and reasonable use of the way.

(1) 9 Exch. 1.
(2) Noy's reports 123.
(3) 1. B. & S. 571, and in Ex. Chamber 3 B. & S. 761.
(4) 1 Ch. D. 362.
(5) 27 L. J. (Ex.) 44.

See also the following authorities:—*Hutton* v. *Hamboro* (1); *Clifford* v. *Hoare* (2); *Cannon* v. *Villars* (3); *Cousens* v. *Rose* (4); *Harding* v. *Wilson* (5), and *Espley* v. *Wilkes* (6).

The result of the cases I think is this, that where no way is specified in the instrument of grant the grantor may assign a way, but that way must be a reasonable one—a way that will enable the grantee to enjoy, in a reasonable manner, the thing granted. If the grantor does not assign a way, or if he assigns a way that is unreasonable, the grantee may select a way, a way that is "most direct and convenient," for himself, but one, the use of which will not unreasonably interfere with the grantor in the enjoyment of his rights upon the servient tenement. And, finally, questions of this character are not questions of law, but of fact, to be determined by the jury upon evidence.

Considering the agreement in question as a grant of growing timber, and nothing more, it is, in my view, clear that the plaintiff, in attempting to compel the defendants to remove the timber through the bush land and refusing them access to the cleared land, was acting beyond his rights. The defendants had a right to remove their timber to the highway by the most direct and available route, subject, however, to this qualification, that they were acting in good faith and not unreasonably, or in other words, that there was no abuse of the rights which their grant gave them. I think it was unreasonable to insist that they should undergo the extra trouble and expense of removing the fruits of their purchase by an admittedly inconvenient and longer route, when the expense, as the learned Chancellor says, "would probably amount to a sacrifice of the greater amount of the timber."

(1) 2 F. & F. 218.
(2) L. R. 9 C. P. 362.
(3) 8 Ch. D. 421.
(4) L. R. 12 Eq. 366.
(5) 2 B. & C. 96.
(6) L. R. 7 Ex. 298.

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If there had been no agreement and no sale, and if the plaintiff, himself, had wanted to cut down and remove and carry to market the timber in question, can there be any doubt that he would have removed it in precisely the same way as the defendants did? Can it be imagined that he, rather than haul it through a hay field or growing bean crop, injuring and even destroying, it may be, the harvest, along the narrow strip necessary for the purpose, would at an enormous increase of expense, remove it by the way he seeks to impose upon the defendants? That, I think, is a fair test as to the reasonableness or unreasonableness of the plaintiff's claim, and, if so, it fails utterly.

The plaintiff's counsel contended at the argument, that he was precluded by the Chancellor's ruling at the trial, from adducing evidence to show that, the defendants' use of the way they claimed was unreasonable. I think this contention cannot avail. It does not appear that he objected to the ruling, or that during the progress of his own case, he brought forward any evidence on this point, that was excluded. The onus was upon him to show that there was an abuse by the defendants of the rights which they had under the agreement, that they were claiming to use a way that unreasonably interfered with the plaintiff's rights, and the method, the only method by which he undertook to show that was, to prove (as if that was all that was necessary), that they took the shortest and most convenient route for themselves, the short and easy way through the plaintiff's fields, instead of the long circuitous and expensive one, through his wood lands.

The plaintiff had to establish his case in the first instance, and it would not I think, have been proper, after the defendants had concluded their evidence, to allow him to strengthen his original case, by introducing new and cumulative evidence in support of it.

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The question remains: Are the legal principles above mentioned, applicable to the present case, or have the defendants contracted themselves out of them?

In my view they have not.

The plaintiff's contention is in effect, that there is in this agreement an implied stipulation that the defendants shall not remove any of the timber by crossing cultivated land.

I cannot find that stipulation in the agreement.

I cannot from the surrounding circumstances as given in evidence, gather that such was the intention of the parties. As regards certain of the trees, the only way to remove them was across these lands. That was known to the parties. They must have contemplated a crossing of the fields, as respects these at least. If that was to be all, why does not the agreement say so? The defendants were at all times to have the right of entry and removal. A convenient method of removal, in winter might be, and was, an inconvenient method in summer; but there is no limitation as to the particular season or the particular method. The defendants' discretion was absolute. Stress is laid upon the stipulation, that during the defendants' user the plaintiff was to have the full and free use and enjoyment of the land, "save in so far as might be necessary for the cutting and removing of said trees and timber." That limitation means, and I think can only mean, that the plaintiff was to enjoy his land subject, and subject only to the defendants' right as created by the agreement. He was to have the use of the whole land uncleared as well as cultivated, subject to the plaintiff's rights. I cannot understand how the use of the word "necessary" gives foundation to the argument that the user of the land was confined to the uncleared portion. The defendants necessarily required to use some land in order to remove the trees. Any

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land used by them for such removal was necessarily used. There is not the slightest indication that the word is used to distinguish one character of land from another, or one mode of egress from another, its object being to prohibit the defendants from using any portion of the property, whether cleared or otherwise, for purposes foreign to the cutting and removal of the growing trees.

I am therefore of the opinion that the insertion in the agreement of the two clauses referred to, does not in any way minimize or modify the rights which, irrespective of them, the defendants take under the general grant of the trees, and that these rights are as I have above stated.

The result is that the appeal fails.

Appeal dismissed with costs.

Solicitors for appellant: *Wilson, Rankin & McKeough.*

Solicitor for respondent: *J. W. Sharpe.*

MICHAEL WILLIAM FOGARTY (PLAINTIFF) ..... APPELLANT;

AND

JEREMIAH FOGARTY (DEFENDANT) RESPONDENT.

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*Mar. 7.

*May 1.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA (APPEAL SIDE.)

Will—Construction of—Division of estate—Right to postpone.

T. F. F., who, in partnership with his brother J. F., carried on business as manufacturers of boots and shoes in Montreal, by his last will left all his property and estate to be equally divided between his two brothers, M. W. F., the appellant, and J. F., the respondent. The will contained also the following provision :—

But it is my express will and desire that nothing herein contained shall have the effect of disturbing the business now carried on by my said brother Jeremiah and myself, in co-partnership under the name and firm of Fogarty & Brother, should a division be requested between the said Jeremiah Fogarty and Michael William Fogarty, should the latter not be a member of the firm, for a period of five years, computed from the day of my death, in order that my brother, the said Jeremiah Fogarty, may have ample time to settle his business and make the division contemplated between them and the said Michael William Fogarty, and in the event of the death of either of them, then the whole to go to the survivor.

T. F. F. died on the 29th April, 1889.

On the 30th April, 1889, a statement of the affairs of the firm was made up by the book-keeper, and J. W. and M. W. F., having agreed upon such statement, the balance shown was equally divided between the parties, viz., $24,146.34 being carried to the credit of M. W. F., in trust, and $24,146.34 being carried to J. F.'s general account in the books of the firm. At the foot of the statement a memo. dated 12th June, 1889, was signed by both parties, declaring that the said amount had that day been distributed to them.

On the 6th March, 1890, M. W. F. brought an action against J. F., claiming that he was entitled to $24,146.34, with interest, from the date of the division and distribution, viz., 30th April, 1889. J. F. pleaded that under the will he was entitled to postpone pay-

*PRESENT :—Strong C.J., and Fournier, Taschereau, Gwynne and Sedgewick, JJ.

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ment until five years from the testator's death, and that the action was premature.

Held, affirming the judgment of the court below, that J. F. was entitled under the will to five years to make the division contemplated, and that he had not renounced such right by signing the statement showing the amount due on the 30th April, 1889.

APPEAL from a judgment of the Court of Queen's Bench for Lower Canada (appeal side) confirming unanimously the judgment rendered in the respondent's favour by the Superior Court.

In March, 1890, the plaintiff, by his action, claimed from the defendant $24,146.34, which he alleged to be his share in the boot and shoe manufactory of Fogarty & Brother, of Montreal, under the last will and testament of Timothy Francis Fogarty, in his lifetime a member of the said firm of Fogarty & Brother, and who, by his said will dated the 28th October, 1887, bequeathed all his rights and interest in the said manufactory to the plaintiff and to the defendant, his brothers, share and share alike, the said plaintiff alleging that there had been a division made between him and defendant of the respective shares and right in the said business, and that the defendant, who was previously a partner with the deceased in the said firm, and who has remained in possession of the whole property ever since, was now bound to pay plaintiff his said share.

To this action the defendant pleaded that under a special clause of the will he had a right to remain in possession of the whole business of the said boot and shoe manufactory during five years to reckon from the death of the testator, which took place in April, 1889.

The following are the material clauses of the will:—

Fifthly. As to the rest, residue and remainder of all my property, whether real or personal, movable or immovable, moneys, stocks, funds, securities for money and effects generally, that I may die possessed of, wherever the same may be found and to whatever the

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same may amount, I give, devise and bequeath the same to my brothers, Jeremiah Fogarty and Michael William Fogarty, both of the said city of Montreal, manufacturers, in equal proportions, share and share alike, hereby constituting the said Jeremiah Fogarty and Michael William Fogarty my residuary legatees and devisees.

But it is my express will and desire that nothing herein contained shall have the effect of disturbing the business now carried on by my said brother Jeremiah and myself in co-partnership under the name and firm of Fogarty and Brother, should a division be requested between the said Jeremiah Fogarty and Michael William Fogarty, should the latter not be a member of the firm, for a period of five years computed from the day of my death, in order that my brother, the said Jeremiah Fogarty, may have ample time to settle his business and make the division contemplated between them and the said Michael William Fogarty, and in the event of the death of either of them, then the whole to go to the survivor.

At the time of the testator's death the appellant was still an employee of the firm.

No difference of opinion appeared to have existed between the appellant and respondent as to the meaning of the clause quoted from the will until after the preparation of a statement in duplicate showing the condition of the affairs of the firm of "Fogarty & Brother," on the 30th April, 1889, at the time of the testator's death. This statement was prepared by Mr. Lindsay the book-keeper of the firm of Fogarty & Brother, and it showed the testator's interest in the business of Fogarty & Brother taking everything into account, to amount to $48,292.69.

After appellant and respondent had opportunity to examine and verify it, they found it correct, and each signed the following entry thereon :—

We approve of and accept the foregoing statement as correct.
MONTREAL, 18th June.

(Signed)
C. CUSHING, N.P.

(Signed) J. FOGARTY.
M. W. FOGARTY.

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The book-keeper also made the following entry at the bottom of the first sheet of the statement:—

In accordance with the provisions of the will of the late Timothy Francis Fogarty, his interest in the business of the firm of Fogarty & Bro., amounting to $48,292.69 (say forty-eight thousand two hundred and ninety-two dollars and sixty-nine cents), as per balance at credit of his capital account on the 30th April, 1889, has this day been distributed as follows:—

Jeremiah Fogarty..... $24,146 35
Michael W. Fogarty..... 24,146 34

MONTREAL, 12th June, 1889.

The principal question which arose on the present appeal was whether the respondent had not waived his right to the postponement of the payment of the bequest by acquiescence in the division and distribution of the estate at once.

C. Carter Q.C. and *Geoffrion* Q.C. for appellant, contended that the division which took place between the parties was a waiver of the delay given to the respondent by the will and the appellant would not have agreed to the division unless it was to be paid over to him at once.

Macmaster Q.C. and *Greenshields* Q.C. for respondent. The delay of five years for payment of the bequest, given by the testator to his partner, in order to give him "ample time to settle the business and make the division contemplated" is an ordinary and prudent provision to make and the courts have properly held that there is nothing on the face of the statement relied on by the appellant to show that, either expressly or impliedly, the respondent waived his right to the period allowed for making the division.

Per Curiam. The judgment appealed from must be affirmed with costs for the reasons given by the courts below.

The judgment of the Superior Court which was unanimously affirmed by the Court of Queen's Bench

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for Lower Canada (appeal side) held that by the will the respondent was entitled to a period of five years to make the division contemplated and that the statement filed of the affairs of the firm as they stood at the demise of the testator, had not the effect of depriving the defendant of the benefit of the said clause, and therefore that the action was premature, but reserved to the plaintiff "all his rights under the will," and specially as to the question of knowing whether during the five years the plaintiff would be entitled to any share in the revenues of the business, and whether he should profit by the increase likely to take place in the value of the real estate engaged in the said business.

Appeal dismissed with costs.

Solicitors for appellant: *Carter & Goldstein.*

Solicitors for respondent: *Greenshields, Greenshields & Mallette.*

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*Mar. 8.

*May 1.

JOHN J. WILLIAMS, *et al.* (DEFENDANTS)..... } APPELLANTS;

AND

THE HON. GEORGE IRVINE (PLAINTIFF)..... } RESPONDENT.

APPEAL FROM THE SUPERIOR COURT OF THE PROVINCE OF QUEBEC, (SITTING IN REVIEW).

Right of appeal—54 & 55 Vic. ch. 25—Construction of.

By sec. 3, ch. 25, of 54 & 55 Vic., an appeal is given to the Supreme Court of Canada from the judgment of the Superior Court in review (P.Q.) "where and so long as no appeal lies from the judgment of that court when it confirms the judgment rendered in the court appealed from, which by the law of the province of Quebec is appealable to the Judicial Committee of the Privy Council."

The judgment in this case was delivered by the Superior Court on the 17th November, 1891, and was affirmed unanimously by the Superior Court in Review on the 29th February, 1892, which latter judgment was by the law of the province of Quebec appealable to the Judicial Committee. The statute 54 & 55 Vic. ch. 29 was passed on the 30th September, 1891, but the plaintiff's action had been instituted on the 22nd November, 1890, and was standing for judgment before the Superior Court in the month of June, 1891, prior to the passing of 54 & 55 Vic. ch. 25. On an appeal from the judgment of the Superior Court in Review to the Supreme Court of Canada, the respondent moved to quash the appeal for want of jurisdiction.

Held, per Strong C.J., and Fournier and Sedgewick JJ., that the right of appeal given by 54 & 55 Vic. ch. 25, does not extend to cases standing for judgment in the Superior Court prior to the passing of the said act. *Couture* v. *Bouchard*, 21 Can. S. C. R. 181, followed. Taschereau and Gwynne JJ. dissenting.

Per Fournier J.—That the statute is not applicable to cases already instituted or pending before the courts no special words to that effect being used.

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*PRESENT:—Strong C.J., and Fournier, Taschereau, Gwynne and Sedgewick JJ.

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MOTION to quash the appeal from the judgment of the Superior Court for Lower Canada (sitting in Review) rendered on the 29th day of February, 1892.

This was an action brought by the respondent to recover from the appellant the sum of $5,191.20 for royalty alleged to be due upon asbestus under a deed of sale of mining rights.

The action was brought in November, 1890, the case was heard on the merits and taken *en délibéré* in June, 1891. On the 17th November, 1891, judgment was delivered by the Superior Court in favour of the respondent for the sum of $2,520, and this judgment was confirmed by the Superior Court (sitting in Review) on the 29th February, 1892.

The Dominion statute 54-55 Vic. ch. 25, giving the Supreme Court of Canada the right to hear appeals from the judgments of the Superior Court of the Province of Quebec (sitting in Review) was passed on the 30th September, 1891.

Mr. *St. Jean*, for respondent, moved to quash the appeal on the ground that 54-55 Vic. ch. 25 was not applicable to cases standing for judgment in the Superior Court when the act was passed.

H. Abbott Q.C. contra.

The cases and authorities relied on by counsel are referred to in the judgments.

The Supreme Court reserved judgment on the motion and heard the counsel on the merits, but the appeal was finally disposed of on the question of jurisdiction.

THE CHIEF JUSTICE.—I am of opinion that this appeal should be quashed for the reasons to be given by my brother Fournier.

FOURNIER.—L'action en cette cause a été commencée par un bref de sommation, émané de la cour Supé-

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rieure de Montréal, daté le 17 novembre 1890 et signifié aux appelants le 22 du même mois. Après une contestation régulière le jugement fut rendu le 17 novembre 1891 par la cour Supérieure et confirmé le 29 février 1892 par la cour de Révision. C'est de ce dernier jugement dont il y a appel à cette cour, en vertu de la 54-55 Vict., ch. 25, amendant la juridiction de cette cour de manière à permettre l'appel des jugements de la cour de Révision en certains cas. Cette loi a été sanctionnée le 30 septembre 1891, l'action avait été signifiée le 22 novembre 1890 et mise en délibéré devant la cour Supérieure dans le mois de juin 1891, plus de trois mois avant l'adoption de cette nouvelle loi. Alors l'action du demandeur n'était soumise à la juridiction de la cour Suprême que dans le cas où le jugement de la cour Supérieure n'aurait pas été confirmé par la cour de Révision. La cour Supérieure ayant été saisie de la cause dans le mois de juin 1891, par la mise en délibéré, avant la passation de la loi d'amendement, le demandeur, intimé, a droit à son jugement conformément à la loi telle qu'elle existait alors, bien que le jugement n'ait été rendu que le 17 novembre 1891, après la passation de cette loi.

La loi qui doit servir à la décision d'une cause est celle qui est en force au moment où l'action est prise et non celle qui peut être passée après ; car c'est de la loi alors en existence que le demandeur tient son droit d'action, ou du titre qu'il peut avoir à ce moment. La loi passée depuis ne pourrait s'y appliquer sans lui donner un effet rétroactif, ce qui serait contraire aux principes, à moins que la loi ne contient une disposition bien spéciale lui donnant cet effet et la rendant applicable aux causes pendantes lors de son adoption.

Le jugement rendu par la cour de Révision étant final, l'intimé a un droit acquis à son jugement qui ne

peut pas être soumis à un droit d'appel qui n'existait pas lorsque la justice a été saisie de la cause.

Si l'appelant avait un droit d'appel, d'après la loi alors en force, c'était au Conseil Privé de Sa Majesté et non à la cour Suprême.

Cette question au sujet de l'application de la 54 et 55 Vict., ch. 25, est déjà venue plusieurs fois devant cette cour, et chaque fois il a été décidé qu'elle ne s'appliquait point aux causes dont la cour Supérieure ou de Révision étaient saisies, par la mise en délibéré, avant la passation de la loi. Dans la cause de *Couture* v. *Bouchard* (1) cette cour a décidé

that the respondent's right could not be prejudiced by the delay of the court in rendering judgment which should be treated as having been given on the 30th September, when, the case was taken *en délibéré* and therefore the case was not appealable.

La même chose avait été décidée dans la cause de *Hurtubise* v. *Desmarteau* (2).

Ces décisions sont conformes au principe du droit français qui veut que le ressort soit déterminé par la loi de l'époque où l'instance est introduite.

Bioche, de l'appel des jugements rendus en premier et dernier ressort, dit:

N° 49. Le taux du premier et du dernier ressort est déterminé par la loi de l'époque où l'instance est introduite et non par la loi de la date de l'acte qui donne lieu à la contestation.

N° 50. L'instance s'introduit par l'assignation et non par la citation en conciliation.

Conformément à cette autorité ce serait d'après la loi en force lors de la date de la signification de l'action que devrait se décider la question du droit d'appel en cette cause. En ce cas la loi en force à cette époque ne donnait pas encore l'appel à la cour Suprême et conséquemment cette cour est sans juridiction pour décider cette cause.

(1) 21 Can. S.C.R. 281. (2) 19. Can. S. C. R. 562.

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TASCHEREAU J.—I would have been of opinion that we had jurisdiction—I do not take part in the judgment.

Gwynne J.

GWYNNE J.—The effect of the Dominion act 54 & 55 Vic. ch. 25, is to amend sec. 29 of ch. 135 of the Revised Statues of Canada so as to enable this court to entertain appeals from all judgments of the Court of Review in the Province of Quebec in affirmance of a judgment of the Superior Court. Prior to the passing of the said act such judgments were by the law of the province of Quebec appealable to the judicial committee of the Privy Council in England. Now the judgment appealed from in the present case is a judgment of the Court of Review rendered subsequently to the passing of said act and is in affirmance of a judgment of the Superior Court. This court therefore has, clearly in my opinion, jurisdiction to entertain and determine the appeal from that judgment, and neither the judgment of this court in the *Queen* v. *Taylor* (1) nor that of the Exchequer Chamber or of the House of Lords in *Attorney-General* v. *Sillem* (2) nor that rendered in any of the cases cited in these cases is, in my opinion, at variance with this conclusion. In the *Queen* v. *Taylor* (1) the point adjudged was, that the act constituting this court which did not come into operation until the expiration of three months after the recovery of the judgment which in that case was sought to be appealed from, did not give to this court any jurisdiction to entertain an appeal from such judgment; that the act only gave to this court jurisdiction to entertain an appeal from—judgments which should be rendered subsequently to the coming into operation of the act constituting the court. *The Attorney-General* v. *Sillem* (2) decided that the right of appeal where no such right

(1) 1 Can. S. C. R. 65. (2) 10 H. L. 720.

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previously existed was a new right which could only be given by legislative authority and that the Imperial Act 22 & 23 Vic. ch. 21 gave no authority to the Barons of the Exchequer to give by rules of court an appeal in revenue cases; what was done having been the granting of an appeal from a judgment of the Court of Exchequer to the Exchequer Chamber in a revenue case in virtue of certain rules of the Exchequer Court which were relied upon as being sufficient to authorize the appeal. The Exchequer Chamber and the House of Lords held that no such power was conferred on the Barons of the Exchequer by the above statute which authorized them to apply and adopt the provisions of the common law procedure act to revenue cases. Now in the present case as already pointed out the judgment appealed from was rendered subsequently to the passing of the Dominion Act 54 & 55 Vic. and it comes precisely within the description of the judgments, appeals from which may after the passing of that act be entertained and adjudicated upon by this court, viz., a judgment of the Court of Review in the Province of Quebec affirming a judgment of the Superior Court in a case in which by the laws of the Province of Quebec there was already an appeal to the judicial committee of the Privy Council. The statute merely extends the jurisdiction of this court by enabling it to entertain and determine appeals from such judgments of the Court of Review which by the existing law were already appealable to the judicial committee of the Privy Council without depriving a suitor of any acquired right whatever. Such being the plain language of the statute I can see no reason why the jurisdiction of this court should be limited to cases in which not merely the judgment appealed from, but that also which had been rendered in the Superior Court and affirmed in Review should be rendered subsequently to the pass-

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ing of the Act 54 & 55 Vic. ch. 25. That act, construed as I construe it, instead of working any prejudice to existing suitors, may be said rather to confer a benefit upon them by enabling a domestic court to entertain appeals from all judgments of the Court of Review of the particular character specified which should be rendered subsequently to the passing of the act and to adjudicate upon such appeals at less expense to the parties than that attending appeals to the judicial committee of the Privy Council.

The case as to its merits turns wholly upon the proper answer to be given to the question: What were the rights of Arthur H. Murphy to the royalty secured by the deed of the 25th March, 1888, between him and the defendants at the time of the execution of the deed of transfer of the 12th April, 1890, by Murphy to the plaintiff, of all his, Murphy's, right, title and interest in and to the royalty stipulated in his favour by the deed of the 26th March, 1888? And that question raises simply a question as to the construction of the latter deed.

By that deed Murphy sold to the defendants two undivided fifth shares of lot No. 32, in range letter B, of the Township of Coleraine, in the County of Megantic, the said lot containing one hundred and twenty-three acres in all, subject to the following conditions, to the fulfilment whereof the defendants bound and obliged themselves, namely:—

1. That the defendants would furnish all the plant, machinery, tools and labour necessary to open up and work the asbestos mines upon the said property in a thorough and efficient manner and for the best advantage of the said property, and would begin the said operations as early as possible in the spring of 1888, and carry on the same during the term of this contract.

2. That they will pay the vendor a royalty of nine dollars upon each and every ton of asbestos of the qualities one, two and three, mined and shipped from the said mine, payable on the fifteenth of

each month following the mining and shipment of the said asbestos, for and during the term of three years, to be accounted from the 31st day of December last, that is to say, 1887.

3. That during each year of this contract, with the exception of the first year, they should mine at least four hundred tons of asbestos.

4. Each of the said parties shall give to the other the option of purchase of their respective interests in the said property, at the amount offered by any *bonâ fide* purchaser, which option must be accepted or refused within ten days after it is received by the other party.

The said deed contained also a clause to the effect that the said sale of two-fifth shares was made for and in consideration of the price and sum of six thousand dollars, which the said purchasers bound and obliged themselves to pay in and by four even and equal consecutive annual payments of fifteen hundred dollars each, the first whereof should become due and payable on the 31st day of December, 1888, and yearly thereafter, and until payment to pay interest thereon or on the part thereof at any time unpaid, at the rate of 6 per centum per annum, payable yearly with the said instalments, and it was thereby specially agreed between the said parties

That as the conditions of this sale, as hereinabove set forth, are part of the consideration thereof, that should the said purchasers fail to carry out the same in any essential, the said vendor shall have the right, upon giving to the said purchasers twenty-four hours notice, by registered letter, to cancel and annul the present sale, to sue for any portion of the price which may be then due, and to claim such damages as he may have suffered, directly or indirectly, in consequence of such default.

Now, can that instrument be construed as containing a covenant by the defendants to pay Murphy, the vendor, a royalty, not only upon every ton of asbestos of the qualities one, two and three which should be mined from the land in each of the three years named, but that such royalty should not be less than $3,600.00 in each of such years but the first? Did the defendants

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in effect guarantee the richness of the mine and covenant that the royalty to be paid in each year, except the first, should not be less than $3,600.00? In my opinion, the answer must be that the contract is open to no such construction, and that nothing could be further from the intention of the parties than that the defendants, who were the purchasers only of two-fifth shares in the property, should so guarantee to the proprietor of the whole property the richness of the asbestos therein. It is obvious that the parties contemplated that asbestos might be produced from the property of a quality inferior to the qualities named as subject to the royalty. Upon such inferior quality no royalty whatever was payable. It might be that the defendants might take one thousand tons of asbestos from the property without succeeding in getting any of the qualities subject to royalty. It might be that after producing for a time asbestos of the qualities upon which the royalty was payable, the property should cease to produce any more asbestos at all. The asbestos might wholly fail. It is impossible, in my opinion, to construe the contract as containing a covenant by the defendants that they should pay a royalty of nine dollars per ton upon not less than 400 tons in each year except the first, whether such quantity of the qualities subject to the royalty could or could not be extracted from the land. The covenant of the defendants is, in my opinion, simply that they would pay the royalty named upon the three qualities of asbestos named if such qualities should be produced from the property, and that they would take out 400 tons of asbestos of such quality as the land should produce in each year except the first, but without any guarantee or covenant that the asbestos so taken out should be of any of the qualities subject to the royalty. If not of those qualities it is clear that no royalty would become

payable, although one thousand tons should be taken out. And if the defendants should cease to work the mine they could be made liable only for such damages

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As the vendor could prove he had sustained by the default of the defendants to fulfil their special covenant to take out at least 400 tons in each year except the first.

Now the contention of the defendants is that they did not mine on the property subsequently to the year 1888, because that upon a thorough and most expensive test of the property by sinking shafts, &c., in that year, 1888, they found that the land ceased to produce any asbestos or at least any of a quality subject to royalty, and that such the defendants' discontinuance to mine on the property was for the reason stated, concurred in by Murphy, and that thereupon and for the above reason the parties interested agreed to endeavour to sell the entire property, and that in fact, in the early part of the year 1889 Murphy requested the defendants to remove their plant to another property of his which the defendants declined doing, only for the reason, that by so doing they might injuriously affect the contemplated sale of the lot 32. Now if this contention of the defendants should prove to be true, it would clearly be a good defence to any action if any had been brought by Murphy to recover damages from the defendants, for the injury sustained by Murphy by reason of the defendants' default in failing to take out 400 tons in the year 1889, for Murphy could have sustained no damage by reason of such default if the land ceased to produce asbestos of the qualities for which a royalty was payable. But the question is not now whether the defendants would have had a good defence to such an action for none such is brought, but whether when Murphy transferred to the plaintiff by the deed of the 12th April, 1890, all his, Murphy's, right, title and interest, in and to the royalty of nine dollars per ton stipulated for

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by that deed he had become entitled to such royalty upon 400 tons of either of the qualities one, two and three for the year 1889? And as no asbestos was taken from the property in that year, Murphy's claim, if any he had for that year, was not for royalty at all, but was reduced to a "claim for such damages as he could prove he had suffered directly or indirectly," in the words of the defendants' covenant "for their default" in not working the property and endeavouring to extract asbestos therefrom in the year 1889, and the defendants consequently were, in my opinion, entitled to have had judgment rendered in their favour in the present action.

The evidence adduced was, as it appears to me, irrelevant to the only question in the case which turned wholly upon the construction of the deed of the 26th March, 1888. It was argued that the agreement of the 15th October, 1889, upon the occasion of the execution of the power of attorney to Martin to sell the property, namely, that, in the event of a sale being effected for $36,000 nett, Murphy should deduct from the defendant's share, the unpaid balance of purchase money and accrued interest, and also royalty for present year of $3,600, constituted an acknowledgment then made by the defendants that such an amount was then due for royalty for the year 1889. When that agreement was made the defendants may have, although erroneously, thought themselves to be liable for royalty for the year 1889, or knowing themselves not to be so liable they may nevertheless have entered into that agreement in their anxiety to get rid of the property by a sale for such a sum as $36,000; or in order not to prejudice the contemplated sale, which might be prejudiced if by any means the sale of the property as a mining property should appear not to be of a going concern after mining operations had been entered upon

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and its value tested, but whatever may have been the motive of the defendants in entering into that agreement of the 15th October, 1889, that agreement cannot be referred to for any assistance in construing the covenant of the defendants in the deed of the 26th March, 1888. That deed must be construed upon the terms which are contained within itself and which are clear and unequivocal and, in my opinion, to the effect I have above stated. This appeal therefore, should in my opinion be allowed with costs and judgment be ordered to be entered for the defendants in the action with costs.

SEDGEWICK J.—I am of opinion that this appeal should be dismissed upon the authority of the case of *Couture* v. *Bouchard* (1) decided by this Court in December, 1892.

Appeal quashed with costs.

Solicitors for appellant: *Abbotts, Campbell & Meredith.*

Solicitors for respondent: *Préfontaine & St. Jean.*

(1) 21 Can. S. C. R. 281.

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*Mar. 16, 17.

*May 1.

JOHN PHILIP DUMOULIN AND OTHERS, RECTOR, ETC. (DEFENDANTS) } APPELLANTS;

AND

GEORGE BURFOOT (PLAINTIFF) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Contract—Sale of land—Building restrictions—Description—Street boundaries—Construction of covenant.

The owners of a block of land in Toronto, bounded on the north by Wellesley street and west by Sumach street, entered into an agreement with B. whereby the latter agreed to purchase a part of said block, which was vacant wild land not divided into lots and containing neither buildings nor streets, though a by-law had been passed for the construction of a street immediately south of it to be called Amelia street. The agreement contained certain restrictions as to buildings to be erected on the property purchased which fronted on the two streets north and west of it respectively and the vendors agreed to make similar stipulations in any sale of land on the south side of Wellesley street produced.

A deed was afterwards executed of said land pursuant to the agreement which contained the following covenant: "And the grantors * * covenant with the grantees * * that in case they make sale of any lots fronting on Wellesley street or Sumach street on that part of lot 1, in the city of Toronto, situate on the south side of Wellesley street and east of Sumach street now owned by them that they will convey the same subject to the same building agreements or conditions" (as in the agreement).

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

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The vendors afterwards sold a portion of the remaining land fronting on Amelia street and one hundred feet east of Sumach street and the purchaser being about to erect thereon a building forbidden by the restrictive covenant in the deed, B. brought an action against his vendors for breach of said covenant, claiming that it extended to the whole block.

Held, affirming the decision of the Court of Appeal, Gwynne J. dissenting, that the covenant included all the property south of Wellesley street; that the land not being divided into lots any part of it was a portion of a lot of land fronting on Wellesley and Sumach streets and so within the purview of the deed; and that the vendors could not by dividing the property as they saw fit narrow the operation and benefit of their own deed.

Held, per Gwynne J.—The piece of land in question did not front nor abut on either Wellesley or Sumach streets, but on Amelia street alone and was not, therefore, literally within the covenant of the vendors.

APPEAL from a decision of the Court of Appeal for Ontario reversing the judgment of the Divisional Court in favour of the plaintiff.

The following statement of the facts on which the appeal was decided is taken from the judgment delivered by Mr. Justice Sedgewick.

On the 1st of February, 1889, the apellants, the Rector and Church Wardens of St. James Cathedral, Toronto, were the owners of a block of land on the west side of the River Don in the city of Toronto. It was of the following shape:

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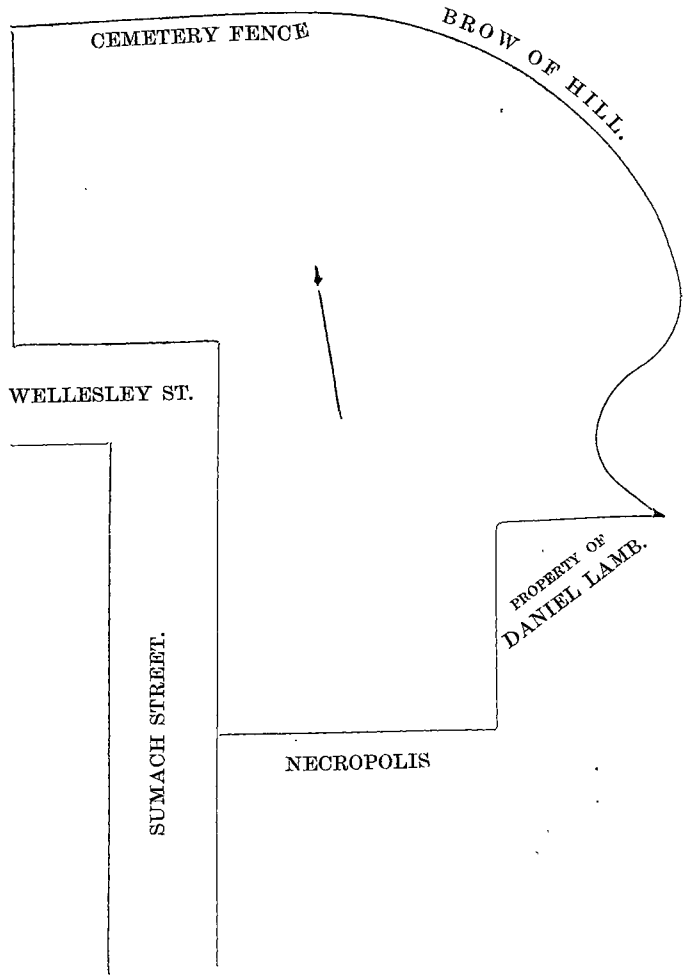

At this time there were neither buildings nor streets on the land, although at the time it was proposed (and a city by-law had been passed for the purpose) to construct a street along the southern boundary westward from Sumach street, to be called Amelia street. Neither had the property been subdivided into lots, although a

firm of surveyors had been employed to survey and had surveyed and made a plan of it at the instance of the appellants.

On the date mentioned the appellant corporation entered into an agreement with George Leaver and George Burfoot, whereby the latter agreed to purchase "three hundred feet frontage on the northerly side of Wellesley street produced, commencing at the intersection of the west limit of Sumach street produced with the northerly limit of Wellesley street and of the depth to the edge of the plateau as marked on the plan" above referred to. The agreement contained among other conditions, provision that all buildings to be erected upon the property purchased were to be "detached or semi-detached two story neat and respectable houses, brick front, brick, brick-cased or stone * * of, actual cost not less than $1,200 each house * * without out-buildings, the vendor agreeing to make similar stipulations in any sale of land on the south side of Wellesley street produced."

Subsequently a plan of the property was made and registered upon which Wellesley street extended was laid off as well as lots and a street to the north, but there was no division into lots south of Wellesley street.

The Corporation then by a deed dated 23rd April, 1889, conveyed to Leaver & Burfoot the lands referred to in the agreement or schedule substantially containing the conditions as set out in the agreement and the instrument contained this covenant:—

"And the grantors * * covenant with the grantees * * that in case they make sale of any lots fronting on Wellesley street or Sumach street on that part of lot 1 in the city of Toronto, situate on the south side of Wellesley street and east of Sumach street now owned by them, that they will convey the same

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subject to the building agreements or conditions as are set out in the schedule to these presents."

On the 22nd of November following, Leaver conveyed his interest in the property to Burfoot.

On the 1st of May, 1890, the appellant corporation conveyed to one Wallace Finch a portion of the property immediately south of Wellesley street described as follows: "Commencing at a point on the south limit of Wellesley street where the said south limit of Wellesley street is intersected by the east limit of Sumach street, thence easterly along the south side of Wellesley street 240 feet, thence southerly parallel to Sumach street aforesaid 100 feet, thence westerly parallel to Wellesley street aforesaid 240 feet to the easterly limit of Sumach street aforesaid, thence northerly along the easterly limit of Sumach street 100 feet to the place of beginning."

This deed contained the restrictive covenant as to buildings stipulated for in the deed to Leaver & Burfoot. But the property to the south between the lands just described and Amelia street still remained. But on the day before the conveyance last referred to, the corporation entered into an agreement with one James A. McIlwain for the purchase of this property. The land although rectangular in shape (173 feet x 198 feet) was described as two lots, as follows:—

"All and singular those certain parcels or tract of land and premises being composed of part of the St. James Cathedral Cemetery property in the city of Toronto, and being part of Park lot number one, Toronto, having a frontage of ninety-seven feet nine inches, more or less, on the northerly side of Amelia street, commencing one hundred feet easterly from the intersection of the northerly limit of Amelia street with the easterly limit of Sumach street, and extending easterly along the northerly limit of Amelia street to

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the westerly limit of the property owned by the Lamb estate, and being of the depth of one hundred and seventy-three feet, more or less, to the rear of the lots of one hundred feet deep facing on Wellesley street. Also, all that parcel of land situated on the easterly side of Sumach street, having a frontage of one hundred and seventy-three feet, more or less, and extending northerly from the intersection of the easterly limit of Sumach street with the northerly limit of Amelia street, to the rear of the lots of one hundred feet deep facing on Wellesley street, and being the depth of one hundred feet"

The property might with equal accuracy have been more shortly described as "that portion of Park lot No. 1, in the city of Toronto, owned by the Corporation fronting on and east of Sumach street and on the south side of Wellesley street, commencing at a point on Sumach street 100 feet south of the corner of Wellesley and Sumach streets, thence southerly along Sumach street to Amelia street, 173 feet to Amelia street, thence easterly along Amelia street 198 feet, thence northerly parallel to Sumach street 173 feet, thence westerly 198 feet parallel to Amelia street to the place of beginning."

This agreement did not contain the restrictive building conditions, stipulated for in the original deed from the Corporation to Leaver & Burfoot.

Subsequently the Corporation with the concurrence of Mr. McIlwain conveyed to divers parties the land north of Amelia street 100 feet east of Sumach street without inserting in the conveyances these restrictive conditions.

The only question in controversy is whether the restrictive covenants described in the agreement between the Corporation and Leaver & Burfoot, as well as in the deed between the same parties, apply to that

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portion of the land the Corporation agreed to sell to McIlwain, which is 100 feet east of Sumach street.

At the trial Mr. Justice Street decided in favour of the plaintiffs holding that the defendant Corporation had broken their covenant in omitting to insert the restrictive stipulations in the agreements and conveyances of the lots north of Amelia street above referred to.

Upon an appeal to the Divisional Court Mr. Justice Ferguson and Mr. Justice Robertson reversed the judgment of the trial judge and dismissed the action. Upon appeal to the Court of Appeal the judgment of the trial judge was by an unanimous judgment restored.

Arnoldi Q.C. and *Bristol* for the appellants contended that the covenant did not apply to this land, and cited, *Bowes* v. *Law* (1); *Hall* v. *Ewin* (2).

As to notice they referred to *Clayton* v. *Leech* (3); *Muttlebury* v. *King* (4); and as to damages, *Beatty* v. *Oille* (5).

Nesbitt and *Percy Galt* for the respondents.

THE CHIEF JUSTICE, and FOURNIER and TASCHEREAU JJ. concurred in the judgment delivered by Mr. Justice SEDGEWICK.

GWYNNE, J.—In my opinion this appeal should be allowed upon the single ground that the piece of land in question which is known and designated as lot B, fronting on Amelia street, in the city of Toronto, neither fronts nor abuts in any way on either Wellesley or Sumach streets but on Amelia street alone, and is not therefore, literally within the covenant of the appellant contained in their deed of 23rd April, 1889,

(1) L. R. 9 Eq. 636.
(2) 37 Ch. D. 74.
(3) 41 Ch. D. 103.
(4) 44 U. C. Q. B. 355.
(5) 12 Can. S. C. R. 706.

upon which covenant the action is based, and I can see no reason for giving to that covenant any other than its plain literal construction.

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SEDGEWICK J.—I am of opinion that the judgment of the trial judge is the correct one.

In my view the stipulation in regard to the restrictive covenants whether in the deed itself which is the foundation of this suit, or in the agreement which preceded, it had reference to all the church property south of Wellesley street produced. In the agreement there is clearly no ground for the appellants' contention. There, the vendors agreed to make the restrictive stipulation in any sale of land on the south side of this street. The land in question comes without doubt within this description. But the question is: Is the deed from the appellants any narrower? Now it does not appear from the evidence that the parties contemplated any change in the terms or conditions of purchase in this regard between the dates of the execution of the agreement and the execution of the deed. It must, I suppose, be admitted that at law the deed must govern. But, admitting that, does not the locus come within the description in the deed "lots fronting on Wellesley street or Sumach street * * situate on the south side of Wellesley street and east of Sumach street"? I think it does. When the deed was executed there was no division into lots (so called) south of Wellesley street. It was all, as I understand, vacant wild land. Subsequently several methods of subdivision were contemplated, and the evidence does not even now indicate exactly the precise areas of the different holdings, but in my view the land in question, until the sale to Finch, was a portion of a lot of land fronting on Wellesley street and Sumach street, situate on the south side of Wellesley street and east of Sumach

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street and therefore within the purview of the deed. And even after the sale to Finch of the street immediately to the south of Wellesley (although that makes no difference) it was still within the description as part of a lot "fronting on Sumach street on the south side of Wellesley street and east of Sumach street" and therefore still within the purview of the deed.

I cannot appreciate the force of the other contentions. Some special meaning is given to the word "lot" that I do not understand. Has a "lot" any specific area or any definite shape recognized by law? When the defendant Corporation gave this deed to the plaintiff and imposed as they did, upon some area south of Wellesley street, the burden of the restrictive stipulation, upon what ground can it be argued that excepted from that burden was this particular parcel 198 feet by 173 feet in extent? Why that parcel and not another? Why that shape and not another? Was it within the contemplation of the parties that the vendors might without reference to the purchasers, and in spite of them, cut up and divide the property according to their pleasure or caprice so as to widen or narrow as they might think fit the operation and benefit of their own deed?

When the sale to Finch was made there remained a "lot" 198 by 173 feet "fronting on Sumach street," "on that part of lot one, in the city of Toronto, situate on the south side of Wellesley street and east of Sumach street," owned by the appellants. By what authority, supported by what argument, can it be contended that they can cut off a block of 98 feet from the rear of this lot and say "the front part of this lot is subject to the burden of our covenant, but this is not"? The defendants admittedly violated their agreement, when they agreed to sell to McIlwain the property just referred to. There was no restrictive stipu-

lation in this agreement, and I am inclined to think it was left out inadvertently, and that the contention that the locus was not within the description set out in the deed to the plaintiff was an after thought.

There is no sufficient evidence to justify the rectification of the deed whether as claimed by the respondent or the appellants. In the view I take the deed sufficiently expresses the true agreement, and the apellants have failed to show any case warranting rectification in their favour.

Our attention has been called to clause 5 of the formal judgment of Mr. Justice Street. That clause should, I think, be varied by directing a reference to ascertain the damages occasioned the plaintiff, not by the erection of the buildings complained of but by the breach on the part of the appellants of the covenant in their deed respecting the restrictive building stipulation.

In my opinion Mr. Justice Street's judgment should be varied as stated and that subject to such variation the appeal should be dismissed with costs.

Appeal dismissed with costs.

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

Solicitors for respondent: *Beatty, Blackstock, Nesbitt & Chadwick.*

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*Mar. 15, 16.

*May 1.

W. P. HOWLAND & COMPANY (PLAINTIFFS) ..... } APPELLANTS;

AND

THE DOMINION BANK (DEFENDANTS)..RESPONDENTS

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Practice—Renewal of writ—Setting aside order for—Statute of limitations.

A writ issued from the High Court of Justice for Ontario, in June, 1887, was renewed by order of a master in chambers three times, the last order being made in May, 1890. In May, 1891, it was served on defendants, who thereupon applied to the master to have the service and last renewal set aside, which application was granted and the order setting aside said service and renewal was affirmed on appeal by a judge in chambers and by the Divisional Court. Special leave to appeal from the decision of the Divisional Court was granted by the Court of Appeal, which also affirmed the order of the master, Mr. Justice Osler, who delivered the principal judgment, holding that the master had jurisdiction to review his own order; that plaintiffs had not shown good reasons, under rule 238 (*a*), for extending the time for service; and the ruling of the master having been approved by a judge in chambers and a Divisional Court, the Court of Appeal could not say that all the tribunals below were wrong in so holding. On appeal to the Supreme Court of Canada:

Held, that for the reasons given by Mr. Justice Osler in the Court of Appeal the appeal to this court must fail and be dismissed with costs.

APPEAL from a decision of the Court of Appeal for Ontario(1) affirming the judgment of the Divisional Court, by which the order of a master setting aside a former order for renewal of the writ in the case, which had been affirmed by a judge in chambers, was upheld.

The writ was first issued in June, 1887, and was renewed, by order of a master in chambers, three times, the last order being made in May, 1890. In May, 1891, it was served on the defendants, the Dominion Bank, and by order of the master the service was allowed.

* PRESENT:—Strong C.J., and Fournier, Taschereau, Gwynne and Sedgewick JJ.

(1) 15 Ont. P. R. 5?

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The defendant then moved, before the master in chambers, to have the service and order allowing the same, and all renewals since June, 1889, set aside, on the ground that the same were contrary to the statute, and that no sufficient cause for granting the same had been shown. The master granted the application, and set aside the renewals and order for service, with costs against the plaintiffs, who appealed to a judge in chambers, to the Divisional Court and to the Court of Appeal, all of which appeals were unsuccessful, and the master's order was sustained. The plaintiffs then appealed to this court.

Arnoldi Q.C., for the appellants.

Dr. McMichael Q.C., for the respondents.

The judgment of the court was delivered by :

SEDGEWICK J.—The appeal in this case relates to a question of practice only. The writ of summons had been renewed three times by the master in chambers, at Toronto, and was not served until nearly four years from the date of its issue had elapsed. The order for the third renewal was set aside by the master, whose order was affirmed by Mr. Justice Street, at chambers, by the Divisional Court and by the Court of Appeal. The effect of the master's order was, it is contended, to enable the defendant bank to set up the statute of limitation as a defence to the action, should it be begun *de novo*, hence the necessity on the plaintiff's part to maintain alive the writ itself, as well as its several renewals.

I am of opinion that the appeal must fail for the reasons stated by Mr. Justice Osler in the Court of Appeal, to whose judgment no observations of mine can usefully be added.

The appeal should, I think, be dismissed with costs.

Appeal dismissed with costs.

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

Solicitors for respondents : *McMichael, Mills & McMichael.*

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*Mar. 13.

*May 1.

THE CANADIAN PACIFIC RAILWAY COMPANY (DEFENDANTS).. } APPELLANTS;

AND

COBBAN MANUFACTURING COMPANY (PLAINTIFFS)..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Practice—Trial—Disagreement of jury — Questions reserved by judge — Motion for judgment—Amendment of pleadings—New trial—Judicature Act, rule 799—Jurisdiction—Final judgment.

In an action brought to recover damages for the loss of certain glass delivered to defendants for carriage the judge left to the jury the question of negligence only, reserving any other questions to be decided subsequently by himself. On the question submitted the jury disagreed. Defendant then moved in the Divisional Court for judgment, but pending such motion the plaintiffs applied for and obtained an order of the court amending the statement of claim, and charging other grounds of negligence. The defendants submitted to such order and pleaded to such amendments, and new and material issues were thereby raised for determination. The action as so amended was entered for trial but was not tried before the Divisional Court pronounced judgment on the motion, dismissing plaintiffs' action. On appeal to the court of appeal from this judgment of the Divisional Court it was reversed. On appeal to the Supreme Court :

Held, affirming the judgment of the court of appeal, that the action having been disposed of before the issues involved in the case, whether under the original or amended pleadings, had ever been passed upon or considered by the trial judge or the jury, a new trial should be ordered, and that this was not a case for invoking the power of the court, under rule 799, to finally put an end to the action.

Held, also, that the judgment of the court of appeal ordering a new trial in this case was not a final judgment nor did it come within any of the provisions of the Supreme Court Act authorizing an appeal from judgments not final.

*PRESENT :—Strong C.J., and Fournier, Taschereau, Gwynne and Sedgewick JJ.

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THE CANADIAN PACIFIC RAILWAY COMPANY v. COBBAN MANUFACTURING COMPANY.

APPEAL from the judgment of the Court of Appeal for Ontario reversing the judgment of the Divisional Court which dismissed the respondents' action.

This was an action brought by the respondent company, claiming $1,487.17 damages from the appellant company as the value of three cases of plate glass delivered to the appellants in Montreal for carriage to Toronto, alleging the same to have been so negligently loaded upon the appellants' cars, and the cars so negligently managed during transit, that the glass was thrown from the cars and destroyed.

The respondents' defence was denial of negligence and setting up a special contract exempting the carriers from liability in consideration of their accepting a reduced freight rate.

The facts and procedings are fully stated in the head note and in the judgment of Mr. Justice Sedgewick hereinafter given.

Nesbitt for appellants.

J. Osler Q.C. and *Holden* for respondents.

The case was not disposed of on the merits and consequently the cases and authorities relied on need not be referred to.

The rules of the judicature act referred to by counsel on the question of procedure were rules 219, 655 and 799.

The judgment of the court was delivered by

SEDGEWICK J.—This is an action brought by the plaintiff company against the Canadian Pacific Railway Company to recover damages by reason of the loss of a quantity of plate glass, while being carried from Montreal to Toronto on the defendant company's line of railway. The allegation in the statement of claim was that the loss was occasioned by the negligent

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loading of the glass, as well as by the careless and negligent management of the cars while the goods were in transit. The defendants' defence was the denial of negligence and the setting up of a special contract whereby, in consideration of obtaining a reduced freight rate, the plaintiff company agreed that the railway should not be responsible for loss even if caused by the negligence of its servants.

The case was brought on for trial at the Toronto Spring Assizes of 1891, before Mr. Justice Street and a jury. The only question left to the jury was that of negligence, upon which they failed to agree, the learned judge stating that if there were any other questions to be decided he would decide them himself. During the trial counsel for the defence made a motion for non-suit which was informally dismissed, but there was a general understanding before the jury returned that the other questions in the case, as for instance the effect of the release set up by the defence, were to be argued before the trial judge at a subsequent time.

It would seem, however, that no further argument took place nor were any of the questions involved ever again brought before the trial judge.

On the 8th of May following, the defendants gave notice that a motion would be made before the Divisional Court by way of appeal from Mr. Justice Street's decision refusing a non-suit, and for an order that the action be dismissed on the grounds (principally) that there was no evidence of negligence, and that the release pleaded was of itself a complete bar to the action.

Subsequently, and before the hearing of the appeal, an order was made in chambers allowing the plaintiffs to amend their statement of claim, and thereupon it was amended, the defendants filing an amended statement of defence. The appeal then came on to be heard, and the Divisional Court gave judgment ordering the

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action to be dismissed, upon the sole ground that there was no evidence of negligence to go to the jury. No reference was made in the judgment to the fact that the pleadings had been amended since the abortive trial, although a new cause of action, or at least a different species of negligence, was therein set up, and questions were there raised that had not been and could not be dealt with at the trial.

From this judgment the plaintiff company appealed to the Court of Appeal.

That court allowed the appeal, upon the ground that the Divisional Court went too far in disposing of the case as they did before the issues involved in the case, whether under the original or amended pleadings, had ever been passed upon or considered by the trial judge or the jury.

I entirely concur in this view.

This case has never been tried; although standing for trial by a jury no jury has yet passed upon the issues of fact involved, nor has the judge who heard the evidence given a decision upon the remaining questions. The appeal court was, as well as this court, entitled to the aid of the judge and jury before whom the case previously came in their respective functions and should not have been asked to come to a judgment upon the merits of the case without it. In other words the case was not ripe for determination, and the Court of Appeal was right in so declaring.

When and under what circumstances resort may be had to the powers conferred upon the court by rule 799 of the Ontario rules need not now be determined. The facts in this case do not, I think, justify the exercise of those powers.

This appeal should be dismissed upon the ground stated. I may add that I have doubts as to the jurisdiction of this court.

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Sedgewick J.

The judgment of the Appeal Court was clearly not a final judgment, nor does it, as I think, come under the other clauses of the statute defining our jurisdiction.

Appeal dismissed with costs.

Solicitors for appellant: *Wells & Macmurchy.*

Solicitors for respondents: *Thomson, Henderson & Bell.*

GEORGE BURY (PLAINTIFF)..... .....APPELLANT; 1893

AND *Mar. 5.

PETER S. MURPHY (DEFENDANT) .....RESPONDENT. *May 1.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA (APPEAL SIDE).

Partnership moneys—Sequestration of—Contre-lettre.

In November, 1886, G. B. by means of a *contre lettre* became interested in certain real estate transactions in the city of Montreal, effected by one P. S. M.. In December, 1886, G. B. brought an action against P. S. M. to have a sale made by the latter to one Barsalou declared fraudulent, and the new purchaser restrained from paying the balance due to the parties named in the deed of sale. A plea of compensation was fyled and pending the action a sequestrator was appointed to whom Barsalou paid over the money. In September, 1887, another action was instituted by G. B. against P. S. M. asking for an account of the different real estate transactions they had conformably to the terms of the *contre-lettre.* To this action a plea of compensation was also fyled. The Superior Court dismissed the first action on the ground that G. B. had no right of action, but maintained the second action ordering an account to be taken. The Court of Queen's Bench affirmed the judgment of the Superior Court dismissing the first action and P. S. M. acquiesced in the judgment of the Superior Court on the second action. On appeal to the Supreme Court of Canada from the judgment of the Court of Queen's Bench dismissing the first action:

Held, reversing the judgment of the court below, that the plea of compensation was unfounded, G. B. having the right to put an end to P. S. M's. mandate by a direct action, and therefore until the account which had been ordered in the second action had been rendered the moneys should remain in the hands of the sequestrator appointed with the consent of the parties.

APPEAL from the judgment rendered on the 26th November, 1892, by the Court of Queen's Bench for Lower Canada (Appeal side) which confirmed a judg-

*PRESENT:—Strong C. J., and Fournier, Taschereau, Gwynne and Sedgewick JJ.

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ment rendered on the 8th September, 1890, by the Superior Court sitting in and for the District of Montreal, whereby one of two actions brought by the appellant against the respondent was dismissed.

The general circumstances connected with the institution by the appellant against the respondent of the two actions in question, the second of which (no. 1043) was maintained, while the first (no. 1894), with which alone the present appeal is directly concerned, was dismissed, are as follows :—

The appellant on the 18th of November, 1882, by deed passed before Mtre H. P. Pepin, notary, sold to the respondent the north-west portion of lot no. 615 of the cadastre of St. Mary's Ward of the city of Montreal. By a counter-letter under private signature of the same date, it was declared that they had a common interest in the said property and it was agreed that if the respondent should sell the same for a price exceeding $10,470 the surplus should be divided equally between them and the price to the said amount be applied as follows : 1st. $3,699 or about that sum to Selkirk Cross ; 2nd. $1,200 to the plaintiff for the purpose of paying the Muldoon estate ; 3rd. $2,642 to the defendant, Peter S. Murphy ; and 4th. $2,629 to the plaintiff ; and that if the price should be less, than said amount of $10,470, the 3rd and 4th items should be shared between them *pro rata.*

The property was sold to one Barsalou for $13,382.65 and the deed to Barsalou showed that the whole $13,382.60 was payable to respondent and others, there being nothing whatever mentioned in it as coming to the appellant.

Appellant then brought an action against the respondent and while reserving his recourse upon an action of account against respondent prayed that by a judgment of the court the deed should be rectified in

accordance with the terms of the *contre-lettre* and that the *mis en cause*, Maurice Barsalou, be ordered to retain in his hands or to deposit with the treasurer of the Province, the balance of the price due by him, until the amount coming to the plaintiff should have been determined upon a settlement of account between him and the defendant, Peter S. Murphy.

The action of account was subsequently taken.

To the first action the respondent denied the right of action and the alleged fraud, and also pleaded compensation; and to the second suit he pleaded that the suit, although well founded in the abstract, had become unnecessary on account of the pleas by him produced in the first action in which he had incorporated the account now sought to be obtained, and renewed his account and prayed for a judicial declaration of its correctness as well as for a dismissal of this second suit.

Both suits were conducted *pari passu* in the court of original jurisdiction, the proof adduced being common to both, and were finally decided on the same day by Mr. Justice Wurtele. The first action was dismissed and an account ordered to be taken in the second action. The respondent acquiesced in the judgment of the second action, but the appellant appealed from the judgment in the first suit and the Court of Queen's Bench affirmed Mr. Justice Wurtele's judgment.

Barnard Q.C. for appellant, contended that George Bury had never lost his proprietary rights in the property sold, and if so the action had been wrongfully dismissed, citing and relying on Pothier, *Mandat* (1); Laurent (2); Guyot vo. *Acte Conservatoire* (3); Ferrière, Dict., vo. *Acte Conservatoire* (4); Pigeau, Proc. (5);

(1) No. 60.
(2) 28 Vol. No. 76.
(3) P. 148.
(4) P. 33.
(5) 1 Vol. pp. 117 and 118.

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Thurber v. *Holland*, (1); *Wyatt* v. *Senecal* (2); *Henderson* v. *Tremblay* (3); *Prince* v. *Jones & Laurin* (4); *Cryan* v. *Cryan* (5); *White* v. *Murphy* (6); *Barnard* v. *Molson* (7); *Taylor* v. *Wallbridge* (8); *Faulds* v. *Harper* (9); *Barton* v. *Muir* (10).

F. D. Monck Q.C. for respondent contended that the judgment of the Court of Queen's Bench for Lower Canada should be affirmed.

1st. Because, by the terms of the memorandum in writing of the 10th November, 1882, and the sale of the same date, the appellant had a personal recourse only against the respondent and no *jus in re* entitling him to follow the property into the hands of third parties and sequestrate its price.

2nd. Because, even if the fraudulent acts alleged by appellant had existed, he could not obtain relief in the manner he has sought to do by the present proceedings, but should have conformed to Title I of Book II of the Code of Civil Procedure of Lower Canada.

3rd. Because appellant has totally failed to prove the acts of fraud by him alleged.

THE CHIEF JUSTICE concurred in the judgment of Mr. Justice Fournier.

FOURNIER J.—Cet appel est d'un jugement rendu le 26 novembre 1892, par la cour du Banc de la Reine, siégeant à Montréal, en appel, confirmant un jugement rendu par la cour supérieure, à Montréal, renvoyant l'action en cette cause.

Le demandeur, appelant, alléguait dans son action, que le 18 novembre 1882, par acte passé devant Mtre Pepin, notaire, il avait vendu au défendeur la partie nord-ouest du lot n° 615 du cadastre du quartier

(1) Ramsay's App. Cas. 434.
(2) 4 Q. L. R. 76.
(3) 21 L. C. J. 24.
(4) 31 L. C. J. 168.
(5) 13 Q. L. R. 274.
(6) 12 R. L. p. 77.
(7) M. L. R. 6 Q. B. p. 201.
(8) 2 Can. S. C. R. 616.
(9) 11 Can. S.C.R. 639.
(10) L. R. 6 P. C. 134.

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Sainte-Marie de la ville de Montréal, mais que la dite vente était accompagnée d'une contre-lettre contenant la transaction réellement intervenue entre les parties, laquelle est comme suit :

CONTRE-LETTRE.

MONTREAL, 18th Nov., 1892.

We, the undersigned, having a common interest in the property being the North-west part of lot 615 in St. Mary's Ward.

Do agree as follows :

It is understood that should Mr. Murphy sell said property for an amount exceeding $10,470.00 (ten thousand four hundred and seventy dollars), the surplus shall be divided between us by equal shares, the price of sale to such extent to be applied as follows : 1st, $3,699.00 or about that sum to S. Cross ; 2nd, $1,200.00 to Mr. Bury, for the purpose of paying Muldoon's estate ; 3rd, $2,642.00 to P. S. Murphy ; 4th, $2,929.00 to G. Bury. And should the price of sale be less than said amount of $10,470, the 3rd and 4th items shall be shared between the parties at *pro rata*.

(Signed) GEORGE BURY,
P. S. MURPHY.

Comme on le voit cette contre-lettre déclare que malgré la dite vente les parties, appelant et intimé, ont un intérêt commun dans la dite propriété. Elles déclarent de plus que dans le cas où l'intimé trouverait un acquéreur, le prix serait distribué entre l'appelant et l'intimé de la manière spécifiée dans la dite lettre.

La propriété fut vendue à Barsalou pour $13,382.60, mais au lieu des $5,000 au moins qui d'après la bâse de la contre-lettre aurait dû revenir à l'appelant, la vente faite à Barsalou fait voir que tout le prix de $13,382.60 était attribué à l'intimé et à d'autres personnes y dénommées, et qu'aucune somme quelconque n'était mentionnée comme revenant à l'appelant.

La transaction fut effectuée de la manière suivante : Perry, un prête-nom auquel l'intimé avait d'abord vendu la propriété pour un prix nominal, la revendit ensuite à Barsalou et en reçut en apparence la somme de $1,382.60, comptant, tandis que en réalité le montant

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fut payé à l'intimé. La balance de $12,000 payable par Barsalou en cinq ans devait aller comme suit: $8,500 à Rea un autre prête-nom, dont la réclamation n'était tout au plus de $4,206.68 et $564 à Elizabeth Lane, et la balance $2,936, à l'intimé lui-même qui n'avait droit en vertu de la contre-lettre qu'à la somme de $2,642. Il ne restait rien du prix de vente pour l'appelant.

Celui-ci ayant réclamé sa part du prix de vente que l'intimé lui refusa, il intenta sa présente action alléguant qu'il avait un *jus in re* dans le prix de vente, et que la véritable position de Perry et de Rea était telle que ci-dessus allégué, et ayant mis en cause toutes les parties intéressées, il concluait à ce que son droit à une partie du prix de vente fut reconnu, qu'il fut déclaré que Rea n'avait droit qu'à $4,206.68, et de plus qu'il fut ordonné à Barsalou de retenir le prix de vente entre ses mains jusqu'à ce que le montant précis lui revenant d'après la contre-lettre fut déterminé sur un compte rendu légalement.

L'intimé plaida à cette action que l'appelant n'avait aucune réclamation. Qu'ainsi qu'il apparaissait par le compte offert par l'intimé, le plus qu'il pouvait réclamer en vertu de la contre-lettre était $3,727.40, tandis que l'intimé avait contre lui une réclamation de $15,593 qu'il offrait en compensation. Ce plaidoyer n'a jamais été décidé. Un semblable plaidoyer fut opposé à l'action en reddition de compte et renvoyé, l'intimé acquiesçant au jugement.

Dans ce plaidoyer l'intimé admet que Perry n'est qu'un prête-nom, et qu'afin de ne laisser aucune balance comme lui revenant, il a stipulé que le prix de vente serait payable partie pour les taxes, partie au dit sieur Rea, et partie à lui-même; qu'il a toujours été prêt et l'est encore à rendre compte du dit prix de vente aux termes de la contre-lettre. Le plaidoyer allègue aussi que la réclamation originaire de l'appelant a été éteinte

par les diverses transactions citées dans son plaidoyer, lesquelles ont eu l'effet de le constituer débiteur de l'intimé pour un montant beaucoup plus élevé que celui qui pouvait lui revenir, et qu'en conséquence il n'était plus créancier, et n'a pas droit de demander le séquestre du prix de vente. C'est alors que l'appelant a porté contre l'intimé une action en reddition de compte qui est encore pendante. L'intimé a contesté cette action sur le principe que cette action était inutile puisqu'il avait déjà rendu compte sur la première action, le plaidoyer de compensation produit contre cette action fut offert de nouveau contre la seconde action.

Le jugement dont se plaint l'appelant a renvoyé la première action ; celle dont il s'agit sur le présent appel l'a été sur le principe que l'appelant en s'en rapportant à l'intimé pour la vente de sa propriété, en le constituant son prête-nom, a perdu ses droits de propriété dans le prix de vente et n'a plus maintenant qu'un recours personnel contre l'intimé,—qu'en conséquence il n'a pas droit de prendre contre Barsalou, mis en cause, des conclusions de la nature d'une saisie-conservatoire. Qu'ayant perdu ses droits dans la propriété du prix, il a aussi perdu ses droits à l'exercice d'un procédé conservatoire.

Mais est-il vrai que par la vente qu'il a faite à Murphy l'appelant ait perdu ses droits de propriété sur le prix de vente ? L'acte de vente intervenu entre eux n'est que la convention apparente, la convention secrète contenue dans la contre-lettre est la convention véritable entre eux, qui est la contre-lettre. A l'égard de l'appelant Murphy l'acquéreur apparent n'est qu'un mandataire dont les droits et obligations sont régis par la loi du mandat. Comme mandataire, il n'a aucun droit de propriété à l'encontre de l'appelant (1).

(1) *Voir* 28 Demolombe n° 76.

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Il est déclaré par la contre-lettre que le vendeur et l'acquéreur ont un intérêt commun dans la propriété vendue. Le jugement de l'honorable juge Wurtele sur l'action en reddition de compte reconnaît les droits de l'appelant à la propriété, en déclarant qu'il considère l'appelant et l'intimé comme des associés anonymes dans cette propriété.

L'intimé Murphy a vendu à Perry comme prête-nom, la propriété commune des deux parties, et Perry l'a ensuite revendue à Barsalou ; mais l'intimé a admis et reconnu que cette vente est simulée et faite par lui par l'intermédiaire de Perry et comme on l'a vu plus haut par les détails de cet acte de vente, au lieu de $5,000 au moins qui aurait dû revenir à l'appelant d'après la contre-lettre le montant entier du prix de vente $13,382.60 fut entièrement attribué à l'intimé et à d'autres personnes, ne laissant absolument rien pour l'appelant. Cette distribution du prix de vente est en violation directe des termes de la contre-lettre et donne un droit d'action à l'appelant pour faire déclarer qu'elle sera faite suivant les termes de la contre-lettre qui contient la véritable convention entre l'appelant et l'intimé.

Mais comme à l'égard des tiers, les contre-lettres n'ont point d'effet et que c'est la convention apparente ici, l'acte de vente par Perry à Barsalou qui règle leurs droits, ce dernier aurait été justifiable de payer le prix de vente suivant la distribution qui en est faite par son acte d'acquisition, si l'appelant n'avait, en le mettant en cause, informé le dit Barsalou, de ses droits de propriété dans une partie du prix de vente et demandé la suspension du paiement jusqu'à ce que la cour ait définitivement prononcé sur les droits respectifs des parties dans le dit prix de vente. Mais les parties ayant de consentement réglé cet incident il ne reste alors à la cour qu'à leur donner la sanction judiciaire.

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En conséquence, l'appelant a droit aux conclusions qu'il a prises contre Barsalou au sujet du paiement du prix de vente.

Je suis d'opinion que l'appel doit être alloué.

TASCHEREAU J.—The respondent's plea of compensation was under the circumstances totally unfounded in law. If he had been paid by Barsalou and was sued by the appellant for his share of the price then he might have pleaded compensation. But such is not the appellant's action, and could not have been for the good reason that the price of sale was yet unpaid and still remained in Barsalou's hands when it was instituted. The appellant had a perfect right, it seems to me, to say to Barsalou, putting Murphy, respondent, *en cause*, " a part of that price of sale belongs to me, and I ask the court to so declare and order that you pay it to me." He asks less than that, that is to say, he merely concludes by a prayer that Barsalou pay the money in to court or in to the Treasurer's hands, till it has been ascertained what, as between him and the respondent, is his precise share of the price of sale. To this the respondent says: True it is that a part of that price of sale belongs to you, but you owe me a great deal more, and I ask that Barsalou pay me the whole amount so that I get paid for what you owe me. It is thus clear in my opinion that it is the respondent who tries to get in a side way a seizure of what Barsalou has in his hands belonging to the appellant. The appellant merely revendicates his property. The respondent wants to be paid upon that property, but he has no lien nor privilege upon it, and he cannot, having admitted that it was for part appellant's property, prevent Barsalou from paying it or handing it over to the appellant upon the mere pretence that appellant owes him a debt totally unconnected with

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it. The court below rightly dismissed that plea, but upon what ground they also dismiss the action I cannot understand. Of the two actions it is the second, it seems to me, that was the least necessary; the court under the circumstances should have ordered it to be joined to the first to be proceeded upon as a separate issue between the appellant and the respondent, the first remaining in abeyance till it was determined what amount, if any, is due to the appellant by the respondent.

Had the appellant chosen he certainly might have allowed Barsalou to pay the respondent and then taken a personal action against respondent. But he was not obliged to let Barsalou so pay to respondent his share of the price. He had the right to put an end to respondent's mandate by a direct action as he has virtually done. There is no *saisie conservatoire* in this.

By a consent order these moneys are now in the hands of the cashier of the Bank Jacques Cartier. The appellant thus got from the court below all he asked for plus the dismissal of his action. Of this last part he, in my opinion, has reason to complain, and I think that the appeal should be allowed with costs in the three courts against Murphy.

The parties will probably agree as to the form in which the judgment is to be entered. As the moneys are now in de Martigny's hands the judgment will have to be I presume that they remain there till final judgment on the other action.

GWYNNE and SEDGEWICK JJ. concurred in allowing the appeal.

Appeal allowed with costs.

Solicitors for appellant: *Barnard & Barnard.*

Solicitor for respondent: *F. D. Monk.*

TOWN OF PRESCOTT (DEFENDANTS)..APPELLANTS; 1893

AND *Mar. 12, 13.
*June 24.

THOMAS A. CONNELL (PLAINTIFF)....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Negligence—Proximate cause—Danger voluntarily incurred.

C. having driven his horses into a lumber yard adjoining a street on which blasting operations were being carried on left them in charge of the owner of another team while he interviewed the proprietor of the yard. Shortly after a blast went off and stones thrown by the explosion fell on the roof of a shed in which C. was standing and frightened the horses which began to run. C. at once ran out in front of them and endeavoured to stop them but could not and in trying to get away he was injured. He brought an action against the Municipality conducting the blasting operations to recover damages for such injury.

Held, affirming the decision of the Court of Appeal, Gwynne J. dissenting, that the negligent manner in which the blast was set off was the proximate and direct cause of the injury to C.; that such negligent act immediately produced in him the state of mind which instinctively impelled him to attempt to stop the horses; and that he did no more than any reasonable man would have done under the circumstances.

APPEAL from a decision of the Court of Appeal for Ontario (1) affirming the judgment of the Chancery Division in favour of the plaintiff.

The facts of the case are sufficiently set out in the above head-note.

Meredith Q. C. for the appellants. The rule of law as to proximate cause of injury is stated in Addison on Torts (2); Pollock on Torts (3); and Cooley on Torts (4).

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

(1) 20 Ont. App. R. 49.
(2) 6 ed. p. 43.
(3) 3 ed. p. 28.
(4) 1 ed. p. 69.

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The following cases note the distinction between efforts to save life and those to save property. *Anderson* v. *Northern Railway Co.* (1); *Eckert* v. *Long Island Railroad Co.* (2).

The learned counsel cited also *Cook* v. *Johnston* (3); *Marble* v. *City of Worcester* (4); *Hay* v. *Great Western Railway Co.* (5); *Cox* v. *Burbidge* (6) and *Lee* v. *Riley* (7).

Hutcheson for the respondent referred to *Sword* v. *Cameron* (8).

THE CHIEF JUSTICE and FOURNIER and TASCHEREAU JJ. concurred in the judgment of Mr. Justice Sedgewick.

GWYNNE J.—The question which arises in this case is not (as it appears to me to have been treated) whether the plaintiff has been, by any contributory negligence of his own, deprived of a right of action for an injury which, apart from any such contributory negligence, the evidence sufficiently shows to have been caused by some negligence of the defendants, but whether the plaintiff's own statement of the manner in which he sustained the injury of which he complains, and the evidence in support of such statement, do sufficiently show that the negligence with which the defendants are charged was the proximate cause of the injury sustained by the plaintiff. The question whether a plaintiff has been, by his own contributory negligence, deprived of his right of action for an injury charged to have been caused by the negligence of the defendants can never arise until the liability of the defendants has been sufficiently established by evidence apart

(1) 25 U. C. C. P. 301, 313.
(2) 43 N. Y. 502.
(3) 58 Mich. 437.
(4) 4 Gray 395.
(5) 37 U. C. Q. B. 456.
(6) 13 C. B. N. S. 430.
(7) 18 C. B. N. S. 722.
(8) 1 Sc. Sess. Cas. 2. Ser. 493.

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from the question of contributory negligence; that is to say, until it is sufficiently shown in evidence that the negligence of the defendants was the proximate cause of the injury complained of. If it was not the defendants are not liable, and no question of contributory negligence arises. Now in the present case the sole question, as it appears to me, is: Whether the act which is charged as negligence upon the part of the defendants, assuming it to have been proved, can upon the evidence be said in law to have been the proximate cause of the injury which the plaintiff has sustained. It is no doubt a matter of considerable difficulty in many cases to draw a precise line between the proximate and the remote causes of anything, but in the present case I must say that, in my opinion, the act charged as the defendants' negligence, regarding it as proved, cannot be said to be in law the proximate cause of the injury sustained by the plaintiff. We have been referred to several cases, chiefly in the American courts, and almost all arising upon a question as to contributory negligence, and none of which can, I think, be said to be conclusive in favour of the maintenance of the present action. In *Liming* v. *Illinois Central Railway Company* (1) the case arose upon demurrer and upon an article of the Code of Iowa which enacted that:

> Any corporation operating a railway shall be liable for all damages by fire that is set out or caused by operating any such railway.

The petition of claim alleged that a fire, caused by defendants' engines, set fire to a barn of plaintiff's neighbour, and that while the plaintiff was assisting his neighbour in getting his horses out of the stable in which they were the fire seized the stable, and that the plaintiff in escaping therefrom was injured by the fire, through which, in order to escape, he had to pass.

(1) Iowa 1890, 47 N.W.R. 67.

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Now in that case, upon the pleadings which, by the demurrer, were admitted, it could not be doubted that the injury sustained by the plaintiff was directly caused by the fire which was caused by the defendants, and for all damages arising from which they were made liable by statute, so that the fire was clearly alleged to have been the proximate cause of plaintiff's injury, and it was decided that the plaintiff, having been injured by such fire, it could not be said as a proposition of law that his voluntarily assisting his neighbour deprived him of his right of action which sufficiently appeared upon the pleadings. The authority of the case seems to be limited to this, that a question of contributory negligence cannot be raised by demurrer.

In *Twomley* v. *Central Park Railroad Co.* (1) the question was also one of contributory negligence. The jury found that, and there was no doubt that, the negligent and reckless conduct of the defendant's servants had placed the plaintiff in such a position of imminent peril for his life between two hazards viz., a dangerous leap from the moving car or to remain in the car at certain peril. The jury found that the plaintiff upon the instant jumping from the car whereby he was injured acted as a person of ordinary prudence naturally would do in such circumstances, and that he had not therefore been guilty of contributory negligence. In *Wasmer* v. *Delaware and Lackawanna Railway Co.* (2), the train which killed the intestate was the undoubted proximate cause of death; that train was running at a speed much in excess of the rate prescribed by statute in towns (the accident having occurred in a town). So that, apart from contributory negligence, there was quite sufficient to constitute the defendant's negligence the proximate cause of the death, and the question left to the jury was whether the deceased having crossed

(1) 25 Am. Rep. 162. (2) 80 N. Y. 212.

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the track in front of the approaching engine after his horse which frightened by the engine had got on the track was or was not under the circumstances in evidence contributory negligence so as to deprive his administratrix of her right of action. Whether the decision upon the question as one of contributory negligence is one of which we can approve I do not express an opinion; for my purpose it is sufficient that the question was one of contributory negligence and not of proximate cause. So in *Rexter* v. *Starin* (1) the question was one of contributory negligence also. There was no doubt that the collision between the canal boat of the plaintiff and the barge of the defendant by which collision the plaintiff was injured was the direct and proximate cause of the plaintiff's injury; there was no question or doubt that the collision was caused by the negligence of the defendant's servants; but the contention and question was as to whether the plaintiff had lost his right of action for the injury which he had received from the collision by reason of contributory negligence of his own; what he had done was, being in another boat, when he saw the collision about to take place he ran to his own boat to try and prevent the collision and this was held and beyond all question rightly not to have been contributory negligence. It seems to me difficult to conceive how such a question could in such a case be raised for the contributory negligence related to the cause of the injury which the plaintiff had sustained, namely, the collision, and not to the consequences resulting from the collision which beyond all question was caused by the negligence of defendant's servants. In *Donahoe* v. *Wabash St. Louis and Pacific Railway Co.* (2) the law as to a person voluntarily exposing himself to danger in order to rescue another person whose life is exposed to danger from an approaching railway train is thus stated—

(1) 73 N. Y. 601. (2) 53 Am. Rep. 594.

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It is only when a railroad company by its own negligence creates danger to, or through its negligence is about to strike a person in danger that a third person can voluntarily expose himself to peril in an effort to rescue such person and recover for an injury he may sustain in that attempt. For instance, if a man is lying on the track of a railway intoxicated or asleep but in such a position that he could not be seen by the men managing an approaching train and they had no warning of his situation, and another seeing his danger should go upon the track to save his life and be injured by the train he could not recover unless the trainmen were guilty of negligence with respect to the rescuer occurring after the beginning of his attempt. If the railroad company is not chargeable with negligence with respect to the person in danger the case of the person who attempted to rescue him and was injured must be determined with reference to the negligence of the company in its conduct towards him in his making the attempt. In other words the negligence of the company as to the person in danger is imputed to the company with respect to him who attempts the rescue and if not liable for negligence as to such person then it is only liable for negligence occurring with regard to the rescuer after his efforts to rescue the person in danger commenced.

Assuming this to be a sound exposition of the law I fail to see what support it can afford to the plaintiff's action in the present case. If a person, attempting to rescue another from danger impending from an approaching train, can only have an action against the railroad company for an injury received by him in his attempt in the case where the person attempted to be rescued, if injured by the impending danger, would have had an action against the company, or in case of negligent injury committed to himself personally after the commencement of the attempt to rescue, the principle involved in that case cannot, I think, govern a case where a person voluntarily rushes into danger in the manner the plaintiff did, not to save a person, nor even his horses, from any danger impending from any approaching act of the defendants, but to prevent his horses running away, even though their starting to run was attributable to fright occasioned by some past

negligent act of the defendants. The question whether the past negligence can in law be said to be the proximate cause of the injury sustained by the plaintiff in the present case still remains, and must, I think, be determined upon other considerations than those involved in the above case, assuming the judgment therein to be sound.

In *Linnehan* v. *Sampson* (1) all that was determined was that the question in that case, viz., whether the injured man exercised due care, was a question for the jury—that also was a question of contributory negligence. For in the absence of such negligence, it is clear the owner of the bull would be liable for all injuries committed by it when being led in a public place, without the use of means sufficient to prevent its doing injury to persons. In *Woods* v. *Caledonian Ry. Co.* (2), a young woman was killed by a railway train as she was crossing a railway where it crossed a highway, and it was held that as she had gotten upon the railway through the negligence of the defendants' servants in not keeping gates across the highway shut, as they were obliged by statute to do, that negligence was sufficient proximate cause of the accident. Sufficient proximate cause is there defined to be, "a cause, of which the accident was a sufficiently natural and to be looked for consequence." In *Harris* v. *Mobbs* (3), the wrongful leaving of the van and plough in the highway, which caused the mare which the deceased was driving to kick, whereby deceased was killed, was held by the court, though not without considerable hesitation, to be, within the meaning of the law, the proximate cause of the accident, that is to say, that the kicking which caused the death was the natural and necessary consequence of the act complained of, and

(1) 126 Mass. 506.

(2) 23 Sc. L. R. 798.

(3) 3 Ex. D. 268.

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that as the driver of the mare was not aware she was a kicker, and was not shown by his driving to have been guilty of contributory negligence, his executors were entitled to recover. In *Rigby* v. *Hewitt* (1) the plaintiff was a passenger on the top of an omnibus which was struck by an omnibus of the defendants, which was driven with such violence and in such a manner that the omnibus on which the plaintiff was was forced against a lamp post, by which means the plaintiff was thrown off with considerable violence and injured. The jury was directed to ascertain whether the accident arose from the negligence of the driver of the defendant's omnibus, and they found that it was. Upon a new trial being moved for on the ground that the learned judge who tried the case refused to charge the jury that if the accident was in part occasioned by the misconduct of the person driving the omnibus on which the plaintiff was the plaintiff could not recover, the facts being that both omnibusses were being driven at a great and excessive rate, the court refused a new trial, saying that while, generally speaking, where an injury occurs from the misconduct of another the party injured has a right to recover from the injuring company all the consequences of that injury, there could be no doubt that every person who does a wrong is at least responsible for all the mischevous consequences that may reasonably be expected to result, under ordinary circumstances, from such misconduct.

In *Firth* v. *Bowling Iron Co.* (2) the plaintiff's cow was killed by swallowing with the grass some shreds of wire rope which the defendants used for fencing their premises from the plaintiff's fields, and which from long use had decayed and broken off and fallen into the plaintiff's grass. That was a clear case of injury the direct proximate cause of which was the neglect

(1) 5 Ex. 240.

(2) 3 C. P. D. 254.

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of the defendants to maintain the wire fence in a good and safe condition.

In *McMahon* v. *Field* (1) the question arose upon contract which involves some elements of inquiry different from those involved in cases where negligence on the part of the defendant is charged as being the cause, that is to say, the proximate cause of the injury complained of; and in that case, following *Hadley* v. *Baxendale* (2), it was held that it was for the court to determine whether, upon the evidence and finding of the jury upon the points of fact properly determinable by them, the breach of contract established was in law the proximate cause of the injury. *Woods* v. *Caledonia Ry. Co.* (3) and *Harris* v. *Mobbs* (4) were cases of injury charged to have been caused by negligence of the defendants, and there also the court assumed the duty of determining whether the acts of negligence established could in law be held to be the proximate cause of the injuries complained of. In the former of these two cases it was held as already shown that the killing of the girl by the train on the railway on which she had gotten by the wrongful and negligent conduct of the defendant's servants in not keeping the gate across the highway closed, as by statute they were required to do, was a sufficiently natural and to be looked for consequence of the neglect as to make such neglect the proximate cause of the accident. So in *Harris* v. *Mobbs* (4) the conclusion at which the court although not without considerable hesitation and doubt arrived, was that the kicking by the mare of the person driving it was the continuous, natural and necessary consequence of the van and plough being in the highway, so as to make the negligence of the person who left them the proximate cause of the kicking by which the driver was killed. The circumstances

(1) 7 Q. B. D. 591.
(2) 9 Ex. 341.
(2) 23 Sc. L. R. 798.
(4) 3 Ex. D. 268.

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of those cases were very different from those of the present case. So likewise was the case of *Twomley* v. *Central Park Railroad Co.* (4), if that case should be regarded as a decision upon the question of proximate cause and not upon that of contributing negligence. The person who jumped from the train there did so for the purpose of endeavouring thereby to escape from a more imminent and certain peril to his life if he had remained where he was, while in the present case the plaintiff was injured by his exposing himself when in perfect safety to the peril of suffering the injury which he did suffer. The jury have found that the defendants' servants were guilty of negligence in not properly covering their blast when blasting in the street, and that the plaintiff exposed himself in trying to save his property, but that they considered such his action justifiable. What they meant by saying they considered his action in trying to save his property justifiable does not appear to be quite clear. What the plaintiff was trying to do was to stop his horses which were starting to run away. What the jury meant may possibly have been that they thought that the plaintiff may justifiably have expected that he might succeed in stopping the horses without suffering any injury, but what the jury may have meant does not appear to me to be important. The question to which this latter answer was given and the answer itself relate to the question of contributory negligence which no doubt would have been a question for the jury if the act of negligence of which the defendants were guilty as found by the jury could in law be said to be the proximate cause of the injury, but whether it can or not is a question for the court upon the evidence, and is as it appears to me the sole question in the present case.

(4) 25 Am. Rep. 162.

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Now as to the evidence upon which that question turns there is no dispute, assuming as I do that the negligence found by the jury in the blast not being properly covered caused the plaintiff's horses to start to run. His horses and another team of horses of another man were in a lumber yard near which the blast took place, standing in a narrow space between a shed and the piles of lumber in the yard. The plaintiff was in the yard or shed conversing with the owner of the yard and lumber, having left his team in charge of the other man who thus had the two teams, his own and that of the plaintiff to look after; immediately upon the blast taking place the plaintiff's team or both of the teams started to run and the one man was unable to manage both. The plaintiff then, while in safety where he was, rushed forward to try and catch his own horses; to do so he had to get round the team of the other man; this, however, he was unable to do and almost immediately upon his rushing out from where he was to try and stop his horses he was knocked down by the other team, and was run over by it and injured. The question now is: Can the negligence of the defendants' servants as found by the jury be said to be in law the proximate cause of the injury sustained by the plaintiff? and I am of opinion upon principle and in perfect consistency with the authorities that it cannot.

It is said that the persons engaged in the blasting should reasonably have expected that there might be teams standing in the lumber yard, and that stones from the blast if not sufficiently covered might reach the shed and that thereby horses standing there might naturally be expected to run away, but whether such expectations would or would not be natural and reasonable expectations, I do not think we can impute as reasonable expectations to be entertained by the

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defendants or their servants engaged in the blasting, that the owner of one of the teams being there should, as the plaintiff said, leave his team in charge of another person having a team of his own to look after, or that having done so he should voluntarily expose himself to such imminent peril of injury to himself as the evidence shows that the plantiff did. If the court in *Harris* v. *Mobbs* were justified in having had considerable difficulty in arriving at the conclusion which they did in that case, that the negligence complained of there was a sufficiently proximate cause of the injury, we should, I think, without difficulty arrive at the conclusion in the present case that the defendants' negligence as found by the jury cannot in law be said to have been the proximate cause of the injury sustained by the plaintiff.

The appeal, I think, should be allowed with costs and the action dismissed in the court below.

SEDGEWICK J.—This action is brought to recover damages for injuries alleged to have been sustained by the respondent through the negligence of the appellants in conducting certain blasting operations in the town of Prescott. The appellants' servants were constructing a drain in one of the streets of the town, in which work it was necessary to blast rock by means of gunpowder. In making these blasts care was not taken (as found by the jury), to confine the broken rock to the trenches, and it happened that on the occasion in question a shower of stones was thrown up into the air which, in falling upon the roof of an adjoining building, frightened the plaintiff's team of horses which caused them to run away eventually doing the injury which the plaintiff complains of.

The plaintiff who is a farmer had driven into the town his span of horses and wagon and had proceeded

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to the lumber yard of one Elliott, entering by a gate at the east side of the yard on George Street, and after driving along a lane or passage way which extended to a gate opposite to the one by which he had entered he stopped his team, and handed the lines to one Bennett who had also driven in in the same way and was standing in front of his span of horses and wagon in the lane or passage way. The lumber yard is bounded on the north by Wood Street where the blasting operations were being carried on, and it was upon the roof of a shed built on this street and part of the lumber yard that the stones fell. As soon as the horses began to run the plaintiff who was in the shed observed them, and ran out in front of them for the purpose if possible of stopping them. He, however, found this impossible and in endeavouring to get away was in some way struck by them and thrown down and injured. If he had remained in the shed where he was, leaving the horses to their fate, while they may have been injured and possibly done injury he would have remained uninjured and the particular damage complained of would not have happened.

The case was tried before the Hon. Mr. Justice Street and a jury at Brockville. The jury found that the defendants were guilty of the negligence which caused the injury to the plaintiff; that the negligence consisted in not properly covering their blast; and that the plaintiff's action in exposing himself to danger for the purpose of saving his property was justifiable; and they assessed the damages at $3,000.

Upon an appeal to the Chancery Division before the learned Chancellor and Mr. Justice Meredith the defendants' appeal was dismissed. Upon appeal to the Court of Appeal for Ontario the appeal was likewise dismissed, Mr. Justice Burton dissenting.

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The finding of the jury upon the question of the defendants' negligence in connection with their blasting operations was hardly questioned before us at the argument, nor did we think it could be questioned. The defendants were bound to use those ordinary appliances which are well known for the purpose of preventing what happened in the present case. There are appliances in ordinary use for this purpose and the failure of the corporation to use them was in law negligence.

The main argument, however, upon which the defendants claimed immunity from liability was that their negligent act was not the *proxima causa* of the damage to the plaintiff; that it was the act of the plaintiff himself in voluntarily rushing from a place of safety to a place of danger that caused the accident.

The rule upon the question of proximate cause is stated by Addison (1) as follows:—

> The general rule of law is that whoever does an illegal or wrongful act is answerable for all the consequences that ensue in the ordinary and natural course of events, though those consequences be immediately and directly brought about by the intervening agency of others, provided the intervening agents were set in motion by the primary wrong-doer, or provided their acts causing the damage were the necessary or legal and natural consequence of the original wrongful act. If the wrong and the legal damage are not known by common experience to be usually in sequence and the damage does not, according to the ordinary course of events, follow from the wrong, the wrong and the damage are not sufficiently conjoined or concatenated as cause and effect to support an action.
>
> Where there is no reason to expect it and no knowledge in the person doing the wrongful act that such a state of things exists as to render the damage probable, if the injury does result it is generally considered that the wrongful act is not the proximate cause of the injury so as to render the wrong-doer liable to an action.

Pollock in his work on Torts, (2) says:

> The view which I shall endeavor to justify is that for the purpose of civil liability those consequences and those only are deemed immediate,

(1) Addison on Torts 6 ed. p. 40. (2) 3 ed. p. 28.

proximate, or to anticipate a little natural and possible which a person of average competence and knowledge, being in like case with the person whose conduct is complained of and having the like opportunities of observation, might be expected to foresee as likely to follow upon such conduct.

Cooley in his work on Torts, (3) says:

When the act or omission complained of is not in itself a distinct wrong and can only become a wrong to any particular individual through injurious consequences resulting therefrom, this consequence must not only be shown, but it must be so connected by averment and evidence with the act or omission as to appear to have resulted therefrom according to the ordinary course of events, and as a proximate result of a sufficient cause.

Each of these statements, I apprehend, contains a substantially accurate definition of the law as applied to the present case, and the question is, whether the accident may be considered to be the "necessary," "legal" or "natural" consequence of the original wrongful act. Was it the natural or probable result of that act? Did it follow upon it in the ordinary course of events?

Pollock, in another place (4), refers to the standard of duty as being "the ideal behaviour of a reasonable man," and the determination of this case depends upon the view that that ideal man would take as to the probable consequences of the defendants' wrong-doing were he an eye-witness of it. Were he from some safe point observing it his reflections would be, I think, somewhat as follows:—"These workmen are making a great mistake in not covering that blast. Why don't they stop the stones from flying in the air? They may fall upon people using the streets, and do damage; they may fall upon adjacent houses and do damage; they may fall upon horses standing upon the street of the neighbourhood and do damage. If they don't fall, the noise they make may frighten them and

(3) 3 ed. p. 69.

(4) P. 36.

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they will run away. The person in charge will naturally rush to stop them, and damage may happen to him."

Any or all of these events the observer would think of as possible or likely to happen in consequence of what they were doing. Speaking from my own knowledge and observation a person in charge of horses naturally and instinctively rushes to save them or stop them when he sees them frightened and trying to run away. It is as natural and likely that he, without thinking of consequences, will rush to their rescue as that they themselves will be in a condition of alarm. The fright of the horses, as well as the efforts of the coachman to regain control, are both events which naturally followed upon the noise produced by the falling stones.

The present case, therefore, is one, in my judgment, which comes within the rule above stated. The accident followed upon the negligent act in a natural order of sequence. It was an event likely to happen, probable to happen, natural to happen, as the direct and immediate result of that negligent act.

But the appellants urge that it was the plaintiff's own wilful act that was the immediate cause of the accident, namely, his voluntarily leaving the place of safety in which he was at the time of the explosion and exposing himself to danger, and they invoke the principle that if between the agency setting at work the mischief and the actual mischief done there intervenes a conscious agency which might or should have averted the mischief the original setter in motion of the mischievous agency ceases to be liable. But in the present case it was the negligent act of the defendants that immediately produced in the plaintiff that state of mind which instinctively, as I believe, impelled him towards his horses; he did no more than any reasonable man,

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under the circumstances, would have done; his attempt was futile; it may have been a rash thing for him to attempt; but he did what any other man, reasonable or otherwise, situated as he was and in the same state of mind in which he was, might have been expected to do, that situation and that state of mind having been immediately and directly caused by the defendants' act. In the leading case of *Scott* v. *Shepherd*(1)—the Squib case—the ground of the decision was that the act of the intermediate persons who threw the squib was involuntary, unpremeditated and without distinct and independent volition, and therefore, as the act was instinctive, the actual proximate agent of the injury was not the responsible agent. It was the act of the defendant that placed these intermediate persons in such an excited or peculiar state of mind that they naturally threw from them the instrument which occasioned damage to the plaintiff. Persons who in a sudden emergency are distracted by terror, and thus between two causes choose the wrong one, are not disentitled to recover. The very state of incapacity to judge calmly is produced by the defendant's negligent act. To hold that a plaintiff is disentitled to recover in such a case would be to hold that the defendant, having aggravated his negligence by those circumstances of terror which deprived the plaintiff of his power to avoid the consequences, or which, irresistibly by the plaintiff, drove him upon the danger, could set up a state of terror produced by his wrongful act as a protection against the consequences. Beven on Negligence (2). *Jones* v. *Boyce* (3). The principle is thus laid down by Johnston J. in the New York Court of Appeals in *Coulter* v. *The American Merchants' Union Express Company* (4).

(1) 1. Sm. Lead. Cas. 9th ed. 480.
(2) P. 137.
(3) 1 Starkie 493.
(4) 56 N. Y. 585.

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There can be no rule of law which imposes it as a duty upon one over whom danger impends by the negligence of another to incur greater danger by delaying his efforts to avoid it until its exact nature and measure are ascertained. The instinctive effort on the part of the plaintiff to avoid a danger did not relieve the defendant from responsibility.

It is not necessary in the present case to consider those American cases which were discussed at length at the argument in which it would appear to have been held that any person was justified in exposing himself to danger with a view of saving either life or property. If I while walking on the sidewalk see a pair of horses running away, I, for my part, would not feel called upon to incur the risk of attempting to stop them. That, however, is not the present case. It is not, it seems to me, necessary to cite authorities other than those already given in support of the general principles above laid down. The question in each case has been: Was the damage the natural result of the defendants' act, notwithstanding there may have been agencies intervening between the act or omission complained of and the damage sustained, or was the damage naturally referable to some cause altogether independent of the defendants' act? A few cases, however, may be considered. In *Hill* v. *New River Co.* (1) the defendant company had caused a stream of water to spout up in the middle of a highway without making any provision, such as fencing or watching, for the safety of persons using the highway. As the plaintiff's horse and carriage were being driven along the road the horses shied at the water, dashed across the road and fell into an open excavation on the road side which had been made by persons and for purposes unconnected with the Water Co. It was argued that the proximate cause of the injury complained of was not the unlawful act of the Water Co. but the neglect of

(1) 9 B. & S. 303.

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the contractors who had made the cutting in leaving it open and unfenced, but the court held that the proximate cause was the first negligent act which drove the carriage and horses into the excavation; in fact it was a natural consequence that frightened horses should bolt off the road; it could not be foreseen exactly where they would go off or what they might run against or fall into, but some such harm as did happen was probable enough and therefore the defendants were liable. In *Lynch* v. *Nurdin* (1) the owner of a horse and cart left them unwatched in the street. Some children came up and began playing about the cart and as one of them (the plaintiff in the case) was climbing into the cart another pulled the horse's bridle; the horse moved on and the plaintiff fell down under the wheel of the cart and was hurt; but the owner who had left the horse and cart was held liable for this injury. It was contended that the one who immediately caused the accident was the child who pulled the horse's bridle and thereby set it moving, but the court thought it strictly within the provision of the jury to pronounce upon all the circumstances, whether the defendant's conduct was wanting in ordinary care and the harm to the plaintiff was the result of it as might have been expected. So, too, in the the case of *Clark* v. *Chambers* (2) the *chevaux de frise* case. The defendant without authority set a barrier partly armed with spikes across a road subject to other persons' right of way. An opening was at most times left in the middle of the barrier and was there at the time when the mischief happened. The plaintiff went after dark along this road and through the opening by the invitation of the occupier of one of the houses to which the right of using the road belonged, and in order to go to that house some one, neither the

(1) 1 Q. B. 29. (2) 3 Q. B. D. 327.

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defendant or any one authorized by him, had removed one of the *chevaux de frise* barriers and set it on end on the foot-path. Returning later in the evening from his friend's house the plaintiff, after safely passing the central opening above mentioned, turned on to the foot-path; he there came against the *chevaux de frise* (which he could not see, the night being very dark) and one of the spikes put out his eye. After a verdict for the plaintiff the case was reserved for further consideration and the court held that the damage was nearly enough connected with the defendant's first wrongful act, namely, obstructing the road with obstructions dangerous to people lawfully using it, for the plaintiff to be entitled to judgment. Cockburn C. J. says:—

> A man who unlawfully places an obstruction across either a public or private way may anticipate the removal of the obstruction by some one entitled to use the way as a thing likely to happen, and if this should be done the probability is that the obstruction so removed will, instead of being carried away altogether, be placed somewhere near—if the obstruction be a dangerous one, wherever placed it may (as was the case here) become a source of damage from which injury to an innocent party might occur, the original author of the mischief should be held responsible.

I am of opinion that the appeal must fail and that the plaintiff is entitled to maintain his verdict.

Appeal dismissed with costs.

Solicitor for appellants: *J. K. Dowsley.*

Solicitors for respondent: *Hutcheson & Fisher.*

WILLIAM YORK, ADMINISTRATOR OF THE ESTATE AND EFFECTS OF CATHARINE YORK, DECEASED (PLAINTIFF) ..... } APPELLANT.

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*May 2, 3.
*June 24.

AND

THE CANADA ATLANTIC STEAMSHIP COMPANY (DEFENDANT)... } RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Negligence — Passenger vessel — Use of wharf — Invitation to public — Accident in using wharf—Proximate cause—Excessive damages.

A company owing a steamboat making weekly trips between Boston and Halifax occupied a wharf in the latter city leased to their agent. For the purpose of getting to and from the steamer there was a plank sidewalk on one side part way down the wharf and persons using it usually turned at the end and passed to the middle of the wharf. Y. and his wife went to meet a passenger expected to arrive by the steamer between seven and eight o'clock one evening in November. They went down the plank sidewalk and instead of turning off at the end, there being no lights and the night being dark, they continued straight down the wharf which narrowed after some distance and formed a jog, on reaching which Y's wife tripped and as her husband tried to catch her they both fell into the water. Forty four days afterwards Mrs. Y. died.

In an action by Y. against the company to recover damages occasioned by the death of his wife it appeared that the deceased had not had regular and continual medical treatment after the accident and the doctors who gave evidence at the trial differed as to whether or not the immersion was the proximate cause of her death. The jury when asked: Would the deceased have recovered, notwithstanding the accident, if she had had regular and continual attendance? replied, "very doubtful." A verdict was found for the plaintiff with $1,500 damages which the Supreme Court of Nova Scotia set aside and ordered a new trial. On appeal from that decision:

Held, that Y. and his wife were lawfully upon the wharf at the time of the accident; that in view of the established practice they had

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

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a right to assume that they were invited by the company to go on the wharf and assist their freinds in disembarking from the steamer; and that they had a right to expect that the means of approach to the steamer were safe for persons using ordinary care and the company was under an obligation to see that they were safe.

Held, further, that it having been proved that the wharf was only rented to the agent because the landlord preferred to deal with him personally and that it was rented for the use of the company whose officers had sole control of it, the company was in possession of it at the time of the accident.

Held, also, that the evidence and finding of the jury having left it in doubt that the accident was the proximate cause of Mrs. Y's death, the jury not having been properly instructed as to the liability of the company under the circumstances, and the damages being excessive under the evidence, the order for a new trial should be affirmed.

APPEAL from a decision of the Supreme Court of Nova Scotia setting aside a verdict for the plaintiff and ordering a new trial.

The material facts of the case are sufficiently set out in the above head-note and more fully in the judgment of the court.

Newcombe for the appellant. As to the right of deceased to be on the wharf see *Holmes* v. *North-eastern Railway Co.* (1); *Wright* v. *London & North-western Railway Co.* (2).

As to the accident being the proximate cause of death see *Davis* v. *Garrett* (3); *Sauter* v. *New York & Hudson River Railroad Co.* (4); *Coomes* v. *Houghton* (5).

The defendant company was in possession of the wharf. *John* v. *Bacon* (6).

Borden Q.C. for the respondent. Plaintiff should have proved the accident to the proximate cause of

(1) L. R. 4 Ex. 254; 6 Ex. 123.
(2) L. R. 10 Q.B. 298; 1 Q.B. D. 252.
(3) 6 Bing. 716.
(4) 23 Am. Rep. 18.
(5) 102 Mass. 211.
(6) L. R. 5 C. P. 437

death. Pollock on Torts (1); Sherman & Redfield on Negligence (2); Encyclopedia of English and American Law (3).

The meaning of proximate cause should have been explained to the jury. *New Brunswick Railway Co.* v. *Robinson* (4); *Morgan* v. *Vale of Neath Railway Co.* (5).

The defendant company had no property in the wharf. *Wendell* v. *Baxter* (6).

The court will not interfere with an order for a new trial. *Allcock* v. *Hall* (7).

The judgment of the court was delivered by

SEDGEWICK J.—The defendant is a steamship company owning a steamer, the SS. "Halifax" plying weekly between Halifax and Boston. The landing place of the steamer at Halifax was at the wharf known as Noble's wharf. The defendant company used Noble's wharf for that purpose under an arrangement with their general agents Messrs. Chipman Bros., the nominal lessees of the wharf, by which arrangement the defendant company had the privilege without making specific payment therefor of using the wharf and of occupying the store on the wharf and the office at the head of the wharf. The wharf is reached from Water Street by a passage way about 250 feet long. When this passage way reaches the head of the wharf there is an archway with a large gate at its west end the passage under the archway being about 12 or 15 feet wide. Immediately beyond the archway at the head of the wharf, on the occasion of the arrival or departure of the steamer, cabs stand at each side leaving a passage about the same width as that under the archway down the middle of the wharf; this passage under the archway

(1) 3rd ed pp. 404, 410.
(2) 4 ed. vol. 1 s. 26.
(3) Vol. 16 p. 430.
(4) 11 Can. S. C. R. 688.
(5) 13 L. T. N. S. 564.
(6) 12 Gray 494.
(7) [1891] 1 Q. B. 444.

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is thus continued along the middle of the wharf. There is also access to the wharf by turning to the left after going through the archway and passing at the head of the cabs standing on the left of the archway, and then turning and going down the wharf by a plank sidewalk running along the north side for about 20 feet, and then turning to the right at the end of the plank sidewalk and passing through a gap left in the line of the cabs for that purpose to the passage way before mentioned along the middle of the wharf. About 50 feet east of the end of the plank sidewalk the wharf narrows a little and there is what is called in the evidence a jog; there is a capsill around the wharf at the jog about 8 inches above the level of the wharf; a short distance beyond the jog there is a fence across the wharf with a gate through which persons coming from or going to the steamer are admitted; beyond this fence there is a freight shed.

The SS. "Halifax" which is a passenger vessel making weekly trips between Halifax and Boston and carrying large numbers of passengers, arrived at Noble's wharf on November 30th, 1890, between 7 and 8 o'clock in the evening. Catharine York whose mother was an expected passenger on the steamer went with her husband (the plaintiff), her brother and another to meet her mother. The plaintiff and his wife in going down the wharf did not go down between the two lines of cabs but turned to the left after passing through the archway, went down the plank sidewalk on the north side of the walk and when they reached the end of the plank sidewalk, instead of turning to the right and coming back to the passage way along the middle of the wharf, continued straight along the north side of the wharf to the jog and then turned to the right, and as they did so Mrs. York tripped and as her husband tried to catch her they both fell into the water. Forty-

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four days afterwards Mrs. York died, and her death is alleged by the plaintiff to have been occasioned by this accident.

An action was brought by the plaintiff, who was appointed the administrator of the estate of his wife under the Provincial Act (1) which is substantially a copy of what is known as Lord Campbell's Act, to recover the damages occasioned by her death. The case was tried before Mr. Justice Meagher with a jury. Upon the finding of the jury judgment was entered for the plaintiff for $1,500. Upon appeal to the Supreme Court in *banc* the verdict was set aside and a new trial ordered, the Chief Justice dissenting. Mr. Justice Weatherbe was of opinion that it was not proved that the submersion of the deceased was the cause of death, nor did he appear to think that the defendants were under any obligation to protect the place where the accident occurred. Mr. Justice Townshend was of opinion that the plaintiff and the deceased were trespassers while on the wharf, or at least had no business there, and could not therefore throw the responsibility of the accident on the defendants. And Mr. Justice Graham thought that the case should be submitted to another jury, to ascertain whether there was a want of proper medical treatment and attendance, and also which one of the causes was the proximate cause of the death.

I am of opinion that, under the evidence, the plaintiff and his wife were lawfully upon the wharf. The deceased went upon the wharf with the permission and upon the implied invitation of the company for the purpose of meeting her mother, who was in fact a passenger, and assisting her home. In view of the practice which had long previously prevailed she was right in presuming an invitation on the part of the

(1). R. S. N. S. 5 ser. c. 116.

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company to go there and assist her friends in disembarking from the steamer. She had equally a right to expect that the means of approach to the steamer were safe for any one using ordinary care, and the company were, I think, under an obligation to see that they were safe.

The case is within the principle stated in Smith on Negligence (1) and as illustrated in the cases of *Holmes* v. *North-eastern Railway Company* (2); and of *Wright* v. *London and North-western Railway Company* (3), affirmed on appeal (4). In accordance with the same rule is a decision of Denman J. in *Watkins* v. *Great Western Railway Company* (5) where he says:—

> I am of opinion that a railway company keeping open a bridge over their line for the use of their passengers is bound to keep that bridge reasonably safe, and that if in practice the friends of passengers are allowed to see them off by the train and to cross the bridge without asking special permission, the duty of the company in that respect cannot be put down towards them otherwise than it is towards those whom they accompany for such not unreasonable purposes.

I think that this view is consistent with the case of *Corby* v. *Hill* (6) and *Smith* v. *London Docks Company* (7):—

> I regard the passenger's friend so permitted to go along the bridge by constant acquiescence on the part of the railway company as not being in the nature of a person barely licensed to be there but as being invited to go to the same extent as the passenger whom he accompanies, and is there on lawful business in which the passenger and the company have both an interest.

And the rule is the same in the United States (8).

I am also of opinion that the jury were right in finding that the defendant company were in possession of the wharf at the time of the accident. I gather from the evidence as a whole that the wharf was rented by Mr. Chipman for the use of the company; that it would

(1) 2 ed. pp. 130 & 135.
(2) L.R. 4 Ex. 254; affirmed on appeal L. R. 6 Ex. 123.
(3) L.R. 10 Q.B. 298.
(4) 1 Q. B. D. 252.
(5) 37 L.T.N.S. 193.
(6) 4 C.B.N.S. 556.
(7) L.R. 3 C.P. 326.
(8) See Patterson's Railway Accident Law 1886, p. 219 sec. 227.

have been rented in the name of the company except that the landlord preferred leasing it to the company's agent personally and that as a matter of fact the company's officers, as such officers, had sole control of the wharf and regulated the conduct of those having occasion to use it upon the arrival or departure of the steamer. The company, carrying on the business of carriers of passengers by water, inviting as they do the public to use their vessel were bound to use all reasonable efforts to secure the safety of persons who might lawfully come upon their premises. I agree with Mr. Justice Weatherbe that no wharf owner is under any obligation to erect barriers around his wharf with a view to prevent persons from falling into the water; a wharf surrounded by such a structure would cease to be a wharf; nor do I think they were under this obligation as respects the jog where the accident occurred; but the place on the night in question was manifestly a dangerous one; there were no lights near it; it was somewhat in the nature of a trap; the fact that both the husband and wife fell in is some evidence at least that it was dangerous (*res ipsa loquitur*); and the jury having found that there should have been a light there I am not disposed to disturb their finding on that point.

I do, however, entertain the doubts expressed by Mr. Justice Weatherbe and Mr. Justice Graham as to whether as a matter of fact the accident in question was the proximate cause of Mrs. York's death; that question, it seems to me, was the crucial one, and it is that question chiefly which is left in doubt, not only by the evidence but by the finding of the jury.

I have already in the case of the *Corporation of the Town of Prescott* v. *Connell* (1), now before this court on appeal from the Court of Appeal for Ontario, discussed somewhat fully the law as to the remoteness of damage

(1) 22 Can. S. C. R. 147.

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in cases of negligence, and it is therefore unnecessary for me to enter into detail upon the same question here; but so far as the facts are concerned it seems to me that in the present case there is at least ground for believing that Mrs. York would have died when she did and from the same disease even if the accident had not happened at all. This difficulty appears to have pressed itself upon the jury, and when asked: Would the deceased have recovered, notwithstanding the accident, if she had had regular and continual attendance? they replied "very doubtful." The answer to the question implies that she might have recovered. The length of time between the accident and her death would of itself give rise to doubt as to whether it was the accident which set the disease, of which she died, in motion. On the evening of the accident, the 30th November, she was attended by Dr. Jones. He saw her again next morning, when according to him she had recovered from the shock after passing a very good night. She was up afterwards every day and had been going out for seventeen days when she went to Dr. Jones complaining of a pain in the right lung, with a cough. She had not in the mean time seen a medical man or undergone any treatment. The doctor then found a slight derangement of the lung and prescribed a mixture for the cough. During the ten days following she remained in town without treatment and then went to her husband's home in Preston, a distance of several miles. She attended the funeral of her sister who died meanwhile of lung disease. Nineteen days after Dr. Jones had seen her Dr. Weeks, a physician in Dartmouth, near Preston, was called to see her; this was on January 6th. No professional man was ever called to see her after that, and on the 13th January, seven days after Dr. Weeks' first visit, and forty-four days after falling from the wharf, she died. While

Dr. Jones testified that her death was due to some acute affection of the lungs, which in all probability was tubercular, an immersion such as she received at that season of the year would in all probability cause disease of the lungs, and might produce fatal results. Dr. Weeks, who was also called by the plaintiff, testified that she should have been under medical care throughout; that acute bronchitis requires constant medical care and treatment; and he comes to the conclusion, and he expressed the opinion, that if she had received continuous medical treatment after the accident there was a fair chance that the disease would not have been established. This is about all the evidence there is to establish the fact that the death of the deceased was occasioned by immersion.

I do not wish to express here any opinion to the contrary; that is the "function of the jury;" but what I do insist upon is that, upon a point of such importance, it was the primary duty of the judge who tried the case to explain to the jury in the clearest terms possible the fundamental principle that a person who merely contributes in some way towards an accident is not necessarily responsible for the damages occasioned by it; that it must be his negligent act or omission that directly caused it; and that in the present case if the deceased or those in charge of her were careless in the use of means: if for instance they failed to provide efficient and continuous medical attendance, or if the deceased came to her death by reason of her failing to comply with the proper directions of her medical attendants, and if in consequence thereof, death ensued, the defendants were not liable. It might also I think have been suggested to the jury that the deceased might have died when she did irrespective of the accident altogether; her sister had in the meantime died; she herself had taken a journey in the

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meantime, and in an inclement season, on which journey she might have caught cold, or by which journey her disease might have been developed. There might between the time of the accident and her death have been an innumerable number of acts or omissions, one or all of which might have been the occasion of the rapid development of the disease. All this is wanting in the judge's charge. He told them, it is true, that in an action founded on negligence the plaintiff would fail if the jury found that he was himself negligent or had contributed to the cause of the accident. But that was not the question here; he should likewise have told them that the plaintiff in this case would equally fail even if there had been no negligence on the part of the deceased contributing to the accident, if as a matter of fact there had been negligence on her part contributing to or hastening her death.

I am further of opinion that the damages in this case are excessive. I can gather nothing in the evidence to convince me that the pecuniary loss which the plaintiff sustained by his wife's death amounts to the sum of $1,500, and I think the case should go back for a new trial upon this ground.

On the whole I do not think the judgment of the court below should be disturbed.

The appeal should therefore be dismissed, but the general rule as to costs should in the present case be departed from. At the argument below two judges thought that under no circumstances could the plaintiff succeed. Mr. Justice Graham's view as to the merits was uncertain. The plaintiff in coming to this court has obtained a declaration that there was an obligation due from the company to the deceased as to the safety of the wharf, and that there was negligence on the company's part (two points which the decision below

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left in doubt and which would remain in doubt had the case gone to a new trial without this appeal). He has therefore partially succeeded and has probably obviated the necessity of the case coming before us again. For this reason I think the appeal ought to be dismissed without costs.

Appeal dismissed without costs.

Solicitor for appellant: *W. B. Wallace.*

Solicitor for respondent: *Pearson, Forbes & Covert.*

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*Mar 17, 18.

*June 24.

J. O. WISNER, SON & COMPANY (PLAINTIFFS) ..... } APPELLANTS;

AND

COULTHARD, SCOTT & COMPANY AND OTHERS (DEFENDANTS) } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Patent—Combination—Old elements—New and useful result—Previous use.

In an application for a patent the object of the invention was stated to be the connection of a spring tooth with the drag-bar of a seeding machine and the invention claimed was "in a seeding machine in which independent drag-bars are used a curved spring tooth, detachably connected to the drag-bar in combination with a locking device arranged to lock the head block to which the spring tooth is attached, substantially as and for the purpose specified." In an action for infringement of the patent it was admitted that all the elements were old but it was claimed that the substitution of a curved spring tooth for a rigid tooth was a new combination and patentable as such.

Held, affirming the decision of the Court of Appeal, Gwynne J. dissenting, that the alleged invention being the mere insertion of one known article in place of another known article was not patentable. *Smith* v. *Goldie* (9 Can. S. C. R. 46) and *Hunter* v. *Carrick* (11 Can. S. C. R. 300) referred to.

APPEAL from a decision of the Court of Appeal for Ontario affirming the judgment of the Queen's Bench Division by which the plaintiffs' action was dismissed in respect to the patent in question.

The following statement of facts is taken from the judgment of Mr. Justice Sedgewick in this court:—

The plaintiffs carry on business at Brantford and the defendants at Oshawa, both as manufacturers of agricultural implements.

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

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On the 22nd of February, 1887, the plaintiffs had letters patent granted to them (no. 26049) as assignees of one James Samuel Heath for alleged new and useful improvements in spring hoes (these letters patent being a reissue of letters patent no. 17833 granted to plaintiffs on the 6th October, 1883), and on the 24th October, 1883, the plaintiffs had granted to them, as assignees of Heath, another patent for alleged new and useful improvements in combined seeding and drilling machines under no. 17963.

The allegation of the plaintiffs is, that the defendants had infringed both these patents by manufacturing and putting upon the market certain seeding and drilling machines containing certain of their patented improvements. At the trial the alleged infringements were by consent or abandonment reduced to two, namely: an infringement of claim no. 2 in patent no. 26049, and claim no. 2 in patent no. 17963. In the former patent the specification stated that—

The object of the invention was to simplify the construction of the spring hoe and to arrange it so that the drill hoe can be taken off and the cultivator tooth put in its place without removing a single bolt or disconnecting the lifting chain, and that it consisted in the formation and arrangements of parts as hereinafter specified.

And what was claimed as the invention was,—

2nd. "In a drill hoe or cultivator tooth having a projection to fit within the drag bar, and a notch formed on the top side of the said projection to fit on to the bottom side of the pivot pin, the combination of a strap, bolted or otherwise, fastened to the drag bar and extending below the notched projection, for the purpose of holding it against the pivot pin as specified."

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In the latter case (which is the case to be considered in this appeal) the object of the invention was stated to be the connection of a spring tooth with the drag bar of a seeding machine, and the invention was claimed to be as follows :—

"In a seeding machine in which independent drag bars are used, a curved spring tooth detachably connected to the drag bar in combination with a locking device arranged to lock the head block to which a spring tooth is attached, substantially as and for the purpose specified."

The defence denied the novelty and utility of the alleged inventions. It set up that they were known and used by others previously, and were in public use or for sale for more than one year before the patents were applied for, and generally denied the alleged infringements.

The case was tried before Mr. Justice Ferguson, at Toronto, the trial lasting six days. Judgment was given in favour of the plaintiffs on both the claims above specified, and an injunction was ordered restraining the defendants from further infringement, the amount of damages by reason of the infringement being left to reference. Upon appeal by defendants to the Queen's Bench Division judgment was delivered dismissing the plaintiffs' action with costs. The plaintiffs thereupon appealed to the Court of Appeal. That court in delivering judgment found unanimously in favour of the plaintiffs as to claim 2 of letters patent no. 26049, but dismissed the appeal, (Mr. Justice Burton dissenting) with respect to claim 2, of letters patent no. 17963 ordering a reference to take an account of damages with respect to that claim and awarding to plaintiffs the whole costs of action, less one fourth. In pursuance thereof damages were awarded to plaintiffs in the sum of $6,190. This amount together with costs

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has been paid, and the claim as far as respects the letters patent no. 26049 has been finally settled between the parties. It is from the judgment of the Court of Appeal dismissing the plaintiffs' claim in respect to patent no. 17963 that this appeal is taken.

Ridout for the appellant referred to *Harrison* v. *Anderston Foundry Co.* (1), and *Smith* v. *Mutchmore* (2).

Arnoldi Q.C. and *Roaf* for the respondent.

THE CHIEF JUSTICE and FOURNIER J. concurred in the judgment delivered by Mr. Justice Sedgewick.

TASCHEREAU J.—I am of opinion that the appeal should be dismissed.

GWYNNE J.—The present appeal relates only to claim 2 of letters patent 17963, dated 24th October, 1883. I am of opinion that this appeal should be allowed and the judgment of the learned trial judge restored, upon the grounds stated in the judgments of that learned judge and of Mr. Justice Burton, in the Court of Appeal for Ontario. The evidence clearly establishes, and it has been so found by the learned trial judge, that as a matter of fact in a combined seeding and drill machine in which independent drag bars are used, the introduction of a small curved spring tooth, detachedly connected to the drag bar in combination with the locking device arranged to lock the head block to which the spring tooth is attached, as in the appellants' machine, is a marked improvement upon machines formerly used for the same purpose in this, that it does attain its results in a much more useful and beneficial manner than machines formerly used for a like purpose did.

(1) 1 App. Cas. 574. (2) 11 U. C. C. P. 458.

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This is all the novelty which the appellants claim for their machine the several parts being all old, but with great deference to the opinion of my learned brothers I am of opinion that the attaining such more useful and beneficial results is sufficient to support the letters patent granted for the machine producing such results.

SEDGEWICK J.—The points in controversy are well stated by Mr. Justice Ferguson in his judgment. He says:—

Then as to claim no. 2, in patent no. 17963. It is admitted that all the elements of this combination are old elements. It is also admitted that there was and is a combination prior in time to this and similar to it, excepting that in that combination the teeth used were rigid teeth and in this combination the teeth are curved spring teeth. The locking device is such a one as I have already endeavoured in some degree to describe. In regard to this combination the defendants say that it is simply inserting in an old combination a spring tooth attached by the same means as those before connecting the rigid tooth, and they argue that this cannot be a new combination. The view of the plaintiffs and the way in which their counsel states the matter do not, I think, differ widely, or perhaps not at all, from this. The plaintiffs admit that if a rigid tooth were substituted for a spring tooth the then combination would be old, and they say that what this virtually did was to take out of an old combination of old elements one of these elements, the rigid tooth, and to put in its place another and different old element, the curved spring tooth, thereby forming another and different combination which they say is a new combination, producing new and useful results.

According to the evidence of the witness (Mr. Ridout) the combination contains four elements: First, the independent drag-bars; second, the locking mechanism; third, a curved spring tooth; and fourth, means of detachably connecting the curved spring tooth to the drag-bar and locking mechanism. The witness says, and it is admitted, that these are old elements; that a curved spring tooth detachably connected to the drag-bar is old, and this does not seem to be disputed. As nearly as I can understand then the parties do not disagree as to the facts of the construction of the combination in question. They seem to differ chiefly in this:—the plaintiffs say that this is a new combination producing new and useful results. The defendants say that under such circumstances this cannot be a new combination.

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The machine which has given rise to this litigation is called a combined drill and seeder. The machine itself was in part exhibited at the argument before us, and in the case there is a diagram of it. It has for its object two purposes: first, by means of what is called a drill hoe making a trench or furrow in the ground and depositing seed therein through a tube in the drill hoe; and secondly, by substituting a spring tooth in place of a drill hoe, and with it breaking up the ground like an ordinary harrow. It is important to observe that the drill hoe and the spring tooth are not used at the same time. There is no mechanism in connection with the machine by which two processes, namely, the making of the furrow and depositing of the seed therein, and the harrowing of the ground, are carried on at the same time; in other words, the machine is used at one time as a seeder only, and at another time, by means of a different instrument inserted therein, as a harrow or cultivator only. It is a complete machine for two purposes; with the drill hoe attached it is a seeding machine only, and with the spring tooth attached it is a cultivator or harrow only. As Mr. Justice Ferguson stated, and as was admitted by the plaintiffs' counsel at the argument, there is nothing in any of the separate elements of this machine when used as a cultivator or harrow that is new; neither the spring tooth nor the means of attaching that spring tooth to the drag bar, nor the drag bar itself, nor the locking mechanism by means of which the tooth springs back again into place when more than a certain strength is applied to it, nor any of the means by which the motive power is applied to the machine as a whole, is new, nor is there anything new in the machine when, by the removal of the spring tooth and the substitution of a drill hoe, it is used as a seeder, the drill hoe and spring tooth being attached to the drag bar in exactly

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the same way and by a process not now in question (although it was in question in respect to that portion of the plaintiffs' claim which has been settled, as I have above stated). In fact the machine in question, if used as a cultivator or harrow simply is all old; if used as a drill hoe only it is likewise all old; as a cultivator with one appliance it is an old machine and as a seeder with another appliance it is an old machine. The manufacturer may sell the one machine only, or the other machine only, or both machines, the purchase of both machines involving only the acquisition of the curved teeth or of the spring hoe. If the machine is sold without the hoes the purchaser has in his possession a cultivator every element of which and every combination of which is old; so, too, if he purchase a machine without the teeth, he has in his possession a machine every element of which and every combination of which is likewise old. But beyond this there is in the market, as I understand, a machine like the present, designed for the same objects, in which cultivator, teeth and drill hoes are interchangeably used, but in that machine the cultivator tooth, instead of being a spring tooth, is rigid, and it is from this difference, and from this difference alone, that the plaintiffs maintain the patentability of the machine in question and assert that it, as a whole, produces a known result in a more useful and beneficial way. But there is likewise upon the market a machine like the present, in so far as it fulfils the office of a cultivator or harrow, with curved spring teeth attached to a drag bar, with locking mechanism, &c., &c.

The principles of law involved in this case are well understood; they were very fully discussed in the case of *Smith* v. *Goldie* (1), before this court in 1882, when the late Chief Justice delivered an elaborate judgment,

(1) 9 Can. S. C. R. 46.

holding that the invention involved in that case was patentable, and in the case of *Hunter* v. *Carrick* (1), in 1885, where an alleged invention was held to be otherwise. The first and fundamental requisite in order to entitle to a patent is, that the machine is new. Its production must have required the existence and exercise of the inventive faculty, whether the idea of the invention was a happy hit, as has been expressed, or the result of patient and laborious investigation. There must be an exercise of skill and ingenuity to entitle it to the protection of an exclusive grant. *Saxby* v. *Gloucester Waggon Co.* (2). An invention is likewise patentable if it consists in the improved application of existing machines to materials whether new or old, if there be a new and beneficial combination and application of well known machines; a patent properly limited to and claiming this combination will be valid. *Wright* v. *Hitchcock* (3). And if a combination of machinery for effecting certain results has previously existed and is well known, and an improvement is afterwards discovered consisting for example of the introduction of some new parts, or altered arrangement of some parts of the existing constituent parts of the machine, an improved arrangement or improved combination may be patented; *Foxwell* v. *Bostock* (4); or, as was stated by Lord Hatherley in *Harrison* v. *Anderston Foundry Co.* (5) before the House of Lords:—

> A new combination of old parts producing a new result or producing a known result in a more useful and beneficial way is patentable.

And it was upon that principle that *Smith* v. *Goldie* (6) in this court was determined. The law is similar in the United States. In *Loom Company* v. *Higgins* (7) it is stated that,—

(1) 11 Can. S. C. R. 300.
(2) 7 Q. B. D. 305.
(3) L. R. 5 Ex. 37.
(4) 4 De G. J. & S. 298.
(5) 1 App. Cas. 582.
(6) 9 Can. S. C. R. 46.
(7) 105 U. S. R. 591.

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It might be laid down as a general rule, though perhaps not an invariable one, that if a new combination and arrangement of known elements produce a new and beneficial result never obtained before it is evidence of invention.

Before applying these principles to the case in hand I feel bound to call attention to the claim as now put forward by the appellants. What they now claim to to be an invention is an alleged combination in one machine of what was formerly two machines, namely, a cultivator and a seeder, the cultivator having spring teeth instead of rigid teeth. What they claim in the patent as the object of invention is to connect a spring tooth with a drag bar of a seeding machine, and what the inventor claims as his invention is in a seeding machine—

> in which independent drag-bars are used, the curved spring tooth detachably connected to the drag-bar in combination with a locking device, arranged to lock the head block to which the spring tooth is attached.

In my judgment the wording of the claim as put forward in the patent conveys little or no meaning and certainly does not in terms describe the combination now contended for, and upon the authority of the *Keystone Bridge Co.* v. *Phœnix Iron Co.* (1), *Burns* v. *Meyer* (2), *Hinks* v. *Safety Lighting Company* (3), I am inclined to think the appellants would have to fail on this ground. But I am not disposed to rest my judgment upon this point, but rather upon the substantial question: Whether, under the circumstances of this case, the alleged invention, so far as this specific claim is concerned, is the subject of a patent.

In considering this question it must be kept continually in mind that the plaintiffs have already received damages by reason of the defendants' infringement of a patent held by them covering this machine, in so far

(1) 95 U.S.R. 274. (2) 100 U.S.R. 671.
(3) 4 Ch. D. 607.

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as the attachment of the drill hoe or the spring tooth, as the case may be, to the drag bar, and the action in connection with both of the locking devices are concerned. The plaintiffs' claim is that the mere use of a curved spring tooth in a machine, which by the use of a tooth or a hoe may be either a cultivator or a seeder respectively, has been patented to them by the patent in question, and that the defendants' use of a spring tooth in such a machine is an infringement.

Now, I am not able to see that the machine in question is a combination at all within the meaning of the cases which hold a combination patentable.

There are upon the market cultivators with independent drag bars and locking devices in which curved spring teeth are used. This machine, so far as the claim in question is concerned, is that machine and nothing more. This machine so far as the evidence goes produces the same results as the other in precisely the same way or, if in a different or more beneficial way, not by reason of the tooth being curved and flexible, but by reason of the improvements which the plaintiffs in other inventions have secured to them in connection with the attaching of a hoe or tooth, whether rigid or flexible, to a drag bar. The new and beneficial results, if any, have been produced not by the curved spring tooth but by other means, the curved spring tooth not being the occasion of these results. If there had been invented a new tooth of certain specified curves and other stated dimensions and shape, which upon trial was found to produce better results than any other curved tooth in existence, that doubtless might have been the subject of a claim itself but there is no such claim here. The plaintiffs insist upon their exclusive right to use a curved spring tooth in any machine which may be used both as a cultivator and a seeder. It appears, too, that in this case there is no

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combination at all. The combination mentioned in the cases is a combination which produces a result; here, there is no use at the same time of the tooth and the drill hoe. The idea of attaching a tooth to a drag bar at one time and for one purpose, and of attaching a hoe to the same drag bar at another time and for another purpose, does not involve, in my judgment, the exercise of the inventive faculty, any more than the harnessing of a wagon to a horse on one day for one purpose and the harnessing of a sleigh to the horse on another day for another purpose, or in the attaching to an engine of a freight train on one day and a passenger train on another. The idea itself is not new. The plaintiffs themselves had previously obtained a patent for an invention the object of which was to simplify the construction of a spring hoe and to arrange it so that the drill hoe could be taken off the drag bar and a cultivator tooth put in its place. The cultivator tooth there specified was not a rigid tooth but a curved flexible tooth.

As the learned Chief Justice in the Court of Appeal suggests, the mere insertion of one known article in place of another known article, namely, a tooth into a known machine, is not a patentable matter. If, as I have already intimated, there was some useful and novel device in the method of such insertion, or in securing or producing a new or more beneficial result after such insertion was made, the question would be altogether different. The plaintiffs' machine, although called a combined drill and seeder, is not a combination; it is not one machine but two machines. In so far as it is either (as respects this claim), it is wholly an old machine, and in neither case does it produce according to the evidence any new or useful result, even although it may be admitted that a machine which, with one mechanism attached can do one thing,

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and another mechanism attached can do another thing, is a most useful machine. A horse that draws both a carriage and a sleigh is a more useful animal than a horse that draws a carriage only.

It seems to me that the claim of the plaintiffs, if allowed, would be to prevent any manufacturer from any time hereafter manufacturing a machine for seeding and cultivating purposes together of which a curved spring tooth forms part. I am not prepared to give to the plaintiffs such a far reaching monopoly.

In my opinion this appeal should be dismissed.

Appeal dismissed with costs.

Solicitor for appellants: *John G. Ridout.*

Solicitors for respondents: *Roaf & Roaf.*

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*Mar. 22.
*June 24.

THE MIDLAND RAILWAY OF CANADA (DEFENDANTS)..... } APPELLANTS;

AND

ROBERT H. YOUNG (PLAINTIFF) AND MARGARET MABEL YOUNG AND JOHN YOUNG (DEFENDANTS) } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Title to land—Tenant for life—Conveyance to railway company by—Railway acts—C.S.C. c. 66 s. 11 ss. 1—24 V. c. 17 s. 1.

By C.S.C. c. 66 s. 11 (Railway Act) all corporations and persons whatever, tenants in tail or for life, *grèves de substitution*, guardians, &c., not only for and on behalf of themselves, their heirs and successors, but also for and on behalf of those whom they represent * * * seized, possessed of or interested in any lands, may contract for, sell and convey unto the company (railway company) all or any part thereof; and any contract, &c., so made shall be valid and effectual in law.

Held, affirming the decision of the Court of Appeal, that a tenant for life is authorized by this act to convey to a railway company in fee but the company must pay to the remainderman or into court the proportion of the purchase money representing the remainderman's interest.

APPEAL from a decision of the Court of Appeal for Ontario, (1) affirming the judgment for the plaintiffs at the trial (2).

The facts of the case may be briefly stated as follows:—

That portion of the defendants' line of railway which passes through the lands above-mentioned was, prior and up to the 10th day of March, A.D. 1882, known as the Toronto and Nipissing Railway Company, being incorporated by the act of the Legislature of Ontario,

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

(1) 19 Ont. App. R. 265. (2) 16 O.R. 738.

31 Vict. ch. 41, and under said statute and the acts amending the same, the said Toronto and Nipissing Railway Company acquired the land above described, and built and worked their railway thereon. In October, 1852, Thomas Jefferson Stephens being seized in fee conveyed the ten acres in question, part of the said south half of lot 27, concession 6, to John R. Torrance. John R. Torrance and the plaintiff's mother were the only children of John Torrance. John R. Torrance died first, leaving his widow Margaret Torrance, and leaving a will devising the land in question to his widow, Margaret Torrance, for life. He made no further dispositions and left no children. John Torrance died without a will, and was heir-at-law to John R. Torrance. The mother of the plaintiff, who claimed to be the heir-at-law of John R. Torrance her brother, by her will devised to Robert Hamilton Young 100 acres of land, the south part of lot 27, concession C, in the township of Scarboro', adding the words, "Together with all my right, title and interest therein, present and future." Then, on or about the 23rd day of October, 1871, Margaret Torrance being the tenant in possession of the ten acres in question, executed a conveyance to the defendants' predecessors in title the Toronto and Nipissing Railway. Upon executing the said conveyance the said Margaret Torrance was paid the sum of $1,200, which was the price agreed to be paid for the said land. The said Margaret Torrance departed this life on or about the 9th day of March, A.D. 1886.

Subsequently the said Toronto and Nipissing Railway Company, by the act of the Ontario Legislature, 45 Vict. ch. 67, and the agreement which forms part thereof, became consolidated with other companies under the name of the Midland Railway of Canada, the defendants in this action. The plaintiff then brought

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this action against the said defendants to recover the sum of $1,200, the purchase money aforesaid, and interest thereon from the death of the said Margaret Torrance. The action came on for trial before the Hon. Mr. Justice Street, at the Toronto Spring Assizes, on the 16th May, 1888.

At the close of the argument the plaintiff applied for leave to add as parties the other heirs of Isabella Hamilton Young the mother of the said plaintiff.

In March, 1889, the learned judge delivered judgment, giving the plaintiff leave to amend as asked, and postponing further disposition of the action until such amendments were made. Subsequently the plaintiff, on the 14th of May, 1890, amended by adding as defendants Margaret Mable Young and John Young, infants under the age of twenty-one years, children of one John Young, a son of the said Isabella Hamilton Young, who predeceased her, and by inserting in the statement of claim other additional paragraphs.

The defendant company on the 21st day of May, 1890, also amended by inserting an additional paragraph in the statement of defence.

The hearing and trial of the case concluded on the 15th day of November, 1890.

Judgment was delivered by the learned judge on the 25th day of November, 1890, His Lordship holding under section 11, subsection 22, of chapter 66, Consolidated Statutes of Canada, which enacts that compensation shall stand in the stead of land, that inasmuch as the said Margaret Torrance would have been entitled to the annual rental of the said lands had the same not been taken by the Railway Company, and at her death those in remainder would have been entitled to the fee in possession, that therefore those rights should be maintained with regard to the compensation which the above section enacts shall stand

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in the stead of the land taken, and further that the railway company should not have paid the purchase money for the said land to the said Margaret Torrence, but should have paid the same into court

The learned judge then directed that judgment be entered for the plaintiff against the defendants for the sum of $1,000, with interest at 6 per cent from 9th March, 1886, and the costs of the action, including the costs of the official guardian to be paid by the plaintiff and added to his own; and that the defendants, the railway company, pay into court for the infant defendants the remaining $200 of the compensation with interest at 6 per cent from the 9th March, 1886, and that defendant company should set off against plaintiffs' costs their costs occasioned by the amendment, including the costs of the hearing on 15th November, 1890, and plaintiffs should have no costs of said amendment and hearing.

From this judgment the defendants appealed to the Court of Appeal for Ontario. The argument was heard on the ninth day of February, 1892, and on the 8th day of March, 1892, judgment was delivered affirming the judgment of the learned trial judge (Burton, J.A. dissenting) and dismissing the appeal with costs. From this judgment the defendants appeal to this court.

Osler Q.C. for the appellants referred to *Cameron* v. *Wigle* (1).

Kerr Q.C. for the respondents.

THE CHIEF JUSTICE.—I am of opinion that this appeal must be dismissed for the reasons given by the majority of the Court of Appeal.

It appears to me that the judgment of Chancellor Spragge in *Cameron* v. *Wigle* (1), was in all respects

(1) 24 Gr. 8.

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correct, and was properly adopted by the Court of Appeal as the principle of their decision.

FOURNIER and TASCHEREAU JJ. concurred.

Gwynne J.

GWYNNE J. The title undoubtedly passed, but in such a case I think it well to hold that the company having power to protect themselves by payment into court should be required to do so.

SEDGEWICK J.—The only question presented to us for consideration upon this appeal is the construction of section 11 of the Railway Act, Con. Stats. of Canada (1859) chapter 66 as amended by chapter 17 of 24 Vict. 1861, sec. 1.

The lands set out in the statement of claim were taken by the Toronto and Nipissing Railway Co. as a portion of the roadbed of their railway. One Margaret Torrance who had a life estate in the lands conveyed them to the company, the instrument of conveyance purporting to pass the fee simple, and the whole of the purchase money was paid to her.

The company held under this title alone.

Margaret Torrance died on the 9th March, 1886. The plaintiffs who are interested in the remainder now bring this action to obtain compensation for that interest. The defendant company having succeeded to the rights and obligations of the company that constructed the road contend that the deed by Margaret Torrance above referred to, a life tenant only though she was, vested an absolute title in the Toronto and Nipissing Company, and that the receipt by her of the purchase money was a discharge of all claim thereon which, prior to such payment, any person interested in remainder might have.

The statutes upon which the question depends are as follows: Con. Stat. Canada (1859) c. 66 :—

11. The conveyance of lands, their valuation and the compensation therefor, shall be made in manner following: 14 & 15 V. c. 51 s. 11.

First. All corporations and persons whatever, tenants in tail or for life, *grévés de substitution*, guardians, curators, executors, administrators, and all other trustees whatsoever, not only for and on behalf of themselves, their heirs and successors, but also for and on behalf of those whom they represent, whether infants, issue unborn, lunatics, idiots, *femes-covert*, or other persons, seized, possessed of or interested in any lands, may contract for, sell and convey unto the company all or any part thereof; and any contract, agreement, sale, conveyance and assurance so made, shall be valid and effectual in law to all intents and purposes whatsoever; and the corporation or person, so conveying, is hereby indemnified for what he or it respectively does by virtue of or in pursuance of this Act.

24 Vict. ch. 17, sec. 1 :—

Whereas doubts are entertained as to whether rectors in possession of glebe lands in Upper Canada, ecclesiastical and other corporations, trustees of land for church and school purposes or either, executors appointed by wills in which they are not invested with any power over the real estate of the testator, administrators of persons dying intestate but at their death seized of real estate, are authorized by the eleventh section of the Railway Act to sell or dispose of any of such lands to any railway company for the actual use of, and occupation by, such company; and whereas it is desirable to remove such doubts and to amend the said Railway Act in the particulars hereinafter set forth: Therefore Her Majesty, by and with the advice and consent of the Legislative Council and Assembly of Canada, enacts as follows :—

1. The true intent and meaning of the said section of the said act was and is, that the several persons and parties hereinbefore mentioned, with respect to the lands above in this act referred to, should and shall exercise all the powers mentioned in the first subsection of the said section eleven of the said Railway Act, with respect to any of such lands actually required for the use and occupation of any railway company; and any conveyance made under the first subsection shall vest in the railway company receiving the same the fee simple in the lands in such deed described, freed and discharged from all trusts, restrictions and limitations whatsoever.

The words of section 11, so far as they can be applicable to the case, are :—

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Sedgewick J.

All tenants for life, not only for and on behalf of themselves, but also for and on behalf of those whom they represent, seized, possessed of or interested in any lands, may convey to the company all or any part thereof, and any conveyance so made shall be valid and effectual in law to all intents and purposes whatsoever.

Is there here any power given to a tenant for life to contract for or convey away the interest of a reversioner or remainder man? I cannot find it. The section includes all classes of persons and corporations (except the crown) capable of conveying. It refers to parties who may without it convey lands. It likewise gives authority to persons who without it would have no authority to convey lands. But that authority is given to those only who occupy a fiduciary position, and who at law represent other persons whose rights they are thereby empowered to affect. I am not aware that a life tenant represents the remainder-man. There is no natural or legal relationship between them. The statute allows the life tenant to contract on behalf of those persons whom he represents, but it does not intimate or even suggest who they are. Where it enables *grévés de substitution*, guardians, curators, executors, administrators or trustees to contract on behalf of those whom they represent we can understand, at least partially, what is meant. The offices which they each discharge are representative in character. Behind them, in each case, are persons whose rights they are bound to subserve, whose interest the law calls upon them to protect. Besides, these functionaries are all, in one respect or another, under the direction of the court, and either have given security for the faithful discharge of duty or have been chosen by reason of supposed fitness to discharge it. It does not, therefore, seem unreasonable that the legislature, in order to facilitate the inexpensive and speedy acquisition of railway

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lands, should invest them with additional powers in regard to the disposition of land of which they officially are in charge, and should seek to make it plain that they, at all events, could convey interests larger than their own.

But these considerations do not apply in the case of a life tenant. The law casts upon him no duty towards his successor in title. No relation of trust exists between them. In my view it is for the legislature in unambiguous terms to impose that duty and create that relationship. If it has not done so the courts cannot do it.

And in this connection I may say that I am as desirous as any one of giving effect to the intention of the legislature, but when, as in the present case, it is contended that Parliament has given power to a life tenant to fix upon the price and convey away the interest of the person next entitled to possession—a person who may be well known to the company, and as easy of access as the tenant himself—and that too without that person's assent and even in spite of his protest I must have pointed out to me the expression of that intent in such clear and specific language that no doubt can remain. I am not to glean from doubtful inference, I must be satisfied by positive and direct words that what Mr. Chancellor Spragge has termed "a most violent and unnecessary interference with the rights of property" is made authoritative and legal by the statute.

It is true that in England tenants for life have power to sell the interest of the remainder-man. But in what clear and unmistakable terms has that power been conferred?

"It shall be lawful for the following parties to sell, convey or lease, tenants in tail or for life not only on behalf of themselves but also for and on behalf of any

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person entitled in reversion remainder, or expectancy." (Land Clauses Consolidation Act, 1845, sec. 7.)

There is no question there as to what the English Parliament intended, and for my part I cannot interpolate similar words in the Canadian statute without, as I think, doing violence to the elementary and fundamental principles by which statutes of this description are to be construed.

It may however be asked: What did the legislature mean by the words in question? The present case does not call for an answer to that question; but it may fairly be said that the words "for and on behalf of those whom they represent" apply only to and are apt words to describe the extended powers intended to be given to *grévés de substitution*, guardians, curators, executors, administrators and trustees, all of whom are mentioned in the section. They are as unapplicable to tenants for life as they are to "corporations and persons" also mentioned in the section—"corporations" and "persons" representing no one. But there is as much reason in the assertion that they represent persons entitled to reversionary interests as that life tenants represent them. Or, if these words do apply to life tenants they may apply to those life tenants only who by some express act or instrument have been empowered, either by the owner of the outstanding interest or by its creator, or by order of court, or by statute, to so represent that interest.

But we need not be astute to give these words a meaning. We know of many cases where legislatures without doubt intended to say one thing but signally failed to say it. We should not say it for them. The misfortune is curable by the legislatures only, not by the courts.

But, it is contended, if a life tenant has no power to dispose of a remainder-man's interest under the Railway

Act of 1859, he has that power by virtue of the amending act of 1861.

I have above written out the preamble and first section of the act. The preamble, it will be seen, deals with rectors, corporations, trustees, executors and administrators only. It is alleged that doubts are entertained as to their powers and that it is desirable to remove these doubts. No doubts appear to have been entertained as to the powers of life tenants. If what I have said is correct there could be no doubt as to their powers—they could sell their own interest and that only. So far as appears there was no intention of dealing with any classes of persons except those mentioned in the preamble, and the first section therefore proceeds to enact in effect that the persons mentioned in the preamble might (notwitstanding the doubt referred to) exercise all the powers of sale specified in section 11 of the Railway Act with respect to lands actually required for the use of the railway "and" the section proceeds "any conveyance made under the said first subsection shall vest in the railway company receiving the same the fee simple in the lands in such deed described, freed and discharged from all trusts, restrictions and limitations whatsoever." That in my judgment manifestly deals with the cases, and the cases alone, that are in doubt. The conveyance referred to is evidently a conveyance by the persons or parties just mentioned, the intent being that conveyances executed by them in their representative or fiduciary capacity of what purported to be a fee simple should in law have that effect, and that the land itself should be discharged from any "trust"—that is, the company was to be absolved from seeing to the application of the purchase money;—"restriction"—however the use of the land had been restricted by the instruments under which the vendors held, it was got rid of; or

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"limitation,"—whatever outstanding interests there might be, whatever limitations to which the land might be subject under the vendor's title, these were destroyed and an absolute estate became vested in the company. I am conversant with the principle that the preamble of an act cannot govern its enacting part; that although a particular mischief or inconvenience may be recited in a preamble the enacting clauses may extend beyond it; but at the same time it may be legitimately consulted for the purpose of keeping the effect of the act within its real scope, and generally to ascertain the legislative intent. It is a good means to find out its meaning and is, as it were, a key to the understanding of it.

It is, as I have said, clear, so far as we can gather the intent from the preamble, that the statute was not intended to deal with life tenants, nor do I think the enacting clause properly construed in any way enlarges its effect.

The latter clause of the first section forming, as it does, a part of the single sentence of which the whole section is composed must, I think, be taken to be an amplified re-expression of the first part including a declaration of the nature of the title intended to pass, and does not refer to a conveyance by a party whose case is not mentioned. This, I think, would be the obvious construction were the act in question of a character demanding a wide and liberal interpretation. That construction is, however, imperative when, as in the present case, a contrary interpretation would lead to manifest hardship and injustice.

The result of the opinion I have herein expressed will be, if adopted, that the appeal will be dismissed.

The majority of the court below had no doubt (nor have I), as to the right of the plaintiffs to recover, but they rested their decision upon the ground that while

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the effect of the two acts in question was to give the life tenant a right to convey the fee simple they did not give him authority to receive that portion of the purchase money that represented the remainder-man's interest. I am inclined to think that this opinion, given as it was with apparent hesitation, was influenced largely by the opinion of the late Chancellor Spragge in *Cameron* v. *Wigle* (1), where he would appear to have held the same view.

Reference to that case will show that whatever opinion he had, whether the tenant for life could or could not convey, the plaintiffs were equally entitled to judgment. "It may be conceded," he says, "for the purposes of this case, that the tenant for life had power to contract for sale (which would involve the agreement for price) and to convey." Whether the payment of this full value to the tenant for life was a good payment is quite a different question. In support of the company's contention he takes that for granted, but assuming that he proceeds to argue that it was the duty of the railway company to see that the remainder-man's rights were secured by the payment of his share of the consideration money into court or to himself.

The reasoning of the learned Chancellor upon this latter point does not convince my judgment. I should suppose that where a statute authorizes a trustee or other person to contract for and give a conveyance in fee simple payment to that person would discharge the purchaser in the absence of any provision to the contrary. I know of no such provision in the statutes under discussion, and I am inclined to think that a railway company may, in good faith, in all cases pay to a trustee or other person empowered by statute to convey lands in fee simple the whole of the purchase

(1) 24 Gr. 8.

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money, and is under no obligation either to pay into court or to see to its proper application.

For reasons already stated I do not think that the tenant for life in the present case had authority to convey any interest but her own, and the company must therefore make good to the plaintiffs their interests in remainder.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for appellants: *John Bell.*

Solicitors for respondents: *Kerr, Macdonald, Davidson & Patterson.*

IVON LEFEUNTUN (*Petitioner en nullité de décret*) ..... } APPELLANT;

AND

ADOLPHE VÉRONNEAU (*Defendant en reprise d'instance* IN THE COURT BELOW)..... } RESPONDENT.

1893

*Mar. 6.

*June 24.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA (APPEAL SIDE).

Venditioni exponas—Order of court or judge—Vacating of sheriff's sale—Arts. 553, 662, 663, and 714 C. C. P.—Jurisdiction.

A petition *en nullité de décret* has the same effect as an opposition to a seizure and under arts. 662 and 663 C. C. P. the sheriff cannot proceed to the sale of property under a writ of *venditioni exponas* unless said writ is issued by an order of the court or a judge. *Bissonnette* v. *Laurent* (15 Rev. Leg. 44) approved. Taschereau and Gwynne JJ. dissenting.

On the question of want of jurisdiction raised by respondent it was held that a judgment in an action to vacate the sheriff's sale of an immovable is appealable to the Supreme Court under sec. 29 (*b*). *Dufresne* v. *Dixon* (16 Can. S. C. R. 596) followed.

APPEAL from a judgment rendered on the 18th of January, 1892, by the Court of Queen's Bench for Lower Canada (Appeal side) (1) confirming a judgment of the Superior Court rendered on the 28th June, 1889, dismissing the appellant's petition *en nullité de décret* with costs.

The facts of the case and the grounds for the petition *en nullité de décret* are fully stated in the judgment of Mr. Justice Fournier hereinafter given and in the report of the case in the Court of Queen's Bench (1).

Before proceeding to hear the merits Mr. *Bonin* for respondent relying on *Champoux* v. *Lapierre* (2), contended that the case was not appealable.

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

(1) Q. R. 1 Q. B. 277.

(2) Cassels's Dig. 2 ed. 426.

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[MR. JUSTICE TASCHEREAU.—The case of *Dufresne* v. *Dixon* (1), a judgment on a petition *en nullité de décret* is a clear authority for our jurisdiction.]

The appeal was then heard on the merits.

Mercier Q.C. and *Gouin* for appellant cited and relied on arts. 479, 551, 653, 662 and 663 C. C. P. and *Bissonnette* v. *Laurent* (2); *Trust & Loan Co.* v. *Monbleau* (3); *La Compagnie de Prêt* v. *Monbleau* (4).

Bonin for respondent cited and relied on *Bouvier* v. *Brush* (5); rules 35, 57 and 88 of Superior Court Rules of Practice, and contended also, that the Supreme Court should not reverse the decision of the two courts on a mere question of procedure sanctioned by judicial decision, viz.: Whether the prothonotary could issue a writ of *venditioni exponas* without the order of the court.

THE CHIEF JUSTICE concurred with Fournier J.

FOURNIER J.—The appeal in this cause is from a judgment rendered by the Court of Queen's Bench at Montreal, on the 18th of January, 1892, dismissing the appellant's petition demanding the nullity of the sheriff's sale (*décret*) made under a writ of *venditioni exponas* against the appellant's property.

Narcisse Bolduc, now represented by the defendant *en réprise d'instance*, Adolphe Véronneau, had obtained judgment against the appellant in the Superior Court at Montreal for the sum of $433.46 and costs.

A writ of execution *de bonis*, issued on the 10th August, 1875, was returned on the 25th October following indorsed a *nulla bona*, and the same day was issued a writ of *fieri facias de terris* which was

(1) 16 Can. S. C. R. 596.
(2) 15 Rev. Leg. 44.
(3) M. L. R. 3 S. C. 135.
(4) 16 Rev. Leg. 14.
(5) 1 Rev. Leg. 641.

returned on the 20th March, 1876, in obedience to an order of the Honourable Mr. Justice Rainville, granted upon a *requête civile* presented by the appellant against the judgment of the Superior Court of the 28th November, 1874.

On the 30th June, 1876, the *requête civile* was dismissed by the Superior Court.

On the 8th July, 1876, the then attorney of the plaintiff taxed *ex parte* his bill of costs upon the contestation of the said *requête civile* and upon the back of the said bill asked for a fiat for a writ of *venditioni exponas* returnable on the 7th September, 1876, addressed to the sheriff of Bedford. This writ was issued by the prothonotary without any order of the court.

After two notices in the *Official Gazette* and one publication at the church door of St. Valérien de Milton, the parish in which the appellant's property is situate, the said property was sold by the sheriff, and adjudicated to the plaintiff, Narcisse Bolduc, on the 17th August, 1876, for $55, which sum was insufficient to cover the sheriff's costs.

On the 23rd February following the appellant presented to the Superior Court a petition *en nullité de décret* to have the sale of his property declared null and illegal for the following reasons :

1. Because no notice of the said sale had been given to him.

2. Because the said writ of *venditioni exponas* was irregular, illegal and null and did not state what notices the sheriff should give before proceeding to the sale.

3. Because the said sale had been made before the expiration of the delay fixed by law, and without the notices and publications mentioned.

4. Because the said sale was tainted with fraud and fraudulent acts on the part of the plaintiff and, to his knowledge, to prevent the making of bids.

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5. Because the proceedings adopted to arrive at the *décret* and at the sale and adjudication of the said property are irregular, null, illegal and void.

The only grounds relied on by the appellant in this court in support of his demand for nullity, are the following:

1. The premature issue of the writ of *venditioni exponas*, for an amount including costs, which were not yet due and which had not yet been regularly taxed. 2. The said writ was issued by the prothonotary without an order of the court; no notice of the issue of the said writ or of the sale, had been given to the appellant.

Being of the opinion that the issuing of the writ of *venditioni exponas* by the prothonotary without an order of the court or judge is a sufficient ground for the decision of this case I need only deal with that point.

It is evident that the Code of Procedure has not placed the issuing of this writ upon the same footing as ordinary writs of summons, of execution and others. With regard to the latter the prothonotary is specially authorized to issue them. Art. 44 C. P. C. says:— "Writs of summons are issued by the prothonotary, upon the written requisition of the plaintiff." Art. 46. "They are attested and signed by the prothonotary." Art. 222. "Parties are summoned to answer interrogatories upon articulated facts, by means of a process issued in the name of the sovereign by the prothonotary." By art. 545 the writ of execution is attested and signed in the same manner as original writs, and must bear the seal of the court. Art. 633. "The seizure of immoveables can only be made in virtue of a writ, clothed with the same formalities as writs of execution against movables," &c.

In the case of all the above mentioned writs the authority to issue them is given specially to the

prothonotary. With respect to the writ of *venditioni exponas* no such authority is given to him.

In the present case the day fixed for the sale of the immovables of the appellant by the notices given under the writ *de terris*, and the day upon which it was returnable, having passed the said writ had lapsed. The sheriff could not proceed further and the prothonotary, there being no provision in the code to that effect, had no power to decree the sale of the property. To the court alone then belongs the power of ordering the sale under a writ of *venditioni exponas*, in accordance with articles 653, 662 and 663 of the Code of Procedure.

Art. 653 obliges the sheriff, notwithstanding any opposition to the seizure (here *requête civile*) or sale of immovables or rents, to continue the publication above prescribed, but he cannot in such case proceed with the sale without an order from the court. In the present case the *requête civile* had the same effect as an opposition, and the sheriff continued his publications as he had been authorized to do. But the writ having lapsed he could not, as that article says, proceed with the sale without an order from the court. These positive words show clearly that an order for the sale can only be given by the court and not by the prothonotary. The sheriff's duty was then governed by art. 662 which provides that when oppositions have not been decided until after the day fixed for the sale he can only proceed to sell under a writ of *venditioni exponas* and in accordance with the conditions therein contained.

Art. 663 also shows the necessity for the order of the court for the issue of the writ of *venditioni exponas* by declaring that this writ shall "contain, moreover, such other conditions as the court has directed respecting the sale of the immovable or the rent." It is evident then that the order to issue this writ must be asked of

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the court, and that the court alone can grant it, since the writ must contain the conditions upon which the judge may think proper to order the sale.

These several provisions of the code of civil procedure clearly establish that the court alone has power to order a writ of *venditioni exponas* to issue, as has been decided in the Court of Queen's Bench at Montreal in the case of *Bissonnette* v. *Laurent* (1). This decision was followed in the case of the *Trust & Loan Co.* v. *Monbleau* (2).

The respondent has contended that the appellant could not invoke this jurisprudence because it was adopted some time after his petition *nullité de décret.* But this jurisprudence is nothing else than the law itself, and settles nothing but what was already contained in the articles of the Code of Civil Procedure. There has been no change in the law in force at that time, and why should we be now asked to apply to this case an irregular practice, and one which is contrary to the text of the law? To support this contention it is pretended that the appellant should have specially alleged this ground in his petition *en nullité.* This ground was one of law, and the want of an order of the judge to issue the writ, appearing on the face of the record, is sufficiently alleged twice, viz.: in the 2nd and 5th reasons in his petition *en nullité de décret.* In the 2nd he alleges that the writ of *venditioni exponas* is illegal, irregular, null and void; and in the 5th he alleges that all the proceedings adopted to arrive at the sale and adjudication of his property are irregular, illegal, null and void. There are, moreover, a number of other allegations complaining of the nullity of the writ upon which the court below ought to have pronounced judgment. But the court seems to have con-

(1) 15 Rev. Lég. 44.

(2) M. L. R. 3 S. C. 135.

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sidered the irregular and erroneous practice relied upon by respondent, as having the force of a law.

We cannot admit that any practice, even long established but which is contrary to law, should be followed even when it has been sanctioned by a judicial decision. The duty of a judge is to disregard such a practice and to be guided solely by the text of the law.

For these reasons I am of opinion that the writ of *venditioni exponas* in virtue of which the appellant's property was sold is null and void, and therefore that the appeal in this case should be allowed with costs.

TASCHEREAU J.—I am of opinion that the appeal should be dismissed for the reasons given by the court below.

GWYNNE J. was also of opinion that the appeal should be dismissed for the reasons given by the court below.

SEDGEWICK J. concurred with Fournier J.

Appeal allowed with costs

Solicitors for appellant: *Mercier, Gouin & Lemieux.*

Solicitors for respondent: *Taillon, Bonin & Pagnuelo.*

1892
*Nov. 2, 3.
1893
*May 1.

EDWARD MOORE (PLAINTIFF) .....APPELLANT;

AND

JANE JACKSON (DEFENDANT) .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Married Woman's property—Separate estate—Contract by married woman—Separate property exigible—C. S. U. C. c. 73—35 V. c. 16 (O.)—R. S. O. (1877) cc. 125 and 127—47 V. c. 19 (O.).

A woman married between 1859 and 1872 acquired, in 1879 and 1882, lands in Ontario as her separate property and in 1887, before the Married Woman's Property Act of that year (R.S.O. c. 132) came into force, she became liable on certain promissory notes made by her.

Held, reversing the decision of the Court of Appeal, that the liability of her separate property to satisfy a judgment on said promissory notes depended on the construction of the Married Woman's Real Estate Acts of 1877 (R.S.O. cc. 125, 127) and The Married Woman's Property Act, 1884 (47 V. c. 19) read in the light furnished by certain clauses of C. S. U. C. c. 73; and that her capacity to sue and be sued in respect thereof carried with it a corresponding right on the part of her creditors to obtain the fruits of a judgment against her by execution on such separate property.

APPEAL from a decision of the Court of Appeal for Ontario (1) reversing the judgment of the Divisional Court (2) and restoring that of the trial judge in favour of the defendant.

The question for decision on this appeal is whether or not certain lands in the township of Etobicoke, in the county of York, were the separate estate of the respondent Jane Jackson and liable to satisfy the plaintiff's claim against her.

The facts of the case are not in dispute and the decision depends on the construction to be put on the

*PRESENT:—Strong C. J., and Fournier, Taschereau, Gwynne and Patterson JJ.

(1) 19 Ont. App. R. 383. (2) 20 O. R. 652.

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statutes of Ontario relating to married women's property, namely: An act relating to Property Rights' of Married Women (1) the Married Woman's Real Estate Acts (2); the Married Woman's Property Act, 1884 (3); the later acts do not affect the case.

The action was tried before Chief Justice Armour who gave judgment for the defendant, holding that under these acts the wife had no power of disposition of her property. The Divisional Court reversed this judgment, but it was restored by the Court of Appeal. The plaintiff appealed from the latter decision to the Supreme Court.

Moss Q.C. for the appellant. Separate use is not essential to possession of separate property. *Chamberlain* v. *McDonald* (4) where Mowat V. C. dissents from the holding in *Royal Canadian Bank* v. *Mitchell* (5); *Cameron* v. *Walker* (6).

In re Konkle (7), and *Taylor* v. *Meads* (8), are leading cases on the question of separate estate.

Armour Q.C. for the respondent cited *McLean* v. *Garland* (9); *Cahill* v. *Cahill* (10); *Hope* v. *Hope* (11).

THE CHIEF JUSTICE.—The respondent Jane Jackson, is a married woman, and the object of this action is to make certain lands situate in Parkdale and Etobicoke, held by her for an estate in fee and acquired since her marriage, liable for the payment of several promissory notes made by her during coverture and which are now held by the appellant.

The cause was originally heard by the Chief Justice of the Queen's Bench who entered judgment for the

(1) 35 Vic. ch. 16.
(2) R. S. O. [1877] chs. 125 and 127.
(3) 47 Vic. ch. 19.
(4) 14 Gr. 447.
(5) 14 Gr. 412.
(6) 19 O. R. 212.
(7) 14 O. R. 183.
(8) 4 DeG. J. & S. 597.
(9) 10 Ont. App. R. 405.
(10) 8 App. Cas. 420.
(11) [1892] 2 Ch. 336.

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respondent. This judgment was subsequently reversed by the Divisional Court of Queen's Bench. The respondent then appealed to the Court of Appeal which court reversed the judgment of the Queen's Bench Division in part. Against the latter judgment the present appeal has been brought.

The solution of the questions which are raised depends upon the application of statutory enactments which have been varied from time to time. It becomes, therefore, important to ascertain the exact provisions of the statutes which are applicable. In order to arrive at this end we must bear in mind the several dates of the respondent's marriage, of the acquisition by her of the property in question and of the promissory notes sued upon. The marriage took place in 1869. The Etobicoke property was conveyed to her in June, 1879, and February, 1882. The Parkdale property was acquired in March, 1887 The promissory notes sued upon were made in May, June and July, 1887. I may say at once that as regards the Parkdale property its liability to be applied to the satisfaction of the plaintiff's debt has not been controverted by the Court of Appeal. In this conclusion I entirely agree. The question for our consideration is therefore confined to the lands in Etobicoke.

It may also be premised that as regards any of the lands in question which were conveyed by the respondent, Jane Jackson, to her co-defendant Mary Jane Graydon, which may be found to be otherwise liable to the appellant's claim, the conveyance of such lands was void as being in fraud of creditors. This has been decided by both the courts below, and I entirely acquiesce in the correctness of their judgments in this respect. I will therefore proceed to consider the case as confined to the Etobicoke lands which, as I have already said, were acquired by Mrs. Jackson in 1879 and 1882.

The first statute which altered the common law property rights of married women was the Consolidated Statute U. C. cap. 73.

By the first section of that act it was enacted that—

> Every woman who has married since the 4th day of May, 1859, or who marries after this Act takes effect, without any marriage contract or settlement shall and may, notwithstanding her coverture, have, hold, and enjoy all her real and personal property, whether belonging to her before marriage or acquired by her by inheritance, devise, bequest, or a gift, or as next of kin to an intestate or in any other way after marriage free from the debts and obligations of her husband and from his control or disposition without her consent in as full and ample a manner as if she continued sole and unmarried, any law, usage or custom to the contrary notwithstanding; but this clause shall not extend to any property received by a married woman from her husband during coverture.

This statute did not in any way provide that married women should be liable on their contracts nor that their real property should be so liable. Nor did the statute confer upon married women the power to convey their real estate coming within the terms of the first section without the concurrence of their husbands nor otherwise than as the legal estates of married women had been theretofore required to be conveyed, namely, by a deed in which the husband should be a concurring party, duly acknowledged before the proper officers on an examination of the woman apart from her husband.

So far as the mere use of the term "separate estate" has any bearing on the question before us, it may be remarked that this statute of 1859 affixes the denomination of "separate estate" to the statutory property created by the first section. The expression will be found to be so applied in sections 3, 14, 15 and 16 of the act. It is manifest from the context that in all these clauses the words "separate estate" are used to indicate the species of legal estate created by the first section of the statute, and not as in any way referring

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to separate estate arising under the peculiar doctrines of courts of equity with reference to the equitable interests of married women in property settled to their separate use. In the case of the *Royal Canadian Bank* v. *Mitchell* (1) Spragge V. C. expressly decided that the separate estate created by the statute was not analogous to the equitable property of a married woman settled to her separate use either in respect of the power of disposition or in respect of its liability for the debts of the owner. In *Kraemar* v. *Gless* (2) and in *Wright* v. *Garden* (3) similar conclusions were reached.

The next statute to be noticed is that of 1872, 35 Vic. cap. 16, intituled "An Act to extend the property rights of married woman. By the first section of this act it is enacted—

That after the passing of this Act, the real estate of any married woman which is owned by her at the time of her marriage, or acquired in any manner during her coverture, and the rents, issues and profits thereof respectively, shall without prejudice and subject to the trusts of any settlement affecting the same, be held and enjoyed by her for her separate use, free from any estate or claim of her husband during her lifetime, or as tenant by the courtesy, and her receipts alone shall be a discharge for any rents, issues and profits, and any married woman shall be liable on any contract made by her respecting her real estate as if she were a *feme sole*.

And by the 8th section of the same act it was declared that:—

A husband shall not be liable for any debts of his wife in respect of any employment or business in which she is engaged on her own behalf, or in respect of any of her own contracts.

The 9th section provides (*inter alia*) that:—

Any married woman may be sued or proceeded against separately from her husband in respect of any of her separate debts, engagements, contracts or torts as if she were unmarried.

By chapter 125 of the Revised Statutes of Ontario, (1877) section 3, it is enacted as follows:—

(1) 14 Gr. 412. (2) 10 U. C. C. P. 470.
(3) 28 U. C. Q. B. 609.

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Every woman who married between the 5th day of May, 1859, and the 2nd day of March, 1872, (both inclusive) without any marriage contract or settlement, shall and may, notwithstanding her coverture, have, hold and enjoy all her real property, whether belonging to her before marriage or acquired by her by inheritance, devise or gift, or as heir-at-law to an intestate, or in any other way after marriage free from the debts and obligations of her husband, and free from his control or disposition without her consent, in as full and ample a manner as if she continued sole and unmarried; but this section shall not extend to any property received by a married woman from her husband during coverture.

By the second section of the same act provision was made for the case of a woman married before May, 1859, and by the 4th section for that of a woman married after March, 1872.

Section 18 is as follows:—

A husband shall not be liable for any debts of his wife in respect of any employment or business in which she is engaged in her own behalf or in respect of any of her own contracts.

The last clause of section 20 provides that:—

Any married woman may be sued or proceeded against separately from her husband in respect of any of her separate debts, engagements, contracts or torts as if she were unmarried.

Chapter 127 of the Revised Statutes of Ontario, 1877, is intituled "An Act to facilitate the conveyance of real estate by married woman," and by the 3rd section it is provided that a married woman may convey her real estate by deed to which the husband must be an executing party.

By "The Married Woman's Property Act, 1884," (47 Vic. cap. 19) which took effect on the 1st July, 1884, it is by section 2, subsection 1, enacted that:—

A married woman shall in accordance with the provisions of this Act be capable of acquiring, holding and disposing by will or otherwise, of any real or personal property as her separate property in the same manner as if she were a *feme sole* without the intervention of any trustee.

Subsections 2 and 3 of the same act are as follows:

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Subsec. 2 :—A married woman shall be capable of entering into and rendering herself liable in respect of, and to the extent of, her separate property on any contract, and of suing and being sued either in contract or in tort or otherwise in all respects as if she were a *feme sole*, and her husband need not be joined with her as plaintiff or defendant, or be made a party to any action or other legal proceeding brought by or taken against her and any damages or costs recovered by her in any such action or proceeding shall be her separate property, and any damages or costs recovered against her in any such action or proceeding shall be payable out of her separate property and not otherwise.

Subsec. 3 :—Every contract entered into by a married woman shall be deemed to be a contract entered into by her with respect to and to bind her separate property unless the contrary be shown.

By the last section of the statute (sec. 22) "The Married Woman's Property Act," R. S. O. 1877, c. 125, is repealed, and so much of section 3 of the "Married Woman's Real Estate Act," R. S. O. 1877, cap. 127, as required the husband to be a party to and to execute the conveyance by a married woman of her real estate is also repealed.

I have now noticed all the material statutory enactments which in my opinion can apply to the present case. The "Married Woman's Property Act," R. S. O. 1887, cap. 132, so far as it alters the act of 1884, can have no application to the present case inasmuch as the Revised Statutes of that year did not take effect until 31st December, 1887, and the promissory notes, for the recovery of which the present action was brought, were made in May, June and July, 1887.

The question we have to answer, therefore, depends on the construction to be put on the two acts of 1877 and the act of 1884, read in the light furnished by certain clauses in the act of 1859.

It does not appear to me that in construing these statutes we have anything to do with the question of tenancy by the courtesy. As Mr. Justice Maclennan has put it in his judgment we may regard the case as

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if Mrs. Jackson's interest had been a mere life estate, in which case no question of tenancy by the courtesy could possibly arise. Again the doctrines of courts of equity as regards estates settled to the separate use of married women, either through the intervention of an express trustee or without a trustee, have, in my opinion, no bearing upon the question before us. So far from elucidating the acts of the legislature which we have to construe they would rather tend to embarrass us in performing that task, inasmuch as they present false and misleading analogies. No doubt the legislature might, if it had thought fit to do so, have referred to those doctrines as furnishing a proper standard by which to measure the rights and liabilities of married women as regards their legal separate estate created by the statutes, but I do not find that any such intention is expressed or is to be necessarily implied.

The separate estate of a married woman in property settled to her separate use was, as is well known, purely a creature of courts of equity originally introduced whilst that system of jurisprudence was in a formative stage. It was from time to time modelled and further developed, first by the introduction of the restraint upon anticipation, a fetter upon alienation which was altogether repugnant to the principles of the common law. Then it was further adapted to the case of a settlement upon a single woman to her separate use by providing that the separate use should arise as "a postponed fetter" (to use the words of Lord Langdale in *Tullett* v. *Armstrong*) (1), on her marriage. Next arose the question of the liability of this equitable property to make good the contractual liability of married women possessed of it. And lastly came the question as to her power of disposition over estates of freehold and inheritance in land thus settled. The

(1) 1 Beav. 1.

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settlement of these questions gave rise to rules involving much nicety and refinement which I can never think it was the intention of the legislature to have introduced into the statute law of Upper Canada and made applicable to the new species of statutory legal estate in land which was called into existence by the acts referred to.

Further, I do not consider that the extent of a married woman's power of voluntary disposition as regards her statutory separate estate is conclusive upon the question of the liability of that species of property to make good debts which she may have contracted. Incidentally this *jus disponendi* may have some relevancy in the interpretation of the statutes, but I cannot agree that it is in any way decisive.

The English cases decided upon the "Married Woman's Property Act" (Imp.) 1882, so far as the legislation here has been borrowed from the English enactments, are applicable, but we have to be careful in applying them for the reason that the preceding legislation in England and in the province of Ontario was entirely different, and the Ontario statutes are of course all to be construed, especially as regards the meaning of terms, as *in pari materiâ*.

The question then is: What, upon the true construction of the statutes before referred to, is the liability of the respondent Mrs. Jackson, a woman married after 1859 and before 1872, (viz., in 1869) upon these notes made in May, June and July, 1887, as regards these Etobicoke lands, which were acquired by her in 1879 and 1882? In *Kraemar* v. *Gless* (1) Draper C.J. speaking of the statutes of 1859, says:—

> Every provision for these purposes is a departure from the common law and so far as is necessary to give these provisions full effect we must hold the common law is superseded by them. But it is

(1) 10 U. C. C. P. 475.

against principle and authority to infringe any further than is necessary for obtaining the full measure of relief or benefit the act was intended to give.

This principle of construction was adopted and acted upon by Spragge V. C. in *Royal Canadian Bank* v. *Mitchell* (1), by the Court of Queen's Bench in *Wright* v. *Garden* (2), by my brother Gwynne in *Balsam* v. *Robinson* (3), and to the best of my ability I endeavoured to follow it in *Mitchell* v. *Weir* (4), and I propose to take it as a guide in the present case.

The right of Mrs. Jackson in these lands was originally dependent on the statute of 1877. By the third section of that act it was declared that a woman married between 1859 and 1872 should have in lands acquired by her after the statute precisely the same rights as were conferred upon a woman married after the 4th May, 1859, by the 1st section of Consolidated Statutes U. C. cap. 73, that is to say a right to—

> Have, hold and enjoy her lands free from the debts and obligations of her husband and from his control or disposition without her consent in as full and ample a manner as if she continued *sole* and unmarried.

It was decided in the case of the *Royal Canadian Bank* v. *Mitchell* (1), and *Wright* v. *Garden* (2), that the estate which was thus conferred by the statute of 1859 upon women married after the date of that enactment was not liable to make good their debts, at least so far as debts arising under contracts are concerned, for the reason that the statute of 1859 neither imposed such a liability nor took away the common law disability of a married woman to bind herself by contract. Notwithstanding this, however, the right of unfettered enjoyment free from the control of the husband which the statute did confer was undoubtedly

(1) 14 Gr. 412.
(2) 28 U. C. Q. B. 610.
(3) 19 U. C. C. P. 269.
(4) 19 Gr. 570.

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properly described and defined by the expression "separate estate" or "separate property." We find indeed in the statute itself clear evidence of this. In the 16th and 18th sections of the statute of 1859 we find the new statutory property created in favour of *femes covertes* by the 21st section referred to by the legislature as her "separate property" and her "separate estate."

This has a significance which I will refer to hereafter. In the case of *Wright* v. *Garden* (1), it was contended that the statute of 1859 had created separate property which was to be accompanied by the like incidents as property settled to the separate use had acccording to the doctrines of equity. One of the learned judges, Mr. Justice Wilson, was of this opinion; but the majority of the court repelled this construction and held that there was no liability, adopting the reasons which Spragge V. C. had previously stated for the same conclusion in the case of the *Royal Canadian Bank* v. *Mitchell* (2).

It follows, therefore, from these cases that by the reference to separate property in the statute of 1859 separate property in the sense in which the courts of equity used that term was not intended, but what was meant was that particular species of new separate property created by the statute itself. For this proposition, therefore, we have the high authority of the cases cited.

Then the 20th section of the act of 1877 contains this clause:—

> Any married woman may be sued or proceeded against separately from her husband in respect of any of her separate debts, engagements, contracts or torts as if she were unmarried.

The lands in question here were acquired after the statute was passed and before it was repealed. Would

(1) 28 U. C. Q. B. 610. (2) 14 Gr. 412.

they then have been liable for the satisfaction of the promissory notes sued upon if there had been no repeal of this enactment?

In the first place this section 20 is not in terms confined to women married after the passing of the act of 1877; the words are "any married woman" which are extensive enough to include women married before the act. Then confining the operation of the provision to estates acquired after the act, and to contracts entered into also subsequently to the act, it surely could not be obnoxious to the rule against retroactive construction to hold that it did embrace married women included in the category provided for by the third section. This being so, what is the effect of saying that a married woman may be sued or proceeded against in respect of her separate debts, engagements and contracts as if she were unmarried?

Can any rational meaning be attributed to such a statute other than this, that a creditor was to be at liberty not only to sue and proceed against a married woman upon her separate contract, but also that having so sued and proceeded against her and having obtained a judgment, he was to have execution of that judgment out of her separate property? Surely it was not meant to mock at creditors by telling them they might sue and recover a judgment, but that such a judgment was to be barren and fruitless because it had not been said specifically that it was to be satisfied out of the statutory separate estate. If there is such a thing as necessary implication we must have recourse to it here and hold that this right thus conferred to sue and proceed against a married woman upon her separate contract as if she was sole and unmarried implies that the judgment thus recovered was to be satisfied. Then, if it was to be satisfied satisfied out of what? What could be available to satisfy it except the judgment

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debtor's separate property. It must follow that the intention was to confer upon creditors the right to sue and to proceed against and enforce payment out of the statutory separate property of the debtor, or otherwise the clause would be wholly illusory.

In addition to the literal construction which I have referred to there is another reason why this 20th section should be held to include the class of women mentioned in the third section of the statute, those married between 1859 and 1872; it is this: Up to the date at which the Revised Statutes of 1877 came into force a married woman had no power of disposition over her real estate except by a deed to which her husband must have been a party, and which was ineffectual to pass her estate until she had been examined apart from her husband touching her consent to "depart" with her estate. By chapter 127 R.S.O., 1877, before set forth, enlarged power was given her of conveying her land by a deed to which her husband was to be a party merely, an examination apart from her husband being now dispensed with. This was to some extent a relaxation, as was supposed, in the married woman's favour. This clearly applied to women married between 1859 and 1872. Then there being this dispensation with formalities previously required, and the power of alienation being thus enlarged, it was not unreasonable that as regards lands acquired after the statute married women should be made liable for their debts also contracted subsequently to that date.

The statute of 1877 was, however, repealed by the act of 1884, and although the 22nd section of the last act contains a saving of liability incurred under the act of 1877 yet that would not aid the appellant, inasmuch as his right and the corresponding liability did not accrue until the notes were made in 1887.

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We find, however, that assuming the correctness of my proposition that the liability created by the 20th section of the act of 1877 applied to women married between 1859 and 1872, the act of 1884 may, without any infringement of the rule against retroactive construction, be applied to the present case.

If Mrs. Jackson's lands in Etobicoke acquired by her in 1879 and 1882 were, under the act of 1877, liable for her contracts entered into subsequent to that act, it was not retrospective legislation offending against sound principles of construction that the statute which repealed the statute of 1877 should, as regards future contracts, also be held to provide a substitute for that liability neither greater nor less than that which the repealed act imposed. This is, in my opinion, just what the act of 1884 did by the 2nd and 3rd subsections of the 2nd section (which I have before set out.)

This act of 1884 greatly enlarged the power of disposition of married women for the 22nd section, repealing the previous law which required the concurrence of the husband of a married woman in any conveyance made by her, dispenses altogether with the necessity of such concurrence, and enables the married woman to convey alone provided she does so by deed.

Thenceforward married women were completely emancipated from their husbands' control both as regards the enjoyment and the disposition of their real estate. Can it be supposed that this would be the time and occasion chosen by the legislature to restrict the liability of their separate property? Surely not. So far then from there being any presumption against a continuance of the liability which existed under the statute of 1877, there ought, I think, to be a presumption that the legislature did not intend to withdraw from liability to the future separate creditors of married women any of their property which had previously

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been liable to creditors under the statute of 1877. All we have to see is, whether the language of the act is sufficiently comprehensive to include persons such as the respondent as regards the date of her marriage and as regards property acquired previously to the act and under the *regime* of the act of 1877 Subsection 2 says that a married woman shall be capable of entering into and rendering herself liable in respect of, and to the extent of her separate property on, any contracts, and of being sued as if she were a *feme sole*. And subsection 3 says, every contract entered into by a married woman shall be deemed to be a contract entered into and to bind her separate property, unless the contrary be shown.

This language is comprehensive enough to include the respondent and her liability as regards all these lands. It applies to all married women unless it is restricted to some particular class of them by the rule against retrospectivity. That rule, however, cannot apply here for, as I hope I have demonstrated, the 20th section of the statute of 1877 imposed, in other words it is true, just such a liability, and this merely carries on or continues the same liability.

It is not then to innovate in any way upon the respondent's rights to say that, as regards contracts entered into subsequent to the act of 1884, these clauses apply in the appellant's favour.

As to the words "separate property" used in these subsections I have already, I think, sufficiently demonstrated that these words, first found in the statutes of 1859, are entirely applicable to the real property of a married woman the title of which was acquired under the statutes of 1877, section 3.

I would lastly remark that I have been unable to see the force of the *ratio decidendi* of the Court of Appeal. Holding, as I do, that the statutes of 1884 subsections 2 and 3 apply, I think it quite immaterial

what the married woman's power of disposition may be. No doubt courts of equity act upon the theory or presumption that a married woman who has separate property when she contracts a debt intends to make such separate estate as she then has liable to answer it, and it is so liable or at least so much of it as she retains when sued.

If a married woman was restricted in dealing with her separate equitable estate to an alienation by deed she could not make it liable for her promissory notes without a charge by deed. But there is no analogy between that and the present case. Surely it was competent for the legislature, if they thought fit to do so, to say that a married woman should not be competent to dispose of her property in any way, and yet to say that she should be liable on her contracts as if she were a *feme sole* and that to the extent of her estate.

It is all a matter of statutory construction and though the legislature have not done what I have above supposed yet they have by section 20 of the act of 1877 and subsections 2 and 3 of section 2 declared, not merely that the separate property shall be liable (which is all a court of equity does in the case of equitable separate estate), but they have declared that " a married woman shall be capable of entering into any contract as if she were a *feme sole*," thus doing what a court of equity could not do—repealing the rule of the common law and creating a new legal liability. To this they have superadded the declaration that this liability shall be to the extent of her separate property. The liability here does not, therefore, depend upon the power of disposition, but upon the direct and positive enactment declaring the liability of the woman personally as well as that of her estate.

I am of opinion the appeal should be allowed and the judgment of the Court of Queen's Bench restored.

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FOURNIER and TASCHEREAU JJ. concurred with the Chief Justice.

GWYNNE J.—The sole question raised by this appeal is whether or not real property in the province of Ontario acquired in 1879 and 1882, in fee simple by a married woman who had been married in 1869, was liable to the satisfaction of a judgment recovered against her in an action brought against her for the breach of contracts entered into by her in 1887, and in my opinion that question is concluded in favour of the appellant, the judgment creditor, by the provincial statute of 1884, 47 Vic. ch. 19. Whatever difficulty there has been in the case seems to me to have arisen from what I cannot but think was the too hasty and inconsiderate introduction into the provincial act of certain sections of the Imperial act of 1882 *in ipsissimis verbis* and from the decisions of the courts in England upon one of the sections of that act; but the difficulty is wholly removed, I think, when we consider carefully the different state of the law which existed in England respecting the property of married women prior to, and at the time of, the passing of the Imperial act of 1882, from that which existed in the province of Ontario when the provincial act of 1884 was passed, and the great difference between the circumstances of the present case, and the question raised in relation thereto, and the circumstances of the cases in England to which we have been referred, and the question in those cases decided upon one of the sections of the Imperial act which has been imported *verbatim* into the provincial act.

The Imperial Act of 1882, 45 & 46 Vic. ch. 75, was passed, as its title and preamble show, for the purpose of consolidating and amending two acts, viz., the Married Woman's Property Act of 1870, and an act of 1874

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37 & 38 Vic. ch. 50, which had been passed to amend some provisions of the act of 1870. By this act of 1870 a married woman was enabled to hold as her separate property all the wages and earnings acquired by her after the passing of the act in any occupation, trade or employment in which she might be engaged, and to make deposits in savings banks and to invest monies belonging to her in the funds and in shares in joint stock companies in her own name, and to effect insurances upon her own life and the life of her husband, and to hold all such moneys, stock, shares and policies of insurance as her separate property. And as to women who should be married after the passing of the act it was by the 7th section enacted that where any woman married after the passing of the act should during her marriage become entitled to any personal property as next of kin, or one of the next of kin, of an intestate, or to any sum of money not exceeding two hundred pounds under any deed or will, such property should, subject and without prejudice to the trusts of any settlement affecting the same, belong to the woman for her separate use and her receipts alone should be a good discharge for the same; and the 8th section enacted that where any freehold, copyhold or customary hold property should descend upon any woman married after the passing of the act as heiress or co-heiress of an intestate, the rents and profits of such property should, subject and without prejudice to the trusts of any settlement affecting the same, belong to such woman for her separate use, and that her receipts alone should be a good discharge for the same. Save as above provided a married woman was incapable of acquiring and holding any real or personal property as her separate property and free from the control and disposition and from the debts and obligations of her husband, unless it should be vested in trustees for the

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use and benefit of the married woman separate and apart from her husband. By the act of 1870 it was further enacted that a husband should not, in the case of any marriage which should take place after the passing of the act, be liable for the debts of his wife contracted before marriage, but that the wife should be liable to be sued for, and that any property belonging to her for her separate use should be liable to satisfy, such debts as if she had continued unmarried. This clause made the interest of every woman married after the passing of the act in all property vested in trustees for her separate use and benefit, as well as all property declared by the act to be her separate property, liable to the satisfaction of debts incurred by her *dum sola*, thus wholly relieving the husband of every woman married after the passing of the act from all liability in respect of all such debts, and leaving him, as all husbands married before the passing of the act were, entitled to all the property which the wife had *dum sola* at the time of her marriage, to the same extent precisely as before the passing of the act. This was deemed an injustice, and to remedy it the Married Woman's Property Amendment Act of 1874, 37 & 38 Vic. ch. 50, was passed, which recites that it was not just that the property which a woman has at the time of her marriage should pass to her husband, and that he should not be liable for her debts contracted before marriage, and that the law as to the recovery of such debts required amendment; it then repealed the provisions of the act of 1870 which exempted the husband from liability for the debts of his wife contracted before marriage, in so far as respects marriages which should take place after the passing of the act, and enacted that husband and wife married after the passing of the act might be sued jointly for any such debt, and proceeded to declare that in such action or in any action brought

for damages sustained by reason of any tort committed by the wife before marriage, or by reason of the breach of any contract made by her before marriage, the husband should be liable to the extent only of the assets of the wife thereinafter mentioned, namely, the value of the property, real and personal, of the wife which by the marriage vested in the husband.

Such was the state of the law in England when the act of 1882 was passed for the purpose of consolidating the acts of 1870 and 1874 and of amending their provisions by extending the rights of married women in their real and personal property by enacting in substance, as it appears to me the act does, that every married woman, whenever married, whether before or after the passing of the act, should be capable of acquiring, holding and disposing by will or otherwise of any real or personal property as her separate property, in the same manner as if she were a *feme sole*, that is to say, the woman who should marry after the passing of the act, as provided in the 2nd section, and the woman who had been married before the passing of the act, as provided in the 5th section, thus conforming to the provisions of the 1st section which applies to every married woman whenever married. The only sections to which it is necessary to refer for the purposes of the present case are these 1st, 2nd and 5th sections, which enact as follows :—

1. A married woman shall in accordance with the provisions of this Act be capable of acquiring, holding and disposing, by will or otherwise, of any real or personal property as her separate property in the same manner as if she were a *feme sole* without the intervention of any trustee.

(2.) A married woman shall be capable of entering into and rendering herself liable in respect of, and to the extent of, her separate property on any contract, and of suing and being sued, either in contract or in tort or otherwise, in all respects as if she were a *feme sole*, and her husband need not be joined with her as plaintiff or defendant or be made a party to any action or other legal proceeding brought by or

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against her; and any damages or costs recovered by her in any such action or proceeding shall be her separate property; and any damages or costs recovered against her in any such action or proceeding shall be payable out of her separate property and not otherwise.

(3.) Every contract entered into by a married woman shall be deemed to be a contract entered into by her with respect to and to bind her separate property unless the contrary be shown.

(4.) Every contract entered into by a married woman with respect to and to bind her separate property, shall bind not only the separate property which she is possessed of or entitled to at the date of the contract, but also all separate property which she may thereafter acquire.

(5.) Every married woman carrying on a trade separately from her husband shall in respect of her separate property be subject to the bankruptcy laws as if she were a *feme sole*.

2nd section. Every woman who marries after the commencement of this act shall be entitled to have and to hold as her separate property and to dispose of, in any manner as aforesaid, all real and personal property which shall belong to her at the time of marriage or shall be acquired by or devolve upon her after marriage, including any wages, earnings money and property gained or acquired by her in any employment, trade or occupation in which she is engaged or which she carries on separately from her husband or by the exercise of any literary, artistic or scientific skill.

5th section. Every woman married before the commencement of this act shall be entitled to have and to hold and to dispose of in manner as aforesaid, as her separate property, all real and personal property, her title to which, whether vested or contingent and whether in possession, reversion or remainder shall accrue after the commencement of this act, including any wages, earnings, money so gained and acquired by her as aforesaid.

Now these 2nd and 5th sections were quite appropriate having regard to the law as it previously stood and was being amended, which did not enable any married woman to acquire and hold as her separate property any real or personal property otherwise than to the limited extent specified in the 7th and 8th sections of the act of 1870, or through the intervention of a trustee who should hold the property for her use and benefit separate and apart from her husband. The first section then which enabled every married woman to

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acquire hold and dispose by will or otherwise of any real or personal property, in the same manner as if she were a *feme sole* without the intervention of any trustee, was an extremely appropriate provision to be inserted in the English act. Having regard also to the fact that in the property real and personal of women married before the passing of the act of 1882 husbands at the time of the passing of that act had vested in them the right of holding and enjoying to their own use and benefit such property as belonged to the wife at the time of the marriage, or was acquired by her subsequently other than such as might be acquired to the limited extent named in the act of 1870, or was vested in a trustee for her to her use and benefit separate from her husband, it was natural, reasonable, and appropriate that the distinction should be made between women married after the passing of the act and those then already married which is made in the 2nd and 5th sections. Under this 5th section arose the case of *Reid* v. *Reid* (1) to which we have been referred as a judgment of the Court of Appeal wherein the court reviewing several cases, namely, *Baynton* v. *Collins* (2); In *re Thompson* and *Curzon* (3); In *re Hughes' Trusts* (4); In *re Tucker* (5); In *re Adames' Trusts* (6); In *re Hobson* (7) and In *re Dixon* (8), hold that where a woman married before the passing of the act of 1882 had, before the passing of the act, acquired a title in reversion subject to a life estate to certain property in excess of what she could have acquired as her separate property under the act of 1870, such property falling into possession after the passing of the act was not made her separate property by section 5. The object of the suit was to have it declared that the property in question was

(1) 31 Ch. D. 402.
(2) 27 Ch. D. 604.
(3) 29 Ch. D. 177.
(4) W.N. 1885 p. 62.
(5) 52 L.T.N.S. 923.
(6) 53 L.T.N.S. 198.
(7) 34 W.R. 195.
(8) 54 L.J. (Ch.) 964.

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her separate property under that section, or in the alternative that it might be settled on her and her children. If the property had already been settled to her separate use the action would have been unnecessary, but not having been so settled it became the property of her husband who could have disposed of it and who in point of fact had (although after the passing of the act). It became necessary, therefore, for the wife in order to obtain the benefit of the property separate from her husband to establish that it had become her separate property under the section 5, but Lord Justice Cotton pronouncing judgment said :—

> There is a title accruing in reversion before the passing of the act. The husband acquires a title to it subject to his wife's equity to a settlement if it falls into possession during coverture, and subject to her right by survivorship if he dies before it has been reduced into possession leaving her surviving. He might before the passing of this act have disposed of it by mortgage or sale subject to the wife's equity to a settlement and to her chance of survivorship. If the construction contended for by the respondent (the wife) is correct the title of the person claiming under the husband would be ousted, and the wife, notwithstanding the dealing with the property by the husband, would take it as her separate estate when it fell into possession.* * * In my opinion considering the section truly and fairly there must be an accruer of title after and not before the passing of the act, and the title must be considered as accruing when the married woman first acquires her interest in the property whether such interest is at that time in possession, reversion, or remainder.

Now we have only to consider what the nature of the title of the defendant in the present case to the property in question, with which alone we are at present concerned, was at the time of the passing of the Ontario Act of 1884 to see the utter inappropriateness and incongruity of this section 5 as regards the property of a married woman in the province of Ontario married before the passing of the act of 1884, and the inapplicability of the judgment in *Reid* v. *Reid* (1) to such a case as the present. Immediately upon the

(1) 31 Ch. D. 403.

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defendant acquiring the respective pieces of land in 1879 and 1882 she became seized of an estate of fee simple therein under ch. 125 R. S. O. 1877, which was but a repetition in that particular of ch. 73 C. S. U. C. in 1859, and under that act she had held and enjoyed the property:—

> Free from the debts and obligations of her husband and free from his control and disposition without her consent, in as full and ample a manner as if she were sole and unmarried.

And by chapter 127, sec. 3, of the same revised statutes she was enabled to convey such her estate in the said lands by deed as fully and effectually as if "she were a *feme sole*," except that it was provided that to make her conveyance of the land valid and effectual her husband must be a party to and execute the deed. Now the Ontario Act of 1884 having repealed this exception or proviso in sec. 3, of ch. 127, *eo instanti* upon the passing of that act the defendant became absolutely entitled to convey the said lands in fee simple as her separate property as fully and effectually as if she were a *feme sole*, by a deed executed by herself alone without her husband being a party to and executing the deed; this estate in the lands in question she still held when the promissory notes sued upon were made by her in June and July, 1887.

The act of 1884 also, while repealing ch. 125 R .S. O. 1877, enacted that such repeal should not affect any right acquired while the act was in force and thereby preserved the rights of all women then married to the property theretofore acquired by them under ch. 125, and *eo instanti* of enacting such repealing clause the act enacted in its 2nd section the 1st section of the English Act of 1882, in *ipsissimis verbis* save only the omission of subsection 5 omitted because of there being no bankruptcy law then in the Dominion of Canada, and thereby enacted, in language as I have shown

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sufficient to include every married woman, that a married woman should be capable not only of acquiring but of holding and disposing by will or otherwise of any real or personal property as her separate property, in the same manner as if she were *feme sole*. This power of disposition is in precise conformity with the clause of the act which repealed the exception or proviso contained in sec. 3 of ch. 127 R S. O 1877. The effect of this 2nd section, subsection 1, coupled with the said repealing clause, as regards the property in question in my opinion was, that *eo instanti* upon the passing of the act the defendant remained seized of the property in question as she had been before the act as her separate property, but discharged from the effect of the exception or proviso which previously had been contained in sec. 3 of ch. 127, and invested with the incident attached to absolute ownership of being able to dispose of the property by will or otherwise by the express enactment contained in the said 2nd section, so as to remove all doubt that after the passing of the act of 1884 she was seized of an absolute estate of inheritance in fee simple in the lands in question as her separate property which, under the 2nd subsection of section 2, was expressly made liable to satisfy all damages and costs recovered against her in any action instituted against her upon any contract entered into or tort committed by her.

In the argument before us this construction of the act and this application of the 1st subsection of the 2nd section to the property in question was not alluded to; the argument was confined on the part of the appellant to dispute, and upon the part of the respondent to support, the judgment of the Court of Appeal for Ontario, which mainly appears to have rested upon this argument, that the repeal of the exception contained in the 3rd section of ch. 127 only enabled the

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married woman to convey her real property by deed, and that therefore she could not dispose of it by will, and as a resulting consequence it was argued that the property in question could not be levied upon and made available for satisfaction of an execution issued upon a judgment recovered against the defendant in an action instituted by authority of law against her; that is to say, that while she can cut off any estate by the courtesy which the husband might have, and can convey away absolutely for her own benefit all her real property by deed *inter vivos*, she can, by not conveying it but holding on to it, obtain credit upon the strength of her having it, and prevent her judgment creditors from obtaining satisfaction thereout of their judgment debts. I have already expressed my opinion that section 1 of 47 Vic. ch. 19 enabled every married woman to dispose of her real property by will or otherwise; but apart altogether from this clause, and resting solely upon the repeal of the exception in section 3 of ch. 127 R.S.O., 1877, it is clear that every married woman can dispose of absolutely (by deed executed by herself alone) the whole estate which is vested in her. So long as she lives, therefore, it cannot be doubted that she has an absolute *jus disponendi* of all real property which the law enables her to hold and enjoy free from the control and disposition and from the debts and obligations of her husband. Now the real property of every judgment debtor, to the extent of his estate therein, is bound by a judgment recovered against the debtor and execution issued to enforce satisfaction of such judgment. There is no law which makes the case of a married woman judgment debtor any exception from that rule; on the contrary, the 2nd subsection of section 2, which enables her to enter into any contract and of being sued thereon, or in tort, in all respects as if she were a *feme sole*, and that, all

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damages and costs recovered against her on any action instituted against her shall be payable out of her separate property, in express terms subjects her to the provisions of the general law respecting writs of execution, ch. 66 R.S.O., 1877, the 14th section of which declares that:—

> Any person who becomes entitled to issue a writ of execution against goods and chattels may, at or after the time of issuing the same, issue a writ of execution against the lands and tenements of the person liable.

The estate vested in her in the lands in question was an estate in fee simple even though her husband, if he should survive her, might have an estate by the courtesy therein. Whether he would or not have such estate it is not necessary to decide in the present case, and I express no opinion. Whether she could or could not dispose of the lands by will is immaterial, for it is clear and is admitted that she could dispose of them absolutely by a deed *inter vivos*, and that estate which she could have disposed of by a deed executed by herself alone is what the law has expressly made liable to satisfy the judgment obtained against her, and she has no more right than any other judgment debtor to defeat the rights of her judgment creditors by a voluntary or fraudulent conveyance. I have not overlooked the case of *Douglas* v. *Hutchison* (1). Mr. Justice Street considered it to be distinguishable from the present case. I have not thought it necessary to consider whether it be so or not, for if it be not it will be seen from what I have already said that I cannot concur in it, and unless and until our judgment in the present case shall be reversed it cannot hereafter be considered of binding authority. The appeal must be allowed, with costs, and the judgment of the Divisional Court of Queen's Bench restored.

(1) 12 Ont. App. R. 110.

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PATTERSON J.—Mrs. Jackson, a married woman, made several promissory notes, all of them in the months of May, June and July, 1887, payable to the plaintiff.

She was married in 1869 without a settlement.

She had acquired real estate in the township of Etobicoke in 1879 and 1882 by conveyances to herself in fee without the intervention of a trustee.

The question is whether, under the law of Ontario as it existed in 1887, the Etobicoke lands were charged so as to be exigible for the payment of the notes.

The Revised Statutes of 1887 did not come into force until the 31st of December of that year. The law has therefore to be looked for in the Revised Statutes of 1877 and some later acts

The Married Woman's Property Act, which was chapter 127 of R.S.O. 1877, was repealed and replaced by The Married Women's Property Act 1884 (1).

By the Married Women's Real Estate Act (2) as amended by the Married Women's Property Act 1884, every married woman of the full age of 21 years was empowered to convey by deed her real estate and to do other specified things as fully and effectually as she could do if she were a *feme sole*.

The Married Woman's Property Act 1884, while it repealed chapter 125 of the R.S.O. 1877, provided that the repeal should not affect any act done or right acquired while chapter 125 was in force.

Looking at the third section of that act which was in force in 1879 and 1882 when the Etobicoke properties were acquired by Mrs. Jackson we find it enacted that :—

> Every woman who married between the 5th day of May, 1859, and the 2nd day of March, 1872, without any marriage contract or settlement shall and may, notwithstanding her coverture, have hold and

(1) 47 V. c. 19. [See p. 215.] (2) R.S.O. (1877) ch. 127.

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enjoy all her real property, whether belonging to her before marriage, or acquired by her by inheritance, demise or gift, or as heir-at-law to an intestate, or any other way after marriage free from the debts and obligations of her husband, and from his control or disposition without her consent, in as full and ample a manner as if she continued sole and unmarried, but this section shall not extend to any property received by a married woman from her husband during coverture.

The 4th section enables a woman who married after the 2nd day of March, 1872, to hold her real estate for her separate use free from any estate therein of her husband during her lifetime and from his debts and obligations, and from any claim or estate by him as tenant by the courtesy, but provides that nothing therein contained shall prejudice the right of the husband as tenant by the courtesy in any real estate of the wife which she has not disposed of *inter vivos* or by will; but in the case of woman married, as Mrs. Jackson was, before 1872, the husband's estate by the courtesy remains as at common law.

The state of the law respecting the property of married women and their power to charge it by their general engagements under the Married Woman's Act of 1859 (1), was ably explained by Moss C. J. in the case of *Furness* v. *Mitchell* (2). I do not propose to enter at present upon an historical examination of the subject. For that I refer to the judgment just mentioned, and to what was said in that case by the Chief Justice and other judges of whom I was one, and to my judgment in *Lawson* v. *Laidlaw* (3).

The act of 1859 called the property enjoyed under its provisions "separate property." I referred in *Furness* v. *Mitchell* (2), to five sections of the statute in which it was so designated. But it was held that some qualities of separate property, as recognized by courts of equity and as capable under the doctrines of those

(1) C. S. U. C. c. 73. (2) 3 Ont. App. R. 511.
(3) 3 Ont. App. R. 77.

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courts of being charged by a married woman by her general engagement, were wanting paticularly the *jus disponendi*, the woman being incapable of disposing of her property except by a deed in which her husband joined and the husband having still his estate by the courtesy, and that therefore the property, though designated separate property by the statute, was not separate in the sense essential to the married woman's power to create the equitable charge upon it.

Has that state of things been changed by the act of 1884? That is the main question before us.

It has, in my opinion, been changed.

The effect may be the same when property is charged by the general engagements of a married woman whether the charge is one depending in doctrines of courts of equity, or is effected by a process authorized or sanctioned by statute law, but it is to be noted that what was formally recognized only in equity is now a statutory principle. Take subsections 3 and 4 of section 2 which I have already quoted, and apply those provisions to the contracts now sought to be enforced, viz., the promissory notes made by Mrs. Jackson; each note is deemed to be a contract entered into by her with respect to and to bind her separate property, and binds not only the property she was possessed of or entitled to at the dates of the notes respectively, but also all separate property thereafter acquired by her.

Then were these Etobicoke properties her separate property?

They certainly were so, and were so as to the full and absolute estate in fee, subject only to the husband's right by the courtesy.

That right may exist without destroying the character of separate estate even when the separate estate of the wife is equitable only, and of course may when by the operation of a statute it becomes a legal estate.

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Morgan v. *Morgan* (1); *Appleton* v. *Rowley* (2).

No question of *jus disponendi* is now open. The necessity for the husband joining in a deed by which the wife conveys her property or any interest therein was done away with by the act of 1884 (3); but that restriction in her power to convey by deed would not, as it would seem to me, have prevented the effect given to her contracts by section 2.

Mrs. Jackson's property in the Etobicoke lands was in my opinion separate property and was bound by her contracts under section 2, subsections 3 and 4, that is to say the fee simple of the lands was bound subject to her husband's right if all things existed necessary to create in him an estate by the courtesy. His right as possible tenant by the courtesy should no more stand in the way of making his wife's estate exigible for her debts than would her right of dower stand in the way of a creditor of the husband who sought to enforce a judgment against the husband's lands.

In my opinion we should allow the appeal and restore the judgment of the divisional court.

Appeal allowed with costs

Solicitors for appellants: *Roaf & Roaf.*

Solicitors for respondent: *Armour, Mickle & Williams.*

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(1) 5 Madd. 408.
(2) L. R. 8 Eq. 139.
(3) R. S. O. 1877 c. 127 s. 3 amended by 47 V. c. 19 s. 22.

MICHAEL DWYER (PLAINTIFF).....APPELLANT; 1893

AND

THE CORPORATION OF THE TOWN OF PORT ARTHUR AND OTHERS (DEFENDANTS).....RESPONDENTS.

*Mar. 14.
*June 24.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Municipal Corporation—By-law—Street railway—Construction beyond limits of municipality—Validating Act—Construction of.

The corporation of the town of Port Arthur passed a by-law entitled "a by-law to raise the sum of $75,000 for street railway purposes and to authorize the issue of debentures therefor" which recited, *inter alia*, that it was necessary to raise said sum for the purpose of building, &c., a street railway connecting the municipality of Neebing with the business centre of Port Arthur. At that time a municipality was not authorized to construct a street railway beyond its territorial limits. The by-law was voted upon by the ratepayers and passed but none was submitted ordering the construction of the work. Subsequently an act was passed by the legislature of Ontario in respect to the said by-law which enacted that the same "is hereby confirmed and declared to be valid, legal and binding on the town * * * and for all purposes, &c., relating to or affecting the said by-law any and all amendments of the municipal act * * * shall be deemed and taken as having been complied with.

Held, reversing the decision of the Court of Appeal, Taschereau J. dissenting, that the said act did not dispense with the requirements of ss. 504 and 505 of the municipal act requiring a by-law providing for construction of the railway to be passed, but only confirmed the one that was passed as a money by-law.

Held, also, that an erroneous recital in the preamble to the act that the Town Council had passed a construction by-law had no effect on the question to be decided.

APPEAL from a decision of the Court of Appeal for Ontario (1) reversing the judgment at the trial in favour of the plaintiff.

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

(1) 19 Ont. App. R. 555.

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The facts of the case are sufficiently stated in the above head-note.

Mr. Justice Street granted an injunction until the trial restraining the Town Council from paying out any money for the building of the street railway and the contractors from proceeding with its construction. At the trial the interim injunction was, by consent of parties, made perpetual against the town subject to appeal and the action was dismissed against the other defendants, individual members of the council and the contractors. On appeal to the Court of Appeal the judgment of the trial judge was reversed, the injunction set aside and liberty was given to respondents to apply for a reference to ascertain the damages sustained by the continuance of the injunction after the validating act came in force. The plaintiff then appealed to this court.

Aylesworth Q.C., for the appellant.

Delamere Q.C., for the respondents.

The judgment of the majority of the court was delivered by

THE CHIEF JUSTICE.—The by-law no. 281 passed on or about the 5th January, 1891, was *ultra vires* of the corporation and void inasmuch as it made provision for the raising of a sum of $75,000 "for the purpose of building, equipping, maintaining and operating a street railway connecting the municipality of Neebing with the business centre" of the town of Port Arthur. As the law then stood the municipal corporation of a town had no statutory authority to raise money for any such purpose. Had the by-law been restricted to the raising a fund for the construction of a street railway wholly within the limits of the municipality I am not prepared to say that it would have been void

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merely because a by-law under sec. 504, subsec. 14 of the Municipal Act (as amended by sec. 25 of the Municipal Amendment Act of 1890) providing for the construction of the road upon such terms as the Lieut. Governor in Council should approve, had not been previously passed after a due compliance with the preliminaries and conditions required by section 505 of the Municipal Act. There is nothing in the statute indicating the order in which the by-law for construction and the by-law for raising money to be applied to that purpose are to be passed. The other objection that the by-law provided for a work of railway construction beyond the limits of the municipality was, however, a fatal one. Then there was a necessity for validating the by-laws as a financial ordinance, more especially as debentures appear to have been issued under it. This was done by the local act 54 Vic. ch. 78 passed on the 4th May, 1891, which was entitled "An Act to consolidate the debt of the town of Port Arthur." The preamble recites *inter alia* that the corporation had passed a by-law authorizing the construction and operation of the Electric Street Railway by a majority of the electors voting thereon on the 5th January, 1891, and that the corporation had petitioned that, for the purpose of removing all doubts as to the validity of the by-law, the same might be confirmed and legalized. Several other subjects besides this street railway matter were embraced in the act. Then the 15th section is that part of the enacting portion of the act which is material here; it enacts that "the said by-law," (that before referred to) "is hereby confirmed and declared to be valid, legal and binding on the town, notwithstanding anything in any act or law to the contrary. And for all purposes, matters and things whatsoever relating to or affecting the said by-law any and all amendments of the Municipal Act having force

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and effect on the 1st of August, 1891, shall be deemed and taken as having been complied with, and as having been made and been in full force and effect prior to, the passing of said by-law."

By 54 Vic. ch. 42 a subsec. (16) was added to sec. 504 of the Municipal Act by which city and town municipalities were authorized to construct street railways extending beyond their own limits.

This provision was, however, not to come into force until the 1st July, 1891.

The question in this appeal is whether the validating act before referred to had the effect of dispensing with the requirements of the Municipal Act that a by-law authorizing construction should be passed, or whether it was intended only thereby to confirm the by-law of the 5th January, 1891, as a money by-law.

The erroneous recital in the preamble that the Town Council had passed a construction by-law can, in my opinion, have no effect whatever on this question. It is well settled that an erroneous recital of a fact in an act of Parliament may be controverted, and that a mistaken assumption of law is not conclusive. I need not do more that to refer on this head to a well known text book where all the cases are collected (1). Then a reference to the by-law itself, set out in the schedule to the act, shows conclusively that it did not provide for construction but merely for the issuing of the debentures by means of which the fund for construction was to be raised.

The only other argument which it is necessary to notice is that founded on the provision that for all purposes, matters and things relating to and affecting the by-law, all amendments of the Municipal Act having effect on the 1st August, 1891, should be deemed and

(1) Hardcastle on Statutory Law, 2.ed. pp. 461 to 467.

taken as having been complied with, and as having been in full force when the by-law was passed.

I am unable to see in this anything like a legislative dispensation with the requirements of the 504th and 505th secs. of the Municipal Act before adverted to, requiring a by-law providing for construction to be passed under the conditions therein enacted. The provisions in question are of great importance to the ratepayers giving them a control over the expenditure of their money, and I am decidedly of opinion that it is incumbent on the courts not to allow these rights of the ratepayers to be taken away by any ambiguous or uncertain expressions in a legislative enactment which might well have another object in view.

I think it is the bounden duty of the courts to construe with the utmost strictness all retroactive legislation of this kind, and in the absence of express words to decline to enlarge by implication the terms in which such statutes are expressed.

I can find nothing in the validating act taking away the rights of the ratepayers to control the construction of the railway, and I must, therefore, express my adherence to the judgment of Mr. Justice Street, and the reasons he has given for holding the contrary.

The appeal should be allowed and the judgment of Mr. Justice McMahon should be affirmed with costs to the appellant in this court and in all the courts below.

TASCHEREAU J.—I am of opinion that the appeal should be dismissed.

Appeal allowed with costs

Solicitors for appellant: *Wink & Cameron.*

Solicitors for respondents: *Keefer & Boyce.*

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*Mar. 21.

*June 24.

THOMAS CUMMING AND OTHERS (PLAINTIFFS) ..... APPELLANTS;

AND

THE LANDED BANKING AND LOAN COMPANY (DEFENDANTS) RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Trustee—Will—Executors and trustees under—Breach of trust by one—Notice—Inquiry.

After all the debts of an estate are paid, and after the lapse of years from the testator's death, there is a sufficient presumption that one of several executors and trustees dealing with assets is so dealing *qua* trustee and not as executor, to shift the burden of proof. *Ewart* v. *Gordon* (13 Gr. 40) discussed.

W. and C. were executors and trustees of an estate, under a will. W., without the concurrence of C., lent money of the estate on mortgage, and afterwards assigned the mortgages which were executed in favour of himself, described as "trustee of the estate and effects of" (the testator.) In the assignment of the mortgages he was described in the same way. W. was afterwards removed from the trusteeship and an action was brought by the new trustees against the assignees of the mortgages to recover the proceeds of the same.

Held, reversing the judgment of the Court of Appeal, that in taking and assigning said mortgages W. acted as a trustee and not as an executor; that he was guilty of a breach of trust in taking and assigning them in his own name; that his being described on the face of the instruments as a trustee was constructive notice to the assignees of the trusts, which put them on inquiry; and that the assignees were not relieved as persons rightfully and innocently dealing with trustees, inasmuch as the breach of trust consisted in the dealing with the securities themselves and not in the use made of the proceeds.

APPEAL from a decision of the Court of Appeal for Ontario(1) reversing the judgment of the Queen's Bench

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

(1) 19 Ont. App. R. 447.

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Division(1), which affirmed the judgment of the Chancellor (2).

The plaintiffs are the trustees of the estate of James Cumming, and the action was brought to recover from defendants the proceeds of certain mortgages assigned to them by Thomas B. Wragg, formerly an executor and trustee of the estate.

Wragg and Robert Cumming were executors and trustees under the will of James Cumming, the management being almost entirely left to Wragg, his co-executor being only eighteen years old at his father's death. Wragg lent money of the estate and took mortgages in his own name, being described in the instrument as "Thomas Busby Wragg, of the city of Belleville, Esquire, trustee of the estate and effects of the late James Cumming, deceased." Two of these mortgages were assigned to a building society and in the assignment Wragg was described as in the mortgages.

Negotiations were subsequently made by one Bell, solicitor of the estate, with the defendants for a loan to pay off the money borrowed from the building society, which was agreed to and a new assignment was made by Wragg to the defendants, in which Wragg was also described as in the former instruments. Except this description the defendants had no knowledge of Wragg's position or of the affairs of the estate.

An action on behalf of the estate was brought against Wragg to make him account for his dealings with the estate money and judgment was recovered against him for a large amount, and he was removed from the trusteeship. The present action was then brought by the newly appointed trustees against the defendants.

The action was tried before the Chancellor who gave judgment in favour of the plaintiffs (2). His judgment

(1) 20 O.R. 382. (2) 19 O.R. 426.

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was affirmed by the Queen's Bench Division (1), whose decision was afterwards reversed by the Court of Appeal (2). The plaintiffs then brought the present appeal.

Marsh Q.C., for the appellants, referred to *Duncan* v. *Jaudon* (3); *Hill* v. *Simpson* (4); and *Haynes* v. *Forshaw* (5), where *Hill* v. *Simpson* (4) is cited. as authorities for the contention that defendants, in dealing with Wragg, were bound to make inquiries

W. Cassels Q.C. and *Mackelcan* Q.C., for the respondents, cited *Ashton* v. *Atlantic Bank* (6); *Forbes* v. *Peacock* (7).

The judgment of the court was delivered by

THE CHIEF JUSTICE.—The Chancellor by whom this action was originally tried, the Queen's Bench Division consisting of three judges, and the learned Chief Justice of the Court of Appeal, all came to the conclusion that in the matter of the assignment of the mortgages in question Wragg was acting as trustee, and not in the capacity of executor, under the will of James Cumming. Three learned judges of the Court of Appeal arrived at a contrary conclusion. In the several judgments which were delivered in the courts below the reasons for and against the view which ultimately prevailed are fully set forth.

I have come to the conclusion that the judgment in the court of first instance was entirely right, and that for the reasons given by the Chancellor to whose conclusions, as both regards the facts and the law, I give my unqualified assent.

Had Wragg not been an executor under the will of Cumming at all no one can doubt that there would

(1) 20 O.R. 382.
(2) 19 Ont. App. R. 447.
(3) 15 Wall. 165.
(4) 7 Ves. 152.
(5) 11 Hare 104.
(6) 3 Allen (Mass.), 217.
(7) 1 Ph. 717.

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have been a breach of trust in the assignment of these mortgages of which the respondents must be deemed to have had notice. That there would have been in that case in fact a breach of trust is evident, as Wragg had no power to deal with or transfer the securities in which the trust funds belonging to the estate might happen to be invested.

Granting that there was authority to invest the trust funds in the mortgages to Foley & Brignall yet Wragg would have been guilty of a breach of trust in taking those securities in his own name alone. He would have been guilty of a further breach of trust when he assigned these mortgages to the building society, and of yet another dereliction of his duty as a trustee when he made the transfer to the respondents.

Then, on the face of all the instruments,—the mortgages themselves, the assignments to the building society, the re-assignments by the latter to Wragg, and the assignments by Wragg to the respondents,—he is described as a trustee. This was beyond all doubt or question sufficient to give notice to the respondents that he was a trustee professing to act under some trust contained in the will of James Cumming. They, therefore, had constructive notice of the trusts contained in that instrument. If they had made the inquiries which they ought to have made they would surely and easily have discovered the fraud and breach of trust which Wragg was perpetrating.

It is said, however, that Wragg having been an executor as well as a trustee, and the law being that as an executor he had power without the concurrence of his co-executor to make a valid mortgage of any of the assets provided the mortgagees had no notice either from the nature of the transaction or from extrinsic circumstances that he was acting in fraud of the estate, he must be assumed to have been acting as executor in

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these transactions, and that therefore the respondents having had no actual notice of any breach of trust are purchasers for value without notice and entitled to hold the mortgages as such. The case of *Ewart* v. *Gordon* (1) is relied on as an authority for this. I was counsel for the defendant in that case, and my recollection of it, confirmed by a recent perusal of the judgment, leads me to the same conclusion as the Chancellor, viz.: that the actual decision there has no bearing on the present question.

As regards Wragg himself and all persons taking securities from him it would, I think, without altogether ignoring *Sweeny* v. *Bank of Montreal*, (2) be impossible to say that he was not acting as on the face of these instruments he declared himself to be acting, viz., as a trustee and not as an executor.

The respondents' own officer in his evidence swears that the respondents' company dealt with Wragg as a trustee, and in their statement of defence they do not even set up the ground the majority of the Court of Appeal have rested their judgment upon, namely, that he was acting as an executor.

I think it impossible now to hold that Wragg was acting as executor after having announced himself to be dealing with the respondents as a trustee, and after their own officer's admission that they dealt with him in that character.

Further, I am not prepared to say that after all the debts of an estate are paid, and after the lapse of ten years from the testator's death, there ought not to be in any case at least a presumption that one of several executor-trustees who is dealing with assets is so dealing with them *quâ* trustee and not as executor. I think in such a case it should lie on the person seeking to uphold the transaction to show that he dealt with

(1) 13 Gr. 40. (2) 12 App. Cas. 617.

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the other party as an executor. What I have now said may perhaps to some extent contravene propositions laid down in *Ewart* v. *Gordon* (1), or in some of the cases relating to the same estate decided at the same time. I should be unwilling to do this did I not feel that that case was a very strong decision bearing hardly on the beneficiaries of the estate. I do not go so far as to say that the presumption I speak of ought to be conclusive, but I think it ought at least to shift the burden of proof. Then, if it is sufficient for that purpose it is clear that the respondents here cannot say that they did not deal with Wragg as a trustee, for they accepted transfers of these securities from him acting ostensibly in that character, and moreover their officer says they dealt with him as a trustee.

I also agree with Mr. Justice Street that if it was necessary to show that these mortgages had been appropriated to the trust (referring to the case of *Willmott v. Jenkins*) (2), there was proof of such an appropriation here, inasmuch as that fact appeared from the form of the mortgage deeds themselves. What could show more plainly that personal assets held originally by an executor, who was also a trustee, had been turned over to the trust than the fact that he had invested them in securities taken in favour of the trust ?

If there had been within the scope of the trust power in Wragg acting alone to deal with these securities in the way he has done, and the only breach of trust had consisted in his misapplication of the moneys received from the respondents, then it would have been a case within the statute which relieves persons rightfully and innocently dealing with trustees from seeing to the application of purchase money and loans. But, as I have said, the dealing with the securities themselves,

(1) 13 Gr. 40.

(2) 1 Beav. 401.

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CUMMING v. THE LANDED BANKING AND LOAN COMPANY.

The Chief Justice.

not merely the use made of the proceeds, involved a breach of trust of which the respondents must be taken to have had constructive notice.

The original judgment pronounced by the Chancellor must be affirmed with costs to the appellants in all the courts.

Appeal allowed with costs.

Solicitors for appellants: *Lount, Marsh & Lindsey.*

Solicitors for respondents: *Mackelcan, Gibson & Gausley.*

CHARLES MILLAR (DEFENDANT) .....APPELLANT; 1893

AND *Mar. 21, 22.
*June 24.

ALFRED EDWIN PLUMMER (PLAINTIFF) ..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Promissory note—Accommodation—Bad faith of holder—Conspiracy.

P. indorsed a note for the accommodation of the maker who did not pay it at maturity but having been sued with P. he procured the latter's indorsement to another note agreeing to settle the suit with the proceeds if it was discounted. He applied to a bill broker for the discount who took it to M. a solicitor, between whom and the broker there was an agreement by which they purchased notes for mutual profit. M. agreed to discount the note. M.'s firm had a judgment against the maker of the note and an arrangement was made with the broker by which the latter was to delay paying over the money so that proceedings could be taken to garnishee it. This was carried out; the broker received the proceeds of the discounted note and while pretending to pay it over was served with the garnishee process and forbidden to pay more than the balance after deduction of the amount of the judgment and costs; and he offered this amount to the maker of the note which was refused. P., the indorser, then brought an action to restrain M. and the broker from dealing with the discounted note and for its delivery to himself.

Held, affirming the decision of the Court of Appeal, that the broker was aware that the note was indorsed by P. for the purpose of settling the suit on the former note; that the broker and M. were partners in the transaction of discounting the note and the broker's knowledge was M.'s knowledge; that the property in the note never passed to the broker and M. could only take it subject to the conditions under which the broker held it; that the broker not being the holder of the note there was no debt due from him to the maker and the garnishee order had no effect as against P.; and that the note was held by M. in bad faith and P. was entitled to recover it back.

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

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APPEAL from a decision of the Court of Appeal for Ontario affirming the judgment of the Divisional Court in favour of the plaintiff.

The material facts of the case are sufficiently set out in the above head-note and are fully stated in the judgment of Mr. Justice Sedgewick.

Donovan for the appellant.

Beck for the respondent.

The judgment of the court was delivered by :—

SEDGEWICK J.—The plaintiff, Plummer, a responsible gentleman living in Toronto, indorsed a note for the accommodation of one Charles Lowe, a person of no means or credit, of which note the firm of John Fisken & Co. were the holders. Lowe did not pay the note and Fisken & Co. commenced an action against Plummer and Lowe for its recovery. After the suit was commenced and on the first day of April, 1891, Lowe drew a note for $230 payable to the order of Plummer, went to Plummer and obtained his endorsation and agreed with him that from its proceeds when dis counted, if he could succeed in discounting it, he would pay the note in suit held by Fisken & Co Lowe then applied to the defendant Coldwell, who is a bill broker, to discount the note. Coldwell did not discount it but a day or two afterwards, meeting Lowe on the street, he asked him for the note and obtained possession of it for the alleged purpose of seeing what he could do about it ; he thereupon went to the appellant Millar, a solicitor in the city of Toronto, between whom and Coldwell there was an agreement under which they purchased notes for their mutual profit. Millar agreed to discount the note. Now it so happened that the legal firm of which Millar was a member and of which one Levisconte was also a member had an un-

satisfied judgment in the Division Court, for clients of theirs, C. P. Reid & Co. against Lowe, and upon Millar applying to his partner Levisconte for a check with which to discount the note, the idea struck the mind of Levisconte that in some way or other he might get a portion of this money for the purpose of satisfying their judgment against Lowe, and the scheme resolved upon was to bring Coldwell into their confidence, pay him the proceeds of the note but get him to delay paying over the money in the meantime, then to commence garnishee proceedings in the name of Reid against Coldwell as a debtor of Lowe, and attach in Coldwell's hands the amount of that claim, and to pay over only the balance to Lowe. The scheme was partially successful; Millar and Levisconte paid to Coldwell $205 (the discount charged was only at the rate of 45 per cent per annum): garnishee proceedings were issued; Coldwell went to Lowe with the money and while he was pretending to pay it over to him Levisconte walked in with his garnishee process, served it on Coldwell and forbade him paying over $111.20 the amount of money attached with costs. Coldwell then offered Lowe the balance which he refused to take. This suit was then brought by Plummer for the purpose of obtaining an order restraining Millar and Coldwell from dealing with the note in question and for its delivery to the plaintiff. Mr. Justice McMahon who tried the case held in effect that Millar was the holder of the note in due course and dismissed the action. The Divisional Court unanimously, and the Court of Appeal with Mr. Justice Burton dissenting, reversed the judgment of the trial judge and ordered a decree for the plaintiff as prayed; and on this appeal we are asked to restore the original judgment.

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I think the following facts are established by the evidence. (1) Lowe obtained the note from the plaintiff with his endorsation upon it, not for the purpose of accommodation generally, but for the purpose of discounting it and with the proceeds paying the Fisken's claim; (2) Millar never became the holder of the note; no definite agreement had been come to between him and Lowe in reference to it and no property passed to him; (3) Coldwell was aware of the circumstances under which Lowe obtained Plummer's endorsation; (4) there was a joint conspiracy to which Caldwell, Millar and Levisconte were all parties, its object being to divert the proceeds of the note from its proper channel and to dishonestly obtain a benefit for Millar and Levisconte's clients at the expense of Plummer; (5) Plummer was not in any way a party to the garnishee proceedings. This suit was instituted and an interim injunction obtained before any final garnishee order had been made, and the amount of Reid's claim was paid by Coldwell to Millar and Levisconte as solicitors for Reid before a final garnishee order had been passed directing payment.

The contention of the appellant's counsel is that Millar is a holder of the note in due course; that it was discounted by him, and the proceeds paid to Coldwell in good faith; and that whatever may have been the character of the dealings as between Plummer and Lowe, and Lowe and Coldwell, he is not in any way affected by them, and is entitled to hold the note against both Plummer and Lowe. I do not so view it. Both Coldwell and Millar admit that the note in question was one within the purview of their agreement; that agreement was, substantially, that Millar was to loan to Coldwell one half of the moneys which he might require in the discounting of notes; that Coldwell should give his own notes to Millar for that

half, as well as transfer to him the securities themselves; that Millar was to be Coldwell's attorney irrevocable in connection with the securities; and that the profits in connection with these transactions were to be equally divided between them. It is true that the agreement provided that neither party was to be an agent of the other, except as therein expressly set out, but that, I think, does not in any way affect the relationship of partnership or *quasi* partnership created between them under the agreement. I am strongly of opinion that, in consequence of the agreement, Coldwell's knowledge was Millar's knowledge; Coldwell could not give Millar a better title than he had himself. It is clear that Coldwell was not a holder in due course of the note; the title had never passed to him at the time of the alleged discounting; and although, upon the authorities, he might have conveyed the title to a purchaser for value without notice, so as to have bound Plummer and Lowe, yet his relationship to Millar was such that Millar could not take it from him except subject to the conditions under which he himself held it. If Coldwell was not the holder of the note there was no debt due from him to Lowe, and the garnishee order had no effect as against Plummer. The result necessarily is that the note now in Millar's hands is held by him in bad faith; it is not his property, and the plaintiff is entitled to recover it back. The appeal is therefore dismissed.

Appeal dismissed with costs.

Solicitor for appellant: *Joseph A. Donovan.*

Solicitors for respondent: *Beck & Code.*

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*May 3, 4.

*June 24.

THE HALIFAX STREET RAILWAY COMPANY (DEFENDANT)..... APPELLANT;

AND

THOMAS JOYCE (PLAINTIFF) .....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Negligence—Street railway—Height of rails—Statutory obligation—Accident to horse.

The charter of a street railway co. required the road between, and for two feet outside of, the rails to be kept constantly in good repair and level with the rails. A horse crossing the track stepped on a grooved rail and the caulk of his shoe caught in the groove whereby he was injured. In an action by the owner against the company it appeared that the rail, at the place where the accident occurred, was above the level of the roadway.

Held, affirming the judgment of the Supreme Court of Nova Scotia, that as the rail was above the road level, contrary to the requirements of the charter it was a street obstruction unauthorized by statute and, therefore, a nuisance and the company was liable for the injury to the horse caused thereby.

APPEAL from a decision of the Supreme Court of Nova Scotia (1) refusing the defendants a new trial.

The action was brought to recover damages from the defendant company for injuries caused to plaintiff's horse while crossing the street railway and getting his foot caught in the groove of one of the rails. There were two trials, the first resulting in a verdict for defendant which was set aside and a new trial ordered. An appeal to this court from the order for a new trial was quashed (2). On the second trial a verdict was given for plaintiff which was affirmed by the full court, from whose decision the present appeal was taken.

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

(1) 24 N. S. Rep. 113.

(2) 17 Can. S. C. R. 709.

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THE HALIFAX STREET RAILWAY COMPANY v. JOYCE.

The main contention of the defendant in moving the court below for a new trial was that the jury had failed to answer questions submitted to them as to the state of the roadway at the place of the accident, but the court held that the point of the questions submitted was disposed of by other answers and the mere fact that certain questions were not answered did not entitle defendant to another trial.

Ross Q.C. for the appellant.

Newcombe for the respondent.

The judgment of the court was delivered by :—

SEDGEWICK J.—The plaintiff (respondent) recovered a verdict against the city, in the Supreme Court of Nova Scotia, for $32.25. The plaintiff's horse, in crossing defendant's street railway, stept on a grooved rail; the caulk of his shoe caught in the groove and he was injured. The court *in banc* refused to disturb the verdict and from that judgment this appeal is taken. We are of opinion the appeal should be dismissed. The accident was occasioned by the defendant company placing on the street the grooved rail in question. They had a right, under the facts proved in evidence and their charter, to place a grooved rail on the street but they were bound to see that the roadway on both sides of the rail should be kept level with it. They had a right to place a grooved rail on the street but only in such a way as not to protrude above the level of the street. The rail in question protruded above that level. It was a street obstruction unauthorized by statute and therefore a nuisance. It was this obstruction that caused the damage and the company was properly found liable.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for appellant: *F. G. Forbes.*

Solicitor for respondent: *E. L. Newcombe.*

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*Mar. 15, 16.

*May 1.

LAWRENCE G. MACDONALD (INTERVENANT). ... . AND WILLIAM CULLY (DEFENDANT) .... } APPELLANTS;

AND

FRANCOIS ALIAS FRANCIS FERDAIS (PLAINTIFF)..... } RESPONDENT.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA (APPEAL SIDE).

Action confessoire—Real or apparent servitude—Registration—44 & 45 V. c. 16 ss. 5 and 6 (P. Q.)—Art. 1508 C.C.—Procedure—Matters of in appeal.

By deed of sale dated 2nd April, 1860, the vendor of cadastral lot no. 369 in the parish of Ste. Marguerite de Blairfindie, district of Iberville, reserved for himself, as owner of lot 370, a carriage road to be kept open and in order by the vendee. The respondent Ferdais as assignee of the owner of lot 370 continued to enjoy the use of the said carriage road which was sufficiently indicated by an open road, until 1887 when he was prevented by appellant Cully from using the said road. C. had purchased the lot 369 from McD. intervenant, without any mention of any servitude and the original title deed creating the servitude was not registered within the delay prescribed by 44 & 45 V. (P.Q.) c. 16 ss. 5 and 6.

In an action *confessoire* brought by F. against C. the latter filed a dilatory exception to enable him to call McD. in warranty and McD. having intervened pleaded to the action. C. never pleaded to the merits of the action. The judge who tried the case dismissed McD.'s intervention and maintained the action. This judgment was affirmed by the Court of Queen's Bench. On appeal to the Supreme Court of Canada:

Held, affirming the judgment of the court below, that the deed created an apparent servitude, (which need not be registered,) and that there was sufficient evidence of an open road having been used by F. and his predecessors in title as owners of lot no. 370 to maintain his action *confessoire*.

*PRESENT:—Strong C.J. and Fournier, Taschereau, Gwynne and Sedgewick JJ.

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Held, also, that though it would appear by the procedure in the case that McD. and C. had been irregularly condemned jointly to pay the amount of the judgment, yet as McD. had pleaded to the merits of the action and had taken up *fait et cause* for C. with his knowledge, and both courts had held them jointly liable, this court would not interfere in such a matter of practice and procedure.

APPEAL from a judgment of the Court of Queen's Bench for Lower Canada (appeal side) confirming the judgment of the Superior Court for the district of Iberville, which maintained respondent's action *confessoire* and adjudged that a servitude or right of way exists on the lot of land no. 369 of the cadastral plan of the parish of St. Margaret of Blairfindie, belonging to the appellant William Cully, in favour and for the benefit of the lot of land no. 370 of the said cadastral plan belonging to the respondent, and condemned both appellants to pay twenty-five dollars damages to the respondent.

On the 2nd day of April, 1860, Prosper Ferdais, the respondent's father, sold the lot of land no. 369 to Thomas Haddock by deed passed before Mtre Charbonneau, notary public, reserving in his favour a right of way on the said lot in the following terms, to wit:

Avec réserve de la part du dit vendeur d'un chemin de voiture sur le terrain ci-dessus vendu, en par le vendeur ne causant aucun dommage, pour charroyer du bois, foin ou autres fruits récoltés, chaque fois que le vendeur le jugera nécessaire.

That deed of sale was not registered until the 10th day of June, 1886, subsequently to the registration of appellant Cully's title deed of said lot no. 369.

On the 16th day of April, 1874, the said Prosper Ferdais made a donation of the lot of land no. 370 to the respondent, without any mention whatever of the said right of way.

By deed of sale passed on the 28th day of October, 1882, duly registered on the 28th day of December, 1882, Rose Tobin the widow and universal legatee of

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the said Thomas Haddock, sold the said lot of land no. 369 to the appellant L. G. Macdonald, with no mention whatever of a right of way.

And on the 1st day of June, 1886, the said L. G. Macdonald sold the said lot of land no. 369 to the appellant William Cully, without any mention of a right of way, and this last mentioned deed of sale was duly registered on the 8th day of June, 1886, two days before the registration of the aforesaid deed of sale, dated the 2nd day of April, 1860, upon which the respondent pretends to establish his right of way.

On the 15th day of June, 1887, the respondent instituted the present action against the appellant William Cully, claiming the said right of way and $200 damages.

To this action the said William Cully filed a preliminary plea, a dilatory exception, asking for the suspension of the proceedings until he would have called in the case the said L. G. Macdonald, his vendor and his warrantor; and before adjudication upon the said dilatory exception, the said L. G. Macdonald, on the 23rd day of April, 1888, presented a petition in intervention to be allowed to take the *fait et cause* of the said William Cully and to contest the said action.

On the 12th day of December, 1888, the said intervening party L. G. Macdonald filed his pleas to the said action, alleging in said pleas:

1st. That he acquired the said lot of land no. 369 free from any servitude whatever, and that when he acquired the said land, and when he sold the same to the defendant William Cully, the pretended deed creating the alleged servitude was not registered, and that such deed was never registered except after the delay fixed by law to register the same had elapsed.

2nd. That the right of way stipulated in the said deed of sale of the 2nd day of April, 1860, does not

specify or create any servitude of passage for the said Prosper Ferdais and his assigns, or for the said lot of land no. 370, but merely for the said vendor Prosper Ferdais personally and individually.

3rd. That there is nothing in the action or in the deeds set up to show where or at what point or place the alleged right of way existed or now exists.

4th. That two or three years before the institution of the action the fences and ditches dividing the said lands were rebuilt and made anew by the respondent himself, and that no gate in the fence and no bridge over the ditch was made at any point or place for the use of said pretended right of way.

5th. A general denial.

The respondent joined issue with the said intervening party L. G. Macdonald, and after all the evidence had been taken on the 2nd day of March, 1889, the plaintiff (respondent) inscribed the case for hearing on the dilatory exception and intervention giving notice thereof to the defendant, the appellant, William Cully.

On the 28th day of September, 1889, the Superior Court for the district of Iberville, after having heard the plaintiff (the respondent) and the intervening party L. G. Macdonald, rendered judgment against both the intervening party L. G. Macdonald and the defendant William Cully, affirming the existence of the said right of way upon defendant's lot of land no. 369 in favour and for the benefit of plaintiff's land no. 370, ordering both the defendant and the intervening party to rebuild the gates in the fences at each end of such road or passage, and condemned the defendant and the intervening party jointly and severally to pay to the plaintiff the sum of twenty-five dollars damages, with the costs of the action up to the filing of the intervention; the intervening party being alone condemned to

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pay the costs of his intervention and contestation of the action.

E. Z. Paradis and *Belcourt* for appellants in support of the appellant's pleas cited and relied on Boncenne (1); *Stein* v. *Bourassa* (2); Articles 548, 1508, 1519, 1522, 1524 C.C ; Laurent (3); Laurent (4); Demolombe (5).

Geoffrion Q.C. for respondent referred to articles 125, 126, 127, 2116 C. C. P.; Pigeau (6).

THE CHIEF JUSTICE.—I have very grave doubts as to the nature and character of the servitude in this case, but as both my learned brothers Fournier and Taschereau concur I will not take upon myself to dissent and therefore, though doubting, I concur in their conclusion of dismissing the appeal.

FOURNIER J.—Le présent appel est d'un jugement rendu par la cour du Banc de la Reine, le 26 septembre 1892, confirmant un jugement de la cour Supérieure, d'Iberville, rendu par l'honorable juge Wurtele, le 28 septembre 1889, maintenant l'action de l'intimé contre les appelants.

L'intimé allègue en substance que par acte passé, le 2 avril 1860, par-devant Mtre Charbonneau et collègue, notaires, Prosper Ferdais vendit à Thomas Haddock, l'immeuble décrit au dit acte comme suit :

Un terrain de forme irrégulière contenant vingt-deux arpents en superficie, mesure précise, à prendre dans la totalité d'un terrain appartenant au dit vendeur, dans la dite paroisse de Blairfindie, et renfermée dans les limites suivantes, savoir : vingt-deux arpents à prendre dans la totalité du dit terrain sur toute la largeur, étant la partie nord du dit terrain tenant au nord au ruisseau des Noyers, au sud au terrain de William Brownrigg et au nord-est à la partie du dit terrain conservée par le vendeur, sans bâtisses dessus construites.

(1) 3 vol. 387.
(2) 18 Rev. Leg. 484.
(3) 7 vol. No. 175.
(4) 8 vol. no. 136.
(5) 12 vol. no. 716, 721.
(6) 1 vol. 184.

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La terre ainsi décrite et vendue comme susdit est maintenant désignée sous le n° 369 du cadastre officiel.

L'acte de vente a été enregistré.

Le dit Prosper Ferdais, maintenant décédé, s'était réservé un chemin sur la dite terre dans les termes suivants: Avec réserve de la part du dit vendeur d'un chemin de voiture sur le terrain ci-dessus vendu en par le dit vendeur ne causant aucun dommage, pour charroyer du bois, foin ou autres produits récoltés, chaque fois que le vendeur le jugera nécessaire.

Le dit Haddock prit possession de la dite terre comme propriétaire et l'occupa jusqu'à sa mort arrivée en 1872.

Le dit Prosper Ferdais ne résidait pas au temps de la dite vente sur la terre dont la partie ci-dessus vendue a été distraite.

L'intimé ne demeure pas non plus sur la dite terre qui consiste principalement en bois debout et en prairies, et sur laquelle il n'y a pas de bâtisse.

Le 16 avril 1874, le dit Prosper Ferdais et Dame Mary Barry, son épouse, par acte de donation, donnèrent entre autres propriétés, à l'intimé, le terrain décrit comme suit dans le dit acte de donation, savoir:

Un morceau de terre de forme irrégulière, situé en la paroisse de Ste. Marguerite de Blairfindie, dans le comté de Saint-Jean, donnant une superficie d'environ vingt-trois arpents, sans précision de mesure comme aussi sans droit, de part ou d'autre, à réclamation ou indemnité, pour raison de la différence dans l'étendue, limité comme suit: d'un côté vers le nord et nord-ouest par les représentants Thomas Haddock, d'autre côté vers le sud-est, entouré par la petite rivière de Montréal, et vers le sud-ouest par les représentants William Brownrigg, sans aucune bâtisse dessus construite, et presque tout en bois debout.

Le lot ainsi donné est maintenant désigné comme le lot n° 370 du cadastre officiel. Le dit acte de donation a été enregistré.

Avant cette donation les lots n^{os} 369 et 370 n'en formaient qu'un seul et appartenaient à Prosper Ferdais.

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Par l'acte du 2 avril 1860, le dit Thomas Haddock s'obligea de maintenir tout le chemin qui traversait et a toujours traversé jusqu'à ce jour le dit lot n° 369 et le divise en deux depuis au-delà de quarante ans et est connu sous le nom de chemin de Lacadie, c'est-à-dire le chemin qui mène à Lacadie.

Avant l'acte de vente à Thomas Haddock, 2 avril 1850, le dit lot n° 370 était enfermé par la petite rivière de Montréal, les représentants de William Brownrigg, et par le lot n° 369,—qu'il l'a toujours été et qu'il est encore ainsi enfermé—et que la seule sortie du dit Prosper Ferdais avant et au temps de la dite vente, pour communiquer du dit lot au chemin ci-dessus mentionné était par le chemin de voiture réservé par le dit acte de vente, et que le dit chemin de voiture existait au temps de la vente et a toujours existé pour cette fin.

Le dit Prosper Ferdais et l'intimé ont toujours fait usage du dit chemin de voiture jusqu'à ce qu'ils aient été troublés par le défendeur.

Le dit lot n° 370 a été donné à l'intimé avec tous ses accessoires et dépendances dont il a toujours été et est encore le propriétaire.

Le chemin de voiture ainsi réservé par l'acte de vente du 2 avril 1860 crée une servitude réelle apparente sur le lot de terre n° 369 en faveur du lot n° 370, quels que soient les propriétaires des dits lots, et que le lot n° 370 ayant été donné à l'intimé avec tous ses accessoires et dépendances, le chemin de voiture se trouve compris dans la dite donation.

Thomas Haddock a légué le dit lot n° 369 à Marie Rose Tobin, son épouse, qui a été mariée en secondes noces à Frank Cully.

Les dits Rose Tobin et son mari ont ensuite vendu le dit lot n° 369, le 28 octobre 1882 à l'appelant L. G. Macdonald qui l'a ensuite revendu, le 1er juin 1886, à

l'appelant Cully qui en a toujours depuis été le propriétaire en possession.

Pendant le printemps de 1887 et à différentes époques depuis, l'appelant Cully a, par lui-même et ses employés, troublé l'intimé dans la jouissance du dit chemin réservé, l'a labouré et ensemencé, et l'a empêché de s'en servir, à son grand dommage.

L'intimé a demandé par ses conclusions à ce qu'il soit fait défense à Cully de le troubler à l'avenir—et que le dit lot 369 soit déclaré sujet à la servitude du chemin en question en faveur de l'immeuble n° 370 et condamné à des dommages.

Cully a produit une exception dilatoire pour obtenir délai pour appeler son garant, Macdonald, et a même intenté à cet effet une action en garantie contre lui. Macdonald, au lieu de défendre à cette action s'est reconnu garant et est intervenu dans la cause pour prendre le fait et cause de Cully et a plaidé à l'action principale :

Que par son acquisition du 28 octobre 1882 il a acheté le lot 369 sans aucune servitude et qu'il n'en existait pas alors.

Que l'acte créant cette servitude n'a pas été enregistré et que la servitude ne peut pas être invoquée contre les appelants ; que l'acte ne spécifie pas l'endroit où doit s'exercer la dite servitude ;—que l'acte du 2 avril 1860 ne créait pas un droit de servitude réel envers le vendeur et ses successeurs, mais lui accordait seulement un droit personnel.

Que quelques années auparavant la clôture et le fossé séparant les dites propriétés ayant été refaites par l'intimé et Frank Cully de qui Macdonald avait acheté, les dits Cully et l'intimé refirent la clôture et le fossé sans mettre de barrière ni de pont sur le fossé pour indiquer le dit chemin.

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L'intimé allègue en réponse à ces moyens d'intervention que le défaut de description de l'endroit précis de la servitude ne pouvait le priver de son droit, qui existait avant l'acquisition de Macdonald et dont il avait joui depuis ouvertement.

Que son titre avait été duement enregistré, que de plus l'enregistrement n'était pas nécessaire ; qu'en outre, Macdonald, ayant acquis ce lot de terre sujet au droit de chemin de la même personne que l'intimé avait aussi acquis le sien, ne pouvait se prévaloir du défaut d'enregistrement du titre en question.

La preuve a établi de la manière la plus complète et la plus satisfaisante l'existence de la servitude en question. L'intimé a prouvé par un grand nombre de témoins que le chemin existait depuis bien longtemps, que son père et lui s'en étaient toujours servi, ouvertement et sans aucune objection de la part de Cully ni de ses auteurs depuis 1860 jusqu'à 1887, époque à laquelle Cully a commencé à le troubler dans sa jouissance. Plusieurs témoins ont déclaré que le chemin existait depuis un temps immémorial. L'intimé en a toujours joui et ce à la connaissance de Cully et de ses auteurs, d'une manière publique et notoire. Tous ces témoins ont établi positivement que le chemin était visible et apparent et les deux cours Supérieure et d'Appel ont été unanimes à déclarer que la dite servitude était apparente. En face de la preuve du dossier, il est impossible de mettre en doute l'opinion de ces deux cours sur le fait de l'apparence de la servitude en question

La première objection de l'appelant que l'acte créant la servitude n'a pas été enregistré, est fondée sur le Statut de Québec 44-45 Vic. (1881), ch. 16, sec. 5, qui déclare : qu'à défaut de l'enregistrement de l'acte créant aucune servitude réelle, discontinue et non apparente constituée

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à l'avenir n'aura d'effet vis-à-vis des tiers acquéreurs dont les droits auront été ou seront enregistrés.

La sect. 6 accorde un délai de deux ans pour l'enregistrement des servitudes établies avant la passation de cette loi. Ce délai a été ensuite prolongé jusqu'au 8 janvier 1885, sujet aux droits acquis.

La vente du 2 avril 1860, par Ferdais à Haddock, créant la servitude, n'a été enregistrée que le 10 juin 1886.

L'acte 44-45 Vict., n'est pas applicable à la présente cause parce qu'il s'agit ici d'une servitude apparente qui se trouve par la clause ci-dessus citée, et spécialement exemptée de l'enregistrement de même que par l'art. 1508 du code civil.

Un droit de chemin peut être une servitude apparente d'après la doctrine des auteurs.

Ferrot, Lois du Voisinage (1).

De même le droit de passage, qui est une servitude discontinue, peut être apparent, s'il est manifesté *par un chemin*, par une porte donnant sur l'héritage voisin ; et non apparent si aucun signe ne l'indique.

Demolombe (2).

.....C'est ainsi, par exemple, qu'un droit de passage peut être apparent ou non apparent, suivant qu'il se manifeste par une porte, *un chemin tracé*, ou par une voie quelconque.....

No. 718. Il importe peu d'ailleurs, quant au point de savoir si la servitude est apparente ou non apparente, que l'ouvrage qui en manifeste l'existence soit établi sur le fonds servant ou sur le fonds dominant.

No. 719. Une servitude de passage, qui se manifeste par une porte ou *un chemin frayé* est sans doute apparente.

Ainsi, une servitude de droit de chemin, manifestée comme dans le cas actuel par *un chemin* est suffisamment indiquée par un chemin ouvert. Il n'est pas même nécessaire que ce chemin soit visible sur les deux propriétés ; il suffit qu'il soit apparent sur l'une d'elles.

(1) P. 491.

(2) 12 vol. p. 229, no. 717.

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Ce n'est donc qu'une question de preuve en cette cause. Le fait a été constaté d'une manière évidente. La servitude étant apparente, l'enregistrement n'était pas nécessaire. Il est certain qu'avant l'acte 44-45 Vic., ch. 16, les servitudes réelles n'étaient pas soumises à la formalité de l'enregistrement, ni sous l'ancien droit ni depuis le code Il en était de même en France avant 1855.

Demolombe, (1).

Tous les auteurs avaient enseigné, jusque dans ces derniers temps, que le titre constitutif de la servitude n'est pas soumis à la nécessité de la transcription .....

La seconde objection des appelants est que le droit de chemin en question est un droit personnel et non pas une servitude réelle affectant l'immeuble de l'appelant Cully.

On a déjà dit plus haut que l'immeuble en question est enfermé par les terres avoisinantes et par une petite rivière sur laquelle il faudrait construire un pont pour donner accès à l'intimé sur une autre propriété. Sans ce chemin, il n'aurait pas droit de communication avec ses autres propriétés. Le chemin en question lui est indispensable et c'est sans doute à cause de cette position qu'il se l'est réservé, créant par là une servitude par la destination du père de famille.

Le titre établissant la servitude dit expressément que le chemin est réservé pour charroyer du bois et autres produits récoltés sur le lot en question. Les besoins de la culture étant les mêmes tous les ans, il est clair que le but était d'en faire une servitude permanente en faveur de l'immeuble et non pas une servitude personnelle pour le vendeur.

Demolombe, (2).

Et voilà pourquoi on n'hésite pas à regarder comme servitude réelle la concession faite au propriétaire d'un fonds de passer sur le fonds voisin, etc.

(1) 12 vol. p. 240, no. 733. (2) 12 vol. p. 190, no. 681, par. 5.

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Dans tous ces cas, et autres semblables, on voit bien que la concession du droit a eu directement et essentiellement pour but l'utilité du fonds lui-même, considéré comme fonds, et non point l'avantage individuel de la personne, *prædii magis quam personæ* (L. 4, h. t.)

La 3me objection est que le titre ne désigne pas l'endroit où doit s'exercer la servitude.

D'abord, rien ne prescrit l'obligation de désigner la partie de l'immeuble où sera exercée la servitude, et dans la pratique la chose ne se fait pas, pour la raison que ce serait inutilement rendre la servitude plus onéreuse pour l'immeuble assujéti. Bien qu'une description particulière de la servitude soit importante, elle n'est cependant pas essentielle ; il suffit que le titre en contienne l'indication. Demolombe a résumé à ce sujet l'opinion des auteurs comme il suit : Il suffit donc aujourd'hui légalement que l'acte contienne *l'indication* d'une servitude susceptible d'être déterminée par l'application de l'article 1129.

A plus forte raison il en doit être ainsi non seulement lorsque la servitude est indiquée, mais lorsqu'elle est déterminée et visible, comme dans le cas actuel par les traces du chemin sur le sol de l'appelant.

L'objection que l'intimé a laissé le prédécesseur de l'appelant Cully fermer le passage, est tout à fait sans fondement, le fait n'ayant été nullement prouvé. Les appelants ont aussi failli dans leur tentative de prouver que le chemin n'était pas nécessaire à l'intimé et le fait reste acquis que le chemin réservé est le seul moyen de communication avec le terrain enclavé.

Le propriétaire qui a créé une servitude est le seul juge de sa nécessité. Demolombe (1).

Les propriétaires eux-mêmes, d'ailleurs, sont, en général, souverainement juges des motifs d'utilité, c'est-à-dire d'avantage, de commodité, de convenance ou d'agrément, qui leur font établir des servitudes. (art. 686). Sans doute, une prétendue servitude à laquelle le fonds dominant n'aurait aucun intérêt, serait nulle. (L 15 princ. ff. de

(1) 12 vol. p. 201, n° 691.

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servit.) Mais il faudrait que le défaut d'intérêt fut bien manifeste ; car l'utilité dont parle notre article 637 doit s'entendre d'une manière *très large ;* et il suffit que cette utilité soit apparente, éloignée et même seulement possible. C'est en ce sens que le jurisconsulte Labéon disait que nous pouvons stipuler même une servitude inutile, *et si inutilis sit ; quædam enim habere possumus, quam vis ea nobis utilia non sunt.* (L. 19, tit. supra cit.) Je pourrais, par exemple, quoique mon fonds eut un accès facile, ou même déjà plus d'un accès sur la voie publique, acquérir encore, sur un autre fonds, un nouveau droit de passage ;.....

Il est regrettable de voir qu'il se trouve dans la procédure une omission constituant une irrégularité assez grave. C'est que le défendeur—quoique ayant été mis en demeure de plaider, n'a pas été régulièrement forclos de le faire—et, que n'ayant pas demandé, comme il en avait le droit après l'intervention de Macdonald d'être mis hors de cause, il se trouve être resté partie au procès et aurait dû être traité comme tel. Mais au lieu de cela les demandeurs et défendeurs l'ont traité comme hors de cause et ne lui ont plus donné avis des procédures. On a procédé à une longue enquête dont il a sans doute dû avoir connaissance et l'on a plaidé au mérite sans qu'il ait donné signe d'existence. Evidemment voyant la défense faite par Macdonald, il a pensé qu'il n'en avait pas d'autre à faire et s'est abstenu de prendre part au procès ; attendant ainsi sans risque un résultat favorable sauf à le répudier plus tard si cela lui convenait mieux. Mais il vient maintenant, à la dernière heure, se plaindre, en appel, pour la première fois, qu'il n'a pas été forclos de plaider et n'a pas eu d'avis d'inscription au mérite et qu'il a été condamné sans être entendu. Toutefois il a eu tout le bénéfice de la défense faite par Macdonald—et il n'en avait certainement pas d'autre à faire. Peut-on maintenant lui permettre de prendre avantage de cette irrégularité, et pour ce motif annuler le jugement ? Je ne le pense pas, à cause de l'opinion que nous entretenons sur le mérite de la question soumise.

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En principe, notre cour n'intervient pas dans les questions de procédure et il n'est pas permis de faire pour la première fois des objections de ce genre en cour d'appel. Dans les circonstances on doit conclure que l'appelant Cully s'est lui-même mis hors de cause et n'a pas droit de prendre objection de l'irrégularité dont il se plaint.

En conséquence, je suis d'avis que l'intervention de Macdonald soit, quant à lui, renvoyée, vu qu'il n'est pas garant de la servitude en question et que jugement soit prononcé contre Cully déclarant son immeuble sujet à la servitude conformément aux conclusions de l'action de l'intimé, le tout avec dépens.

TASCHEREAU J.—The first question to be disposed of is whether the reservation of a road in the deed of sale of April, 1860, by Prosper Ferdais to Haddock constitutes a real servitude towards the lot now called lot no. 370, or merely a reserve personal to Prosper Ferdais and to cease with his ownership of the said lot no. 370. On this point I am free to say there is room for doubt, but to doubt is to confirm. Upon the intention itself of the parties to this deed there cannot be much doubt, but whether they have clearly expressed that intention in the document is open to controversy. However, the appellant has failed to make it clear to my mind that there is error on this point in the judgment of the two courts below.

The only other point on Macdonald's appeal is upon a question of fact. Was this an apparent or a non-apparent servitude? On this the appeal also fails. The courts below have found that the servitude was apparent and the evidence, in that sense, is, in my opinion, overwhelming. Out of the fourteen witnesses examined one only, a man named Leggatt, appellant Cully's brother-in-law, never could see a road there.

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All the others prove that a road existed there as visible and open as a road of that nature could be expected to have been. I would therefore on this point again come to the same conclusion as the court below. There is no difficulty as to the legal consequences of that finding of fact. If the servitude is an apparent one registration was not required, and the plaintiff's right of action is uncontrovertible. But there arises some difficulty in the case on the appeal by the defendant Cully from the nature and form of the proceedings. The servitude being declared to have been an apparent one it follows that Macdonald was not warrantor, and consequently that his intervention on that ground should have been dismissed purely and simply, but it seems that the condemnation given against him jointly with the defendant, Cully, is wrong, so that as to him, Macdonald, the form of the judgment should be that the appeal should be dismissed with costs and his intervention and pleas as to the action dismissed with costs.

As to Cully, the proceedings have not been strictly regular. All that is wanted, however, on the face of the record is an express order declaring him *hors de cause*. But he clearly treated himself as being *hors de cause* and left his defence in the hands of Macdonald. After having filed a dilatory exception he was asked by respondent for a plea to the merits but never filed one, and why? Because, I assume, Macdonald himself pleaded to the merits of the action, and so as to avoid double issues and double costs. He took his chances of getting the action dismissed on the intervention, but now that it is the intervention that is dismissed he says he has not been heard. By not pleading to the merits, when duly summoned to do so, he, *de facto*, consented to the issue being tried and determined between Macdonald and the respondent. He treated

himself as *hors de cause:* we do the same. And the fact that Macdonald is now declared not to have been a warrantor cannot avail to Cully against this view for having himself summoned Macdonald *en garantie* he cannot now argue that Macdonald did not represent him. The case is not free from difficulty I am free to say. The proceedings are not regular. But the point is one of practice and procedure and I think that, under the circumstances, as the Court of Appeal in Montreal did not feel justified to interfere we should not do so.

The appeal in my opinion should be dismissed. Macdonald having taken up the *fait et cause* of Cully cannot complain if he has been condemned as *garant.* He is estopped from availing himself on this appeal of the ground that he is not a warrantor.

GWYNNE and SEDGEWICK JJ. concurred.

Appeal dismissed with costs.

Solicitors for appellants: *Paradis & Chassé.*

Solicitors for respondent: *Geoffrion, Dorion & Allan.*

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*May 2.

*June 24.

PHILIP F. O'CONNOR AND OTHERS (PLAINTIFFS) ..... APPELLANTS;

AND

THE NOVA SCOTIA TELEPHONE COMPANY (LIMITED) (DEFENDANTS) ..... RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Municipal corporation—Ownership of roads and streets—Rights of private property owners—Ownership ad medium filum viæ—R. S. N. S. 5th sec. c. 45—50 V. c. 23 (N.S.)

That the ownership of lands adjoining a highway extends *ad medium filum viæ* is a presumption of law only which may be rebutted, but the presumption will arise though the lands are described in a conveyance as bounded by or on the highway. Gwynne J. contra.

In construing an act of parliament the title may be referred to in order to ascertain the intention of the legislature.

The act of the Nova Scotia legislature, 50 Vic. c. 23, vesting the title to highways and the lands over which the same pass in the crown for a public highway, does not apply to the city of Halifax.

The charter of the Nova Scotia Telephone Company authorized the construction and working of lines of telephone along the sides of, and across and under, any public highway or street of the city of Halifax provided that in working such lines the company should not cut down or mutilate any trees.

Held, Taschereau and Gwynne JJ. dissenting, that the owner of private property in the city could maintain an action for damages against the company for injuring ornamental shade trees on the street in front of his property while constructing or working the telephone line, there being nothing in the evidence to rebut the presumption of ownership *ad medium* or to show that the street had been laid out under a statute of the province or dedicated to the public before the passing of any expropriation act.

APPEAL from a decision of the Supreme Court of Nova Scotia (1) affirming the judgment for defendants at the trial.

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

(1) 23 N.S. Rep. 509.

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The following statement of facts is taken from the judgment delivered by Mr. Justice Sedgewick.

The plaintiffs are the owners of a dwelling house and lot of land in the city of Halifax, fronting on Spring Garden Road, a street in that city. In front of the house on the sidewalk are several ornamental trees. The defendant company in erecting a line of telephone along the street cut down portions of these ornamental trees in such a way as to lessen their beauty and diminish the shade which they afforded for the plaintiff's dwelling.

An action for this alleged trespass was brought against the company in the Supreme Court of Nova Scotia. The case was tried before Mr. Justice Meagher, who found that the plaintiffs were the owners of the dwelling; that their predecessor in title, Patrick Walsh, had vested in him the fee to the centre of the highway; that in 1862, when Mr. Walsh was owner and in possession, he had planted these trees, and from that time until his death in 1880, had cared for them frequently hiring parties to prune and otherwise attend to them; that the plaintiffs since his death had performed that duty, and that the trees in question were beneficial to the plaintiffs and their property as shade and ornamental trees. He further found that the cutting by the defendants was a mutilation of the trees, injuring their appearance materially and rendering them unsightly particularly from the plaintiff's windows, and further that the cutting in question was not an absolute necessity for the performance of the defendants' business. He assessed the damages of the plaintiffs, in the event of their being entitled to recover, at $100.00, but he directed a verdict for the defendants in consequence of his being of opinion that the effect of chapter 23 of the acts of 1887 was to vest the fee of the street in the crown, and that, therefore, the pro-

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perty of the trees injured, being in the crown, the plaintiffs could not recover for injury done them even by a trespasser. The plaintiffs appealed to the Supreme Court of Nova Scotia in *banc*, on which appeal the court was equally divided, McDonald C. J. and Weatherbe J. being of opinion that the verdict for the defendants should stand—Ritchie and Graham JJ. contra. The plaintiffs thereupon asserted an appeal to this court.

Newcombe for the appellant cited *Wansdworth Board of Works* v. *Telephone Co.* (1), *Bliss* v. *Ball* (2), *Beauchamp* v. *City of Montreal* (3).

Borden Q.C. for the respondent.

THE CHIEF JUSTICE and FOURNIER J. concurred in the judgment delivered by Mr. Justice Sedgewick.

TASCHEREAU J.—I am of opinion that the appeal should be dismissed.

GWYNNE J.—This action is based wholly upon the contention that the fee in the highway upon which the land of the plaintiffs abuts is their soil and freehold *ad medium filum viæ*, and that in right of such freehold the trees growing upon that half of the highway which adjoins the land of the plaintiffs, the tops of which the defendants, for the purposes of the business for carrying on which they have been incorporated, have lopped off, were their property, whereby, as is contended, the defendants have subjected themselves to this action of trespass. It is admitted that the law in England is that a *primâ facie* presumption in law arises that waste lands of a manor on the sides of a public highway, and the soil to the middle of the high-

(1) 13 Q. B. D. 904. (2) 99 Mass. 597.
(3) M. L. R. 7 S C.. 382.

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way, belong to the owner of the adjoining freehold. In *Doe d. Pring* v. *Pearsey* (1) it is said that the origin of this presumption is unknown, but that in all probability it has arisen from, and is founded upon, the supposition that the proprietors of the adjoining lands at some former period gave up to the public for passage all the land between their enclosures and the middle of the road, or that it has arisen from its being a matter of convenience to the owners of the adjoining lands and to prevent disputes as to the precise boundaries of the property. In *Holmes* v. *Bellingham* (2) it is said that the presumption is based upon the supposition, more or less founded on fact, but which at all events has been adopted, that when the road was originally founded the proprietors on either side each contributed a portion of his land for the purpose. In *Berridge* v. *Ward* (3) Erle C.J. states the rule thus:—"Where there is a conveyance of a piece of land which abuts on a highway, and there is nothing to exclude the highway, the presumption of law is that the soil of the highway *usque ad medium filum*, passes by the conveyance;" and Williams J. there states the rule thus:—"That the conveyance of a piece of land, to which belongs a moiety of an adjoining highway, passes the moiety of the highway by a general description of the piece of land." The presumption, then, is that by a grant or conveyance of a piece of land in England, abutting on a highway, there is to be implied a grant or conveyance of the soil of the highway *ad medium filum*, and as the presumption is only a *primâ facie* one it can be rebutted, and so it is held to be always a question of intention to be collected from the terms of the conveyance and the surrounding circumstances. *Marquis of Salisbury* v. *Great Northern Ry. Co.* (4). The rule that

(1) 7 B & C 304.
(2) 7 C.B. N.S. 329.
(3) 10 C.B. N.S. 415.
(4) 5 C.B. N.S. 174.

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the soil and freehold of a highway, *ad medium filum*, is presumed to be the property of the owner of the soil and freehold in the adjoining land cannot be said to be founded upon the same reason as is the rule in relation to the soil and freehold in the bed of a stream adjoining a piece of land granted and conveyed, for it cannot be said that there is any ground for a supposition that the land covered with the waters of a stream, *ad medium filum aquæ*, was given up at some remote period by the proprietors of the land on either side, *ad medium filum*, to the public for passage. I must confess that I cannot see any necessity whatever for the introduction of a rule or presumption of law, based upon the supposition upon which the rule in England is based, into the jurisprudence of any part of the Dominion of Canada, where the origin of every highway can be easily traced, and where there is no pretence for the existence of such a supposition, and where, therefore, the presumption could not be rested on the sole foundation upon which it is said to rest in England; as, however, the presumption, if it is to be considered as forming part of the law of Nova Scotia, can be rebutted by the terms of the grant or deed of conveyance construed in the light of all surrounding circumstances, the first question which arises is: Is there anything in any of the deeds of conveyance under which the plaintiffs claim title which rebuts the presumption? And secondly; If not is or is not the presumption rebutted by any of the acts of the Legislature of Nova Scotia? The case of the *Marquis of Salisbury* v. *Great Northern Ry. Co* (5) was that the Marquis, being the owner of the freehold on both sides of a turnpike road, sold two pieces of land which abutted on the turnpike road to the railway company. In the plans and books of refer-

(1) 5 C.B. N.S. 174.

ence required by the standing orders in parliament the pieces of land conveyed to the company were numbered respectively 75 and 79, and the deed described their exact contents; the deed only conveyed 75 and 79, which, however, adjoined the road which on the plan was numbered 47. The road was, in fact, the property of the Marquis, but at the time of the conveyance was supposed to be the property of the trustees of the turnpike, in whom the control over the turnpike was vested. The deed of conveyance referred to and incorporated the schedule and plan, and specified the lots conveyed as numbered 75 and 79, and coloured red. Under these circumstances it was held that the intention of the parties clearly was that only the parcels numbered 75 and 79 should pass and that the soil of the road did not pass out of the Marquis, the vendor, and that therefore he was entitled to recover in ejectment a portion of the turnpike which had been enclosed and taken possession of by the defendants, they having, under powers in their act, substituted another road for the piece of the turnpike which the defendants had taken possession of.

In *Ernst* v *Waterman* (1), where the owner of the land laid it out into town lots with streets and had sold the lots on either side of the streets, it was held by the Supreme Court of Nova Scotia that the sale of the lots on either side of the streets did not pass out of the vendor the soil of the streets *ad medium filum*. The above presumption of law was urged in support of the contention that the soil of the streets had passed but Thompson J. pronouncing the judgment of the court said: "The presumption is by no means conclusive, and it may be rebutted" which it was held to be sufficiently by the lots being numbered on either side of the streets on a plan, and by specified dimensions of

(1) 4 Russ. & Geld. 272.

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each lot which sufficiently showed an intention to exclude the streets. It was held that under the circumstances the vendor retained in himself the fee in the soil of the streets while he dedicated them as streets to the use of the public.

The same point had been decided by the Supreme Court of Nova Scotia in 1876 in *Pugh* v. *Peters* (1), where it was held that lots being sold by specific numbers on a plan with the dimensions specified in the deed sufficiently rebutted the presumption that the soil of the adjoining street had passed and that the deed only passed to the grantees, in relation to the street, the easement and right of user of it as a street.

These judgments appear to me to be sound in principle and to have been well supported by the statute law of Nova Scotia, for by the statute law of that province all deeds and also all copies of any plans and schedules annexed thereto are required to be registered, so that every person interested can readily ascertain the precise limits of the land expressed by the deeds to be conveyed. Then by chapters 44-45 of the Revised Statutes it is enacted that any road which had theretofore been or should thereafter be made or altered without any demand for compensation by the proprietors of the land through which such road runs, within one year from the opening thereof, such acquiescence of the proprietors shall be held to be a voluntary surrender to Her Majesty for ever for a public highway of all the land through which the road passes. Even in such a case the absolute title to the soil and freehold in the road is to be held to have been surrendered to and vested in Her Majesty for ever for a public highway, while by chapters 46 and 47 the control over all highways and the providing for their maintenance and repair is placed in the respective municipalities within which

(1) 2 R. C. 139.

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the roads are; and by chapter 49 it is enacted that where a line of road has been altered and the old road has been abandoned any of the proprietors of the land adjoining the old road may by petition apply to the council of the municipality to shut or otherwise dispose of the same. These provisions are but re-enactments of similar provisions in chapters 61, 62, 69 and 113 respectively of the Revised Statutes of 1851.

Now in the present case the plaintiffs claim title to the soil and freehold of the highway adjoining a lot of land devised to the female plaintiff by her father one Patrick Walsh, and they claim the trees in question as their property in virtue of such devise. We are not furnished with an extract of this devise from the will of Patrick Walsh, but we assume that the will passed all his estate in the lot. Walsh's title was derived from one Patrick Lynch who as trustee of one Wiswell held the lot upon trust for sale for the benefit of Wiswell's creditors. We have not either the precise description of the lot as contained in these deeds but assume that it conformed to the description in the deed by which the lot was conveyed to Wiswell which we have and which was executed in May 1847 by one William G. Anderson. We have also the description contained in a deed dated in April 1812 from one William Lawson who conveyed the land therein mentioned to one Brenton Haliburton who by a deed dated in April 1847 conveyed the same land presumably by the same description to the said William G. Anderson. We have also the description contained in a deed executed in 1809 of land conveyed by John Woodin to William Lawson and one Grassie and of the piece thereof allotted by deed of partition to the said William Lawson who conveyed it to the said Brenton Haliburton who conveyed it to the said William G. Anderson. The

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description in the deed of 1809 from Woodin to Lawson and Grassie is as follows:—

All that lot of land and field situate and being in the township of Halifax beginning at the north-west corner of a lot of land near the Windmill hills formerly the property of Richard Bulkley, Esq., deceased; thence running westerly 363 feet until it meets the common; thence southerly on the common 880 feet; thence easterly on the lot formerly belonging to Joseph Fairbanks, Esq., 363 feet; thence on the aforesaid lot of Richard Bulkley, deceased, until it meets the bound first mentioned, containing by estimation 7¼ acres more or less.

In this description no mention is made of the highway but the line or "bound" first mentioned namely "from the northwest angle of the lot of land near the windmill hill formerly the property of Richard Bulkley, westerly 363 feet until it meets the common," is the southerly limit of the highway in question; and the area contained within the limits described south of such south limit of the highway is just 7⅓ acres that is to say a little in excess of the 7¼ acres expressed to be intended to be conveyed. The description in the deed of partition between Lawson and Grassie of the piece of the above land which was allotted to Lawson and conveyed by him to Haliburton is as follows:—

All that northerly half of the said lot and field which is situate and being next to the road or street leading from Halifax to the common and is described as follows: Beginning at the north-west corner of the lot of land formerly owned by the said Richard Bulkley, thence running westerly 363 feet until it meets the common; thence on the common 440 feet, thence easterly to the said field of Richard Bulkley, thence northerly on the said field to the place of beginning.

The description in the deed from Haliburton to Anderson is that:

Lot of land lying southward of the road leading from the jail to the common now called Spring Garden Road, being the northern half of a lot purchased by William Lawson and George Grassie from John Woodin.

Immediately after his purchase Anderson appears to have subdivided the piece of land into town lots num-

bered on a plan which was filed by him in the Surveyor General's office, and the lot now under consideration was conveyed by him to Wiswell as lot no. 4, under the description following, that is to say, as:

Situate, lying and being on the south side of Spring Garden, in the city of Halifax, being a portion of the field conveyed to the said William G. Anderson by Brenton Haliburton by deed bearing date the 15th day of April, in the present year, which said lot is marked on the plan of division of the said field filed by the said W. G. Anderson in the Surveyor General's office as lot no. 4, and is described and bounded as follows: Beginning at the north-west corner of lot no. 3, thence running westerly on Spring Garden Road 52 feet to the north-east corner of lot no. 5, thence southerly on the division line between lots numbers 4 and 5, 104 feet to the north-west corner of lot 18, thence easterly along the division line between lots nos. 4 and 18, 52 feet to the south-west corner of lot no. 3, thence northerly on the division line between lots nos. 3 and 4, 104 feet to the place of beginning on Spring Garden Road.

Now Woodin who conveyed to Lawson and Grassie acquired the piece so conveyed to them from one Jonathan Belcher, who as appears by the abstract of the title on registry in the case was the grantee of the crown in 1764, of the said piece of land under the following description, viz.:

A lot of pasture land in the township of Halifax, bounded on the north by the high road on the west by the common, on the south by the lands of James Monk, on the east by lands of Richard Bulkley, measuring 7 acres.

Now, Anderson, assuming him for the sake of argument to have been seized of the fee in the soil of the highway *ad medium filum*, having subdivided the piece of land described in the deed of conveyance thereof to him into town lots, designated by numbers on a plan which was filed in the office of the Surveyor General, and having sold and conveyed the lot under consideration as the lot designed no. 4 on that plan describing it by its number on the plan and by metes and bounds which, as a matter of fact, do not

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include any part of the highway, and the deed of conveyance of such lot together with a copy of the plan whereon the lots were designated by numbers having been registered as required by law, the natural and reasonable inference is that neither did Anderson intend to convey nor Wiswell to purchase any estate, if Anderson had any, in the soil and freehold of the highway and so that the *primâ facie* presumption insisted upon is rebutted; and this inference is justified and supported by the authority of the *Marquis of Salisbury* v. *The Great Northern Railway*(1), and of *Pugh* v. *Peters*(2), and *Ernst* v. *Waterman* (3), in the Supreme Court of Nova Scotia, both of which latter cases were, in my opinion, well decided and should be followed especially upon a question which is one purely of the law of Nova Scotia; so that in this view no estate in the soil of the highway was ever vested in any of the intermediate parties through whom the plaintiffs claim from Anderson, and therefore not in the plaintiffs. But apart from this it is plainly apparent from the abstract of title in the case that so far back as 1764 the highway in question, while the estate therein was in the crown, had been laid out and appropriated as a public highway, and that the soil and freehold therein never passed out of the crown to Belcher the grantee of the piece of land "bounded on the north by the highway" unless it can be held that by the presumption of law insisted upon the estate of the crown *ad medium filum* is to be deemed to have passed by implication from the crown to Belcher; but in my opinion the crown cannot be prejudiced or in any manner affected by an invocation of the presumption insisted upon or be divested by implication of its estate in a piece of land which is in point of fact outside of the limits of the description of the piece granted, because of the crown itself having been pleased to appropriate for a public highway

(1) 5 C. B. N. S. 174. (2) R. & C. 139.
(3) 4 Russ & Geld. 272.

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the piece of land outside of the limits of the piece described in the grant. But however this may be the question in the present case is in my opinion put beyond all doubt by chapter 23 of the statute of the legislature of Nova Scotia passed in 1887 which statute is in its terms purely a declaratory act and which declares that—

> The legal title to all highways and the lands over which the same pass is hereby declared to have been heretofore vested in Her Majesty the Queen for ever for a public highway.

Nothing can, to my mind, be clearer than that this was intended to be, and is, a plain legislative declaration that the legal estate in all highways then already laid out, including the one in question which has been laid out in the township of Halifax as early as 1764, had always continued to be vested in Her Majesty from the time of their being originally laid out respectively but subject to the easement of the public therein as a public highway. When the act declares that "all highways have been heretofore (that is to say up to the time of the passing of the act) vested in Her Majesty for ever for a public highway," such vesting must at least relate back in all cases to the period when each highway was first laid out and appropriated to public use, and in case of the highway in question, by reason of its having been laid out when the seisin was in the crown, to the original seisin of Her Majesty in right of her crown, which seisin as to this highway the act in effect declares had never passed out of Her Majesty. The law as it had already stood was that when the property of private persons was appropriated for the purpose of making a new road in substitution for an old one, however the old one may have been founded, the acquiescence of the private proprietors in the appropriation of their land for the new road for one year without demand of compensation for the land taken

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should be held to be a voluntary surrender to Her Majesty for ever for a public highway—that is to say should operate as a surrender to Her Majesty of her original seisin to date in that case from the time when the acquiescence ripened into a title in the crown by surrender. But chapter 23 of 1887 goes farther and declares that the legal title to all highways—including all then in existence—" and the lands over which they pass have been heretofore (that is say up to the time of the passing of the act from the time they were first made to be highways respectively) vested in Her Majesty the Queen for ever for public highways," that is to say subject to the easement of the public therein as public highways. Thus the cases of the *Board of Works of Wandsworth* v. *the Telephone Co.* (1), and *Coverdale* v. *Charlton* (2), though relied upon in argument have really no application whatever in the present case. There the words " vest in " as used therein were construed to be limited to transferring simply all control over the roads as highways which was plainly all that by the context and surrounding circumstances was intended to pass and not the soil and freehold in the highways which were left in the precise condition in which they then were, but the words " vested in Her Majesty, &c " as used in the present act, have by the express terms of the act and its manifest object and context a very different and more extensive meaning as already shown. The plaintiffs have wholly failed to establish their title to the trees as asserted in their statement of claim and if they had established such title I should entirely concur in the judgment of Mr. Justice Weatherbe that still they could not recover against the defendants for the cutting of the trees, because the act of cutting was clearly justified by the act of Parliament although the manner might amount to

(1) 13 Q. B. D. 904. (2) 4 Q. B. D. 104.

mutilation of which the owners of the trees might complain.—But not only was no such case made by the plaintiffs but no evidence was given or offered which would justify a judgment as for mutilation. It was also suggested but scarcely argued that the plaintiffs even though not owners of the trees cut could recover as persons suffering direct and special injury from a public nuisance in excess of that sustained from the nuisance by the public.—But whether any act be a public nuisance or not is a matter of fact and no such case has been made nor has any act of the defendants been found or proved to be a public nuisance.—The act of cutting has not been and could not be so found upon the evidence.—The act was lawful although the manner might have been injurious to the owner and only to the owner of the trees, and even if a case for public nuisance had been made and proved by reason of the defendants' act in cutting the trees, the injury in such case complained of by the plaintiffs in the damage done thereby to their land by depriving it of the ornament and shade of the trees would not be such a direct and peculiar injury sustained by the plaintiffs in excess of the damage occasioned by the nuisance to the public as would support an action at suit of the plaintiffs, However no such claim has been made by the plaintiffs.

The appeal must therefore, in my opinion, be dismissed with costs.

SEDGEWICK J.—The first question to be considered is as to whether or not the plaintiffs' property extended to the *medium filum* of the street independently of the statute upon which Mr. Justice Meagher bases his opinion. The doctrine is elementary that the law presumes the ownership of half the soil over which a highway exists to be in the owners of the land on either side of that highway, and that although lands

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described in a conveyance may be bounded by or on that way, the ownership *ad medium filum viæ* will pass. It is likewise as elementary that the application of this doctrine depends upon the facts in each case. It is a presumption only, and where, as in Ontario and the North-west, road or street allowances have been made in the original survey of the country the presumption is destroyed, and owners of land abutting upon such roads or streets do not take to the middle thread. It must also, I think, be taken to be settled law in the province of Nova Scotia, upon the authority of *Koch* v. *Dauphinee*(1), that lands expropriated for highways under provincial statutes become vested in the crown as its property, the right of the original owner, upon payment of compensation, being extinguished. It is likewise clear that where there has been no expropriation or other acquisition by the crown or municipality of lands for highway purposes the law presumes that the original proprietor has dedicated the highway to the use of the public, and that upon such dedication the right of the public to use such highway is paramount and perpetual. Mr. Justice Meagher has expressly found, upon what I think is satisfactory evidence, that Spring Garden Road, the street in question, had not been laid out under any statute of the province; he further found, in effect, that it had been dedicated to the public before any expropriation act had been passed by the provincial legislature, and he was of opinion, and I agree with him, that there was nothing in evidence to rebut the presumption of which I have spoken, as to the plaintiffs' ownership extending to the centre of the street. The material question then is: Does the act upon which the learned judge relied apply to the city of Halifax?

The act is as follows:—

(1) James 159.

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An act to amend chapter 45 of the Revised Statutes, 5th series, "of laying out of roads other than great roads."

Be it enacted by the Governor in Council and Assembly as follows:— (1.) The legal title to all highways, and the lands over which they pass, is hereby declared to have been heretofore vested in Her Majesty, the Queen, forever for a public highway. (2.) Every highway or street now opened or used as such shall be deemed to have been laid out under the statute of this province applicable thereto unless the contrary can be shown.

I am clearly of opinion that this act does not, and was not intended to, apply to the city of Halifax. If we are permitted to look to the title of the act this is manifestly clear. The title indicates that the object of the legislature is to amend chapter 45 of the Revised Statutes. The assertion that that chapter applies to the city of Halifax is not even arguable; its sole object is to provide machinery for the expropriation of land in order to the making or changing of highways. The charter of the city of Halifax provides an altogether different machinery for the same purpose, and for that reason chapter 45 cannot be held to apply to the city. If, then, we are at liberty to look to the title of the act of 1887 it simply means that the lands expropriated for highway purposes, under chapter 45, shall vest in Her Majesty for these purposes, and that all highways and streets outside of the city of Halifax shall be deemed to have been expropriated unless the contrary is shown.

The act has obviously been drawn by a person unacquainted with legal draughtsmanship. The first section is ungrammatical in form. It is otherwise ambiguous and difficult of interpretation. According to recognized usage its first section should have specified the special act it was intended to amend and it should then have proceeded by distinct paragraphs to indicate the character and extent of such amendment.

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It is manifestly obvious from the title that chapter 45 only was the statute to be amended. Are we to ignore that intent by reason of any supposed rule forbidding reference to such title? Suppose an act with the same title contained the following words only: "The word 'twenty' in the first line of the second section of the said act is hereby repealed and the word 'thirty' substituted therefor." Is there any possible method of interpreting such an act without reference to the title? In such a case would not the courts be imperatively bound to call the title to their aid in the interpretation rather than to do what would otherwise be a necessity, treat the act as absolutely meaningless and nugatory? So in this case we cannot shut our eyes to the fact that the legislature intended, and only intended, to amend the general Provincial Road Act. They did not intend to legislate in respect to the streets in the city of Halifax.

We are not, I conceive, obliged to disregard this intention out of deference to what is said to be a rule of construction, a rule which I may say has probably been just as much honoured in the breach as in the observance.

I doubt whether as a matter of law there is at present any rule at all upon the subject. In none of the cases referred to in the text books has the existence or authority of the rule been the point to be determined. The assertion of the rule has been *dicta* and nothing more. There is this difference too between English and colonial statutes. In England the title of an act is a creation of modern growth; at one time acts were passed without it and there is even now no binding rule as to its character. Colonial legislatures have, on the other hand, always been under a constitutional obligation, by virtue of express instructions from the

(1) See Maxwell on Statutes, pages 49 to 52 and cases there cited.

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crown, to take care that no clause shall be inserted in any act foreign to what the title of it imports, and I know as a matter of practice that in the legislature of Nova Scotia it is the title of the act alone that is read while going through its different stages in the House of Assembly except when before the House in committee of the whole. It is true that when a bill there passes its third reading, the motion is "that the bill do pass and that the title be &c., &c.," just as in our House of Commons the motion is "that the bill do pass its third reading, and that the title be as in the motion paper," but the legislators have before them in both cases, from the introduction of the bill until it receives its final assent, in its title what its object is.

We cannot, with propriety, shut our eyes to the words of the title when it may be absolutely necessary to have regard to these words in our attempt to ascertain the legislative intention, and I submit that when, as in the present case, obvious omissions are inadvertently or ignorantly made the title may and must be regarded with a view of ascertaining the objects or purposes which the legislature has in view.

My view upon this point is strengthened and supported by the consideration that the legislature of Nova Scotia by a subsequent statute (chapter 60 of the acts of 1890, section 5), passed an act expressly in relation to the city of Halifax, and provided, in effect, that all of the streets of the city should thereafter be vested in the corporation. This latter statute would be absolutely meaningless if the legislature then had supposed that the act of 1887 affected the streets of the city of Halifax. If they had been by that act vested in the crown they could only have been taken from the crown by a statute expressly declaring that it was the interest of the crown which was being affected. Here there is no such declaration, and the statute itself is

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equivalent to a legislative declaration that the act of 1887 had not the extended meaning which is now sought to be given to it. The result would, therefore, seem to be that the land upon which the trees mentioned in the pleadings were growing was the plaintiffs' land, subject to the rights of the public to use the same for street purposes.

Now, what were the rights of the defendant company? They were incorporated by the act of 1887, chapter 100, and were authorized to construct and work lines of telephone along the sides of, and across and under, any public highway or street, with the consent of the council having jurisdiction to give such consent, but it was further provided that in working such lines the company should not cut down or mutilate any trees.

In the present case the company obtained the consent of the city council to erect their telephone line along Spring Garden Road, and in front of the plaintiffs' residence. To that extent only was the city in any way implicated in the alleged trespass. The mutilation of the trees was, therefore, an act in direct violation of the company's charter, and by such mutilation they became liable to this action to the extent of the damage incurred. These damages have been assessed at $100, and no complaint has been made that they are excessive.

Questions were raised at the argument as to whether the statute of 1887 vested the fee simple of highways in the crown, or only an easement,—as to whether, assuming the street in question to be vested in the crown, the plaintiffs had not still an action against the defendants by reason of their wrongful act—as to whether the city of Halifax might not, in the exercise of its controlling power over streets, cut down or mutilate trees growing on the highway for the public

benefit, &c., &c. It being settled that the plaintiffs owned the trees in question and that the defendant corporation mutilated them without authority, either from the plaintiffs or the municipal authorities, and that they were therefore trespassers, these questions do not demand discussion in the present case.

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On the whole I am of opinion that the judgment of Mr. Justice Meagher should be reversed, and that the judgment should be entered for the plaintiffs for the sum of $100 with interest from the date of trial, together with all the costs of the court below and of this court.

Appeal allowed with costs.

Solicitor for appellants: *John M. Chisholm.*

Solicitor for respondents: *F. G. Forbes.*

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*May 13.
*June 24.

THE CORPORATION OF THE VILLAGE OF NEW HAMBURG (PLAINTIFFS) ..... } APPELLANTS;

AND

THE CORPORATION OF THE COUNTY OF WATERLOO (DEFENDANTS)..... ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Ontario Municipal Act—Bridges—Width of stream—R. S. O. [1887] *c.* 184, *ss.* 532, 534.

By the Ontario Municipal Act R. S. O. [1887] c. 184, s. 532, the council of any county has "exclusive jurisdiction over all bridges crossing streams or rivers over one hundred feet in width within the limits of any incorporated village in the county and connecting any main highway leading through the county," and by s. 534 the county council is obliged to erect and maintain bridges on rivers and streams of said width. On rivers or streams one hundred feet or less in width the bridges are under the jurisdiction of the respective villages through which they flow.

Held, reversing the decision of the Court of Appeal, that the width of a river at the level attained after heavy rains and freshets each year should be taken into consideration in determining the liability under the act; the width at ordinary high-water mark is not the test of such liability.

APPEAL from a decision of the Court of Appeal for Ontario (1) affirming the judgment of the Divisional Court (2) in favour of the defendants the County of Waterloo.

This action is brought under the provisions of 53 Vic. ch. 50, sect. 40 (O.), now section 535 (*a*) of the Consolidated Municipal Act, 1892 (55 Vic. ch. 42), for the purpose of determining whether the duty and liability

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

(1) 20 Ont. App. R. 1. (2) 22 O. R. 193.

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to build and maintain a certain bridge, called the Huron Street bridge, across the River Nith, which passes through the village of New Hamburg, an incorporated village in the county of Waterloo, rests upon the appellant corporation or the respondent corporation.

Section 531 of ch. 184, R. S. O., deals with the general duty of municipalities to keep in repair the roads, streets, bridges and highways.

Section 532 provides as follows:—

532. The county council shall have exclusive jurisdiction over all roads and bridges lying within any township, town or village in the county, and which the council by by-law assumes, with the assent of such township, town or village municipality, as a county road or bridge, until the by-law has been repealed by the council, and over all bridges across streams, or ponds, or lakes, separating two townships in the county, and over all bridges crossing streams or rivers over one hundred feet in width within the limits of any incorporated village in the county, and connecting any main highway leading through the county, and over all bridges over rivers, or ponds, or lakes forming or crossing boundary lines between two municipalities.

Section 534 provides as follows:—

534. When a county council assumes by by-law any road or bridge within a township as a county road or bridge the council shall, with as little delay as reasonably may be, and at the expense of the county, cause the road to be planked, gravelled or macadamized, or the bridge to be built in a good and substantial manner; and further, the county council shall cause to be built and maintained in like manner all bridges on any river or stream over one hundred feet in width, within the limits of any incorporated village in the county, necessary to connect any main public highway leading through the county.

The only question to be decided on the appeal was:

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Is the River Nith a river or stream over one hundred feet in width within the meaning of these provisions? The evidence showed that the river has well defined banks higher on one side than on the other and that after an ordinary freshet or heavy rain the water rises nearly to the height of the lower bank, which is overflowed by a heavy freshet. When the water is within one foot of the lower bank it is about 112 feet in width, but in dry weather, when the water is low, it is less than 100 feet.

Mr. Justice Ferguson, who tried the action, held that the proper mode of ascertaining the width of the river under the section was to measure from a point a little below the brow of the lower bank across the stream in a straight line to the bank opposite which would make the river in this case more than 100 feet in width. The Divisional Court reversed this decision, holding that the width at the ordinary high-water mark was the true width for the purpose. The Court of Appeal sustained the judgment of the Divisional Court by being equally divided in opinion.

Meredith Q.C. for the appellants was stopped by the court.

King Q.C. for the respondent referred to Phear on Rights of Water (1); *McCullough* v. *Wainright* (2); *Gilman* v. *Philadelphia* (3).

The judgment of the court was delivered by

GWYNNE J.—The only question raised upon this appeal is whether or not a bridge over the River Nith in the village of New Hamburg, connecting the parts of a main public highway on either side of the river leading through the county of Waterloo, is a bridge within secs. 532 and 534 of ch. 184, R. S. O., that is say, whether or not it is a bridge crossing a river or stream over one hundred feet in width. That the bridge

(1) P. 31.
(2) 14 Penn. 171.
(3) 3 Wall. 713.

which crosses the river is considerably more than 100 feet in length is not disputed, but it is contended that the river itself is not one hundred feet in width. The evidence shows the river to be one having well defined banks, that upon one side being much higher than that on the other. It is also shown that in ordinary freshets and even after an ordinarily heavy rain the waters of the river rise as high as the lower bank, while in heavy freshets they overflow that bank; when, however, the waters in the river rise as high as within one foot of the top of the lower bank and so are flowing within its well defined banks the river is over 112 feet in width, but in dry weather and when the waters are low it is not as much as 100 feet in width. Now a bridge across such a river is, in my opinion, clearly within the sections in question, that is to say, is a bridge which crosses a river over 100 feet in width and is under the exclusive jurisdiction of the county council whose duty it is to maintain the bridge. After heavy rain and during freshets, which are ordinary occurrences in this country, the waters of the streams and rivers are accustomed to be much swollen and raised to a great height, and a bridge therefore which is designed to be the means of connecting the parts of a main highway leading through a county which are separated by a river must necessarily be so constructed as to be above the waters of the rivers in such periods, and the width of the rivers at such periods must therefore, in my opinion, be taken into consideration in every case in which a question arises like that which has arisen in the present case under the sections of the act under consideration. The appeal must, in my opinion, be allowed with costs and the judgment of Mr. Justice Ferguson restored.

Appeal allowed with costs.

Solicitors for appellants: *Meredith, Clarke, Bowes & Hilton.*

Solicitor for respondents: *John King.*

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*May 13.

*June 24.

THE CORPORATION OF THE CITY OF LONDON (DEFENDANTS) ..... } APPELLANTS;

AND

GEORGE WATT & SONS (PLAINTIFFS) RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Assessment and taxes—Ontario Assessment Act R. S. O. [1887] *c.* 19, *ss.* 15, 65—*Illegal assessment—Court of revision—Business carried on in two municipalities.*

Sec. 65 of the Ontario Assessment Act (R. S. O. [1887] c. 193) does not enable the Court of Revision to make valid an assessment which the statute does not authorize.

Sec. 15 of the act provides that "where any business is carried on by a person in a municipality in which he does not reside, or in two or more municipalities, the personal property belonging to such persons shall be assessed in the municipality in which such personal property is situated." W., residing and doing business in Brantford, had certain merchandise in London stored in a public warehouse used by other persons as well as W. He kept no clerk or agent in charge of such merchandise but when sales were made a delivery order was given upon which the warehouse keeper acted. Once a week a commercial traveller for W., residing in London, attended there to take orders for goods, including the kind so stored, but the sales of stock in the warehouse were not confined to transactions entered into at London.

Held, affirming the decision of the Court of Appeal, that W. did not carry on business in London within the meaning of the said section and his merchandise in the warehouse was not liable to be assessed at London.

APPEAL from a decision of the Court of Appeal for Ontario (1), reversing the judgment at the trial by which plaintiffs' action was dismissed.

The plaintiffs were wholesale grocers doing business at Brantford, and for convenience in supplying cus-

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

(1) 19 Ont. App. R. 675.

tomers at London and vicinity they kept a quantity of sugar at the latter city stored in a public warehouse kept by a man named Slater. The warehouse was used by other parties as well as the plaintiffs. When any of the sugar was sold a delivery order was given to the purchaser and the goods were delivered on such order by Slater. The plaintiffs were assessed for the years 1891 and 1892 on their sugar in the warehouse and paid the assessment under protest. In 1891 they appealed from the assessment to the Court of Revision by which it was affirmed and they eventually brought an action to recover back from the corporation of London the amounts so paid under protest for the two years. Two other firms, Lucas Park & Co, and Macpherson, Glassco & Co, respectively carrying on business at Hamilton, were assessed by the city of London in the same way and had also paid their assessments under protest. Both these firms assigned their claims to the plaintiffs for the purpose of bringing the action.

The case was tried before Chief Justice Armour who dismissed the action holding that it was a question solely for the Court of Revision. On appeal to the Court of Appeal this judgment was reversed and judgment given for the plaintiffs for the several amounts claimed.

Meredith Q.C. for the appellants. The policy of the assessment act is that every person carrying on business in a municipality shall, in respect to his personal property there, pay his share of the local rates. See *Toronto Street Railway Co.* v. *Fleming* (1).

The plaintiffs having property in London it was for the Court of Revision to decide as to whether or not they did business there and its decision, and that of the County Court Judge in appeal therefrom, are final.

(1) 37 U. C. Q. B. 116.

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By section 65 of the assessment act the assessment roll as finally revised is conclusive as to all matters it contains. The act was amended in consequence of the decision in *Nicholls* v. *Cumming* (1) in this court.

For purposes of assessment tangible personal property is in the same position as real estate. *McCarrall* v. *Watkins* (2); *City of Kingston* v. *Canada Life Assurance Co.* (3).

Gibbons Q.C. for the respondents. Plaintiffs had no place of business in London within the meaning of the act. *Kingston* v. *Canada Life Co.* (3); *Ex parte Charles* (4).

This case is not distinguishable in principle from *City of Brantford* v. *Ontario Investment Co.* (5), and *Nickle* v. *Douglas* (6).

The judgment of the court was delivered by

THE CHIEF JUSTICE.—I am of opinion that this appeal must be dismissed. First, I agree with the Court of Appeal in holding that the 65th section of the Ontario Assessment Act (R. S. O. ch. 193) does not make the roll, as finally passed by the Court of Revision, conclusive as regards question of jurisdiction. If there is no power conferred by the statute to make the assessment it must be wholly illegal and void *ab initio* and confirmation by the Court of Revision cannot validate it.

To this effect were the decisions in *Scragg* v. *City of London* (7); *Nickle* v. *Douglas* (6); *Nicholls* v. *Cumming* (1). Several other Ontario cases might be cited to the same effect. All these cases were founded on principles laid down in English decisions of the highest authority.

(1) 1 Can. S. C. R. 395.
(2) 19 U. C. Q. B. 248.
(3) 19 O. R. 453.
(4) L. R. 13 Eq. 638.
(5) 15 Ont. App. R. 605.
(6) 35 U. C. Q. B. 126; 37 U. C. Q. B. 51.
(7) 26 U. C. Q. B. 271.

I cannot assent to Mr. Meredith's argument that *McCarrall* v. *Watkins* (1), has any application to the present case. The distinction is that the property assessed in *McCarrall* v. *Watkins* (1), was real estate, in which case the property itself is the subject of assessment; here the property is personal in which case not the property but the owner is assessed. I adhere to what is said in *Nickle* v. *Douglas* (2), as to this distinction.

Then if the roll was not conclusive the only question remaining can be whether the case of the respondents comes within the 15th section of the Assessment Act which provides that—

> Where any business is carried on by a person in a municipality in which he does not reside, or in two or more municipalities, the personal property belonging to such person shall be assessed in the municipality in which such personal property is situated.

It is not disputed that the personal property—merchandise consisting of sugar—assessed in the present case was actually in a warehouse within the appellant municipality at the time it was assessed; nor can it be disputed that the respondents are residents of the city of Brantford and do not reside in the city of London. The sole question is, therefore, whether upon the evidence it can be said that they carried on business in London. The proof upon this head is that the sugar was stored in a public warehouse kept by a Mr. Slater in the city of London; that this warehouse was used for bonded as well as for unbonded goods, and by other persons as well as by the respondents; and that the respondents paid Slater the usual warehouse charges upon these goods. It further appears that they had no clerk or agent in charge of the goods, but that when they made sales of sugar they gave a delivery order which Slater acted upon; that once

(1) 19 U. C. Q. B. 248. (2) 37 U. C. Q. B. 51.

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a week or so their commercial traveller, who resided in London, attended there to take orders for goods, including sugar, but that the sales of sugar out of the stock in Mr. Slater's warehouse were not confined to transactions entered into at London.

I am of opinion that this does not show that the respondents carried on business at London. It only shows that some of their stock in trade incidental to the business they carried on at Brantford was stored in a warehouse in London. The proper presumption is, therefore, that they were assessed for this same sugar at Brantford where they exclusively carried on business. To maintain this assessment at London would therefore be to impose upon the respondents a double tax upon the same property which would be illegal and oppressive.

The case of *Kingston* v. *Canada Life Assurance Company* (1), which appears to me to have been properly decided, is an authority for the respondents as is also *Ex parte Charles* (2) referred to in the judgment of Mr. Justice Osler in the Court of Appeal.

The appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitor for appellants: *T. G. Meredith.*

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

(1) 19 O. R. 453.

(2) L. R. 13 Eq. 638.

THE INTERNATIONAL COAL COMPANY (LIMITED) (DEFENDANTS)... } APPELLANTS;

AND

THE MUNICIPALITY OF THE COUNTY OF CAPE BRETON (PLAINTIFFS)..... } RESPONDENTS.

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*May 4.

*June 24.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Assessment and taxes—Tax on railway—Nova Scotia Railway Act—Exemption—Mining Co.—Construction of railway by—R. S. N. S. 5 Ser. c. 53.

By R. S. N. S. 5 Ser. c. 53, s. 9, s.s. 30, the road, bed etc., of all railway companies in the province is exempt from local taxation. By s. 1 the first part of the act from secs. 5 to 33 inclusive applies to every railway constructed and in operation or thereafter to be constructed under the authority of any act of the legislature and by s. 4 part 2 applies to all railways constructed or to be constructed under authority of any special act, and to all companies incorporated for their construction and working. By s. 5, s. s. 15, the expression "the company" in the act means the company or party authorized by the special act to construct the railway.

Held, reversing the decision of the Supreme Court of Nova Scotia, Gwynne J. dissenting, that part one of this act applies to all railways constructed under provincial statutes and is not exclusive of those mentioned in part two; that a company incorporated by an act of the legislature as a mining company with power "to construct and make such railroads and branch tracks as might be necessary for the transportation of coals from the mines to the place of shipment and all other business necessary and usually performed on railroads," and with other powers connected with the working of mines "and operation of railways," and empowered by another act (49 V. c. 45 [N. S.]) to hold and work the railway "for general traffic and the conveyance of passengers and freight for hire, as well as for all purposes and operations connected with said mines in accordance with and subject to the

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

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provisions of part second of ch. 53, R. S. N. S. 5 Ser., entitled 'of railways,'" is a railway company within the meaning of the act; and that the reference in 49 V. c. 145, s. 1, to part two does not prevent said railway from coming under the operation of the first part of the act.

APPEAL from a decision of the Supreme Court of Nova Scotia reversing the judgment of the trial judge in favour of the defendant company.

The facts of the case will sufficiently appear from the following judgments.

Mr. Justice Townshend who tried the case held that the defendant company was exempt from taxation in respect to the said railway. His judgment was reversed by the Supreme Court of Nova Scotia and the company appealed to this court.

Harris Q.C. for the appellants referred to *Doughty* v. *Firbank* (1).

Borden Q.C. for the respondents cited *In re East & West India Dock Co.* (2); *In re Exmouth Docks Co.* (3).

THE CHIEF JUSTICE and FOURNIER J. concurred in the judgment of Mr. Justice Sedgewick.

TASCHEREAU J.—I agree that this appeal should be allowed.

GWYNNE J.—I entirely concur in the judgment of the majority of the Supreme Court of Nova Scotia that the appellants are not a railway company within the meaning of the 30th subsection of section 9 of ch. 53 of the Revised Statutes of Nova Scotia, 5th series, as amended by 53 Vic. ch. 25 of the statutes of Nova Scotia, which section, as so amended, enacts that "the road, rolling stock, bed, track, wharfs, station houses, and buildings of *all railway companies* in the province

(1) 52 L. J. Q. B. 480. (2) 38 Ch. D. 576.
(3) L. R. 17 Eq. 181.

shall be exempt from local taxation." That section, by the provisions of the said chapter 53, which is entitled "of railways," applied only to such railways as at the time of the passing of the said ch. 53, viz., in 1884, were then constructed and in operation, or which should thereafter be constructed, under the authority of any act passed by the legislature of Nova Scotia; and the term "railway companies in the province" whose property is by the above subsec. 30 of sec. 9 of ch. 53, as amended by ch. 25 of the acts of 1890, exempted from taxation, must, of necessity, as it appears to me, apply only to such companies as had been or should be incorporated by an act passed by the legislature of Nova Scotia as a railway company, for the purpose of constructing and operating the railway authorized by the legislature of Nova Scotia to be constructed. In fact it applies, as it appears to me, only to railway companies with whose special act of incorporation as a railway company the provisions of the first part of the general act "of Railways," viz., ch. 53, were declared to be incorporated, and therefore to those companies only whose corporate powers consisted solely in the working of the railway.

Now the appellants were not incorporated by an act passed by the legislature as a railway company at all or for the construction of any railway; they have come into existence as a company under the name of the International Coal Company, limited, under an act of the Dominion of Canada, viz., the Joint Stock Companies Act of 1877, for the purpose of purchasing and holding certain coal mining properties in Cape Breton. The property, for the purpose of purchasing which the appellants were so incorporated by Dominion letters patent under the provisions of the above Dominion act, was the property of a company which had been incorporated by an act of the legislature of the pro-

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vince of Nova Scotia before Confederation, in 1864, as the International Coal and Railway Company, for the purpose of opening and working coal mines, manufacturing coal oil, and the constructing and making such railroads and branch tracks as might be necessary for the purpose of the transportation of coals from the mines to the place of shipment, and all other business necessary and usually performed on railroads. Now, in 1885, an act of the Dominion of Canada, 48 & 49 Vic. ch. 29, was passed upon the petition of the appellants who were so, as aforesaid, incorporated as the International Coal Co., limited, by Dominion letters patent, by which it was enacted that—

> Notwithstanding any thing in the Canada Joint Stock Companies Act 1877, the said the International Coal Company, limited, is hereby declared to have, as having acquired the properties of the said International Coal and Railway Company which included their said railway, the right and authority to hold and work the said railway for the purposes of their own mines and operations and may hold and exercise such powers of working the said railway for the transport of passengers and freight generally for others for hire as may be conferred upon the company by the legislature of the province of Nova Scotia.

Subsequently, and in 1886, the appellants obtained an act of the legislature of Nova Scotia to be passed whereby it was enacted that,

> The International Coal Company, limited, is hereby authorized to hold and operate the railway lately purchased and now belonging to the company and leading from the mines of the company at Bridgeport to Sydney, for general traffic and the conveyance of passengers and freight for hire as well as for all purposes and operations connected with said mines in accordance with and subject to the provisions of part second of ch. 52 of the Revised Statutes of Nova Scotia, fifth series entitled "of railways."

Now it is to be observed that in this act the appellants are dealt with as "The International Coal Company, limited," and not as a railway company at all. To the International Coal Company who have a railway for the necessary purposes of the company as a coal

company are given certain powers which they may or may not exercise at their pleasure, namely, the power to operate their railway for general traffic and the conveyance of passengers and freight for hire, as well as for the purposes and operations of the company as a coal company in connection with their mines. Now such additional powers conferred upon the coal company does not constitute them a railway company within the meaning of subsec. 30 of sec. 9 of ch. 53, as amended by ch. 25 of the acts of 1890, and I confess to being unable to see any principle upon which we would be justified in holding that the property of the coal company, and which is used by them for the purpose of carrying on the business of a mining coal company, and for carrying on which business they were incorporated, should be exempt from taxation because in addition to the business of a mining coal company they have had conferred on them a privilege which they may or may not exercise at their pleasure of using property essentially necessary to their business as a coal company for other purposes. In my opinion the appeal should be dismissed with costs.

SEDGEWICK J.—The point to be determined on this appeal is as to the liability of the appellant corporation for local taxation in respect to their railway between Bridgeport and Sydney, in the county of Cape Breton. A case was agreed upon between the parties and upon its being submitted to Mr. Justice Townshend he gave judgment in favour of the company. This judgment was reversed upon appeal to the Supreme Court of Nova Scotia the opinion of the court being delivered by Mr. Justice Graham, Mr. Justice Ritchie dissenting, and it is from that judgment that this appeal is taken.

The railway in question is twelve miles long. It is worked continuously except during four months of the

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winter season. It has a regular train service for passengers and freight with a fixed tariff of tolls. Its principal use to the company is the carrying of coals from Bridgeport (where the mines are) to Sydney Harbour, but it none the less is operated as an ordinary railway for the use of the public generally.

It was built by the International Coal and Railway Company, a company incorporated by the Nova Scotia legislature in 1864 (cap. 42) for the purpose of working coal mines in Cape Breton and for the further purpose of

> Constructing and making such railroads and branch tracks as might be necessary for the transportation of coal from the mines to the place of shipment and all other business necessary and usually performed on railroads ; and for constructing and building such wharfs, docks and piers as might be necessary for the working of mines and protection and safety of shipping, the shipment of coals and the transaction of business connected with mines and operation of railways.

After the railway was so constructed in pursuance of the powers stated the company became involved and its property including the road in question was sold at sheriff's sale. Thereupon the purchasers or their assignees formed themselves into a joint stock company under the name of the International Coal Company (the defendant company) incorporating themselves under "The Canada Joint Stock Companies Act 1877."

It happened, however, that under that act (as well as under the present companies act) companies incorporated by letters patent were incapacitated from constructing or working railways (sec. 2). Application was therefore made to Parliament asking in effect for these among other powers, and by section 3 of 48 & 49 Vict. cap. 29 (Canada) it was enacted that notwithstanding anything in the Canada Joint Stock Companies Act the defendant company might hold and work their railway for the purposes of their own mines

and operations, and might hold and exercise such powers of working the railway for the transport of passengers and freight generally for others for hire as might be conferred on the company by the legislature of Nova Scotia. And by chapter 145 of the acts of the Nova Scotia legislature 1886, sec. 1, the company were authorized to hold and operate the railway

for general traffic and the conveyance of passengers and freight for hire as well as for all purposes and operations connected with said mines, in accordance with and subject to the provisions of part second of chapter 53 of the Revised Statutes of Nova Scotia, 5th series, entitled "of railways."

The statutes above referred to are the enactments under which the defendant company now operate their road. In my view they justify its claim to be considered a "railway company" in the ordinary acceptation of these words. Whether or not they are a railway company within the meaning of the Nova Scotia act remains to be considered.

Section 9 of subsection 30 of chapter 53 of the Revised Statutes of Nova Scotia "of Railways" (hereafter called for convenience "the Railway Act,") provides that

The road, bed, track, wharfs, station houses and buildings of *all railway companies in the province* shall be exempt from local taxation.

The contention of the municipality is that this provision does not apply to the defendant company; first, because it is not a "railway company;" and second, because even if it be a railway company, part first of the "Railway Act" in which the exempting clause occurs does not apply to it.

Sections 1 and 4 of the "Railway Act" are as follows: –

1. The provisions of this chapter from sec. 5 to sec. 33 (both inclusive), being part one of this chapter shall apply to every railway constructed and in operation, or hereafter to be constructed, under the authority of any act passed by the legislature of Nova Scotia, and shall, so far as they are applicable to the undertaking, be incorporated

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with the special act, form part thereof, and be construed as forming one act, unless they are inconsistent with or are expressly varied or excepted by the special act or other act of the legislature of Nova Scotia.

4. The remaining provisions of this chapter, being part second, shall apply to all railways which have been or which may hereafter be constructed under the authority of any special act passed by the legislature of Nova Scotia and to all companies which have been or may be incorporated for their construction and working.

Dealing with the second contention first, it appears to me that confusion has arisen by supposing that the classes of railways referred to in these two clauses are mutually exclusive of each other. This is not so. The railways referred to in section 4, and in respect to which part second of the act is intended to apply are likewise included in those railways referred to in section 1. In the analogous Dominion act, the Consolidated Railway Act 1879, almost every clause of which is substantially embodied in this act, part first applied to the Intercolonial Railway only, but part second applied to that railway also, as well as to all railways, whether built by Canada or under the authority of its parliament. The Nova Scotia legislature has, however, widened the effect of part one and made it applicable to every railway in the province constructed or operated under its authority, including any railways built under the general railway act of the province if such now there be. But, apart from this consideration, let us examine more minutely whether this railway does not in express terms fall within part 1.

It is a railway constructed; it is a railway in operation; it is a railway constructed under the authority of an act of the legislature (the act of 1864) and it is likewise a railway in operation under the authority of an act of the legislature (the act of 1886). So far as I can see nothing else is necessary to bring it within the purview of part one and to confer upon it the

benefits as well as to subject it to the obligations thereby created. Nor is there anything in the acts under which it was constructed and is now operated from which it can be inferred that this part is inapplicable. It follows that unless there is something to the contrary elsewhere in the act the exempting clause applies to this railway, assuming always that it is the property of "a railway company."

But I see nothing to the contrary. Part second of the act undoubtedly applies to the company.

It applies because the act of 1886 under the authority of which the railway is operated expressly so enacts, and because, as well, it is a "railway which has been constructed under the authority of a special act passed by the legislature of Nova Scotia." But that fact cannot by any process of reasoning that I can understand exempt it from, or deprive it of, the burdens and benefits of part one. I am therefore of opinion that if the company is a railway company it is entitled to exemption from local taxation.

I have already intimated that in my opinion it is as that phrase is ordinarily understood a "railway company." But, if what has been stated is correct, the company is subject to the provisions of the Railway Act. The acts under which the road was built and is now operated all refer to it as a railway company. It operates the road as a railway company.

It is in my view, therefore, a bold construction to hold (even although the principal business of the company is the mining of coal) that in spite of legislative declarations several times repeated both by the Parliament of Canada and by the legislature of Nova Scotia to the contrary, the company in question is not a railway company.

In my view the appeal should be allowed with costs and judgment should be rendered for the appellants

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for costs including the costs of the hearing before Mr. Justice Townshend and appeals to the court below and to this court.

Appeal allowed with costs.

Solicitors for appellants: *Henry, Harris & Henry.*

Solicitors for respondents: *Borden, Ritchie, Parker & Chisholm.*

R. A. STEWART *et al* (PLAINTIFFS).....APPELLANTS; 1893

AND *Mar. 9.
*June 24.

HENRY ATKINSON (DEFENDANT).....RESPONDENT.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA (APPEAL SIDE.)

Sale of deals—Contract—Breach of—Delivery—Acceptance—Quality—Warranty as to—Damages—Arts. 1073, 1473, 1507 *C.C.*

In a contract for the purchase of deals from A. by S. *et al.*, merchants in London, it was stipulated *inter alia*, as follows :—"Quality—Seller's guarantee quality to be equal to the usual Etchemin Stock and to be marked with the Beaver Brand," and the mode of delivery was f. o. b. vessels at Quebec, and payment by drafts payable in London 120 days sight from date of shipment. The deals were shipped at Quebec on board vessels owned by P. & Bros. at the request of P. & P. intending purchasers of the deals. When the deals arrived in London they were inspected by S. *et al.*, and found to be of inferior quality, and S. *et al.*, after protesting A. sold them at reduced rates. In an action in damages for breach of contract;

Held, reversing the judgment of the court below, that the delivery was to be at Quebec, subject to an acceptance in London and that the purchasers were entitled to recover under the express warranty as to quality, there being abundant evidence that the deals were not of the agreed quality. Arts. 1507, 1473, 1073 C. C. The Chief Justice and Sedgewick J. dissenting.

APPEAL from a judgment of the Court of Queen's Bench for Lower Canada (appeal side) confirming the judgment of the Superior Court.

This was an action in damages for breach of contract for $12,252.44. The facts as alleged by the declaration were as follows :—

That on the 10th November, 1880, at Quebec, the appellants then merchants in London, England, acting

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through one Porteous their agent specially authorized for that purpose, made a contract for the purchase of certain quantity of deals with the respondent, a merchant in Quebec.

That the contract provided for the quantity, specification and price of the deals and the time at which they were to be ready for delivery. The mode of delivery stipulated for was f. o. b. vessels by respondent at Quebec.

Two clauses provided for "quality" and "payment" and read as follows:—

Quality.—Sellers guarantee quality to be equal to the usual Etchemin Stock and to be marked with the Beaver Brand.

Payment.—By acceptance of sellers' drafts payable in London at 120 days sight from presentation and exchange for bill of lading and shipping documents as each shipment is made.

That there was in the contract a further stipulation to the effect that should any of the goods remain unshipped on first of August the respondent was to have the option of drawing for the estimated amount of invoice for whatever quantity they had then ready for delivery, and in like manner on the first of November for any further quantity which they might have ready and not shipped.

That part of the deals were shipped at Quebec in September, 1881 and 1882, and on their arrival in London and when they had been piled in the docks, their defective quality was brought to the notice of the respondent, who was then in London.

That they were all paid for before they had reached London.

To this declaration, respondent answered as follows: Firstly, by a general denial, secondly, by a perpetual peremptory exception in which he alleged:

1. That J. S. Porteous, mentioned in the declaration, acted throughout in the execution of the contract as appellants' agent.

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2. That before the deals had been all sawn and before the first cargo had been shipped, the appellants had already sold them to Price & Pierce, of London, represented at Quebec by Price, Bros. & Co. to whom, by appellants' instructions, contained in a letter of date the 8th September, 1881, the respondent was to deliver the goods.

3. That the deals were delivered to Price Bros. & Co. as appears by the receipts for bills of lading produced.

4. That the deals were of the stipulated quality, as admitted by Price & Pierce, who declared that they were satisfied.

5. That before delivery, Price had caused the said deals to be measured and culled.

6. That respondent's drafts were paid by the appellants, without protest, after delivery of the deals by Price & Pierce.

7. That when the said drafts became due and were paid, the goods had passed into the hands of Price & Pierce, the appellants having no interest in them, and having sold them at a profit to Price & Pierce, who had resold the same.

To these pleas, the appellants replied generally.

The evidence as to the acceptance, delivery and quality of the deals is reviewed in the judgment of Mr. Justice Fournier hereinafter given.

Fitzpatrick Q. C. and *Ferguson* Q. C. for appellants contended that the proper construction of the contract was that the delivery was to be at Quebec subject to an acceptance in London. If so, there is abundant evidence that the deals were of an inferior quality and under articles 1507, 1473, 1073 C.C. the appellants were entitled to recover. Moreover, there being an express warranty, they could not bring their action under art. 1063 until they had sold the deals and therefore art. 1530 relied on by respondent does not apply.

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Casgrain Q.C., Attorney General of Quebec for respondent, contended that the evidence of the appellant on his own behalf was not admissible and if not admissible the courts below were quite right in holding that there had been delivery and acceptance at Quebec. This is nothing else than a redhibitory action and it has not been brought within a reasonable time. Art. 1530 C. C.

The Chief Justice was of the opinion that the appeal should be dismissed for the reasons given by the court below.

FOURNIER J.—Le 10 novembre 1880, les appelants, marchands de Londres, en Angleterre, par le ministère de Porteous, leur agent spécialement autorisé à cet effet, firent avec l'intimé un contrat pour l'achat d'une certaine quantité de madriers.

Le contrat mentionne les quantités, spécification, et prix des madriers et l'époque de la livraison.

Les autres clauses concernant la qualité et le paiement sont comme suit:

Qualité. Les vendeurs garantissent la qualité comme égale à celle du stock ordinaire d'Etchemin portant la marque de Beaver Brand.

Paiement. Sur l'acceptation de traites des vendeurs payables à Londres cent vingt jours après la présentation.

Le contrat contient aussi la stipulation que dans le cas où une partie des madriers vendus n'auraient pas été expédiée le 1er août, l'intimé aurait l'option de tirer pour le montant de la valeur des madriers qui seraient alors prêts à être délivrés, que pareillement au premier de novembre, il pourrait tirer pour toute quantité qui serait alors prête, mais qui n'aurait pu être expédiée.

Ce contrat fut fait à une époque où non seulement les madriers n'étaient pas faits, mais où même les billots

qui devaient servir à les faire n'étaient pas encore coupés, de sorte que la qualité des billots, la classification des madriers restaient entre les mains de l'intimé, la seule protection des appelants qui demeurent à Londres, étant la clause de garantie contenue dans le contrat.

La preuve fait voir clairement que depuis nombre d'années les madriers manufacturés par l'intimé aux moulins d'Etchemin portaient une marque appelée le "Beaver Brand" et avaient une valeur particulière sur le marché de Londres, en conséquence de la qualité des billots employés à leur manufacture et particulièrement de la sévère inspection à laquelle ils étaient soumis. Les appelants se considéraient comme suffisamment protégés par la garantie que les madriers achetés seraient de qualité égale à celle du stock d'Etchemin portant la marque de Beaver Brand.

Les madriers ne furent expédiés qu'en septembre 1881 et les premières charges arrivées à Londres furent dans les docks où l'on pouvait facilement les examiner. Leur qualité inférieure fut constatée en novembre 1881, lorsque la première cargaison fut déchargée et l'intimé, requis de venir les voir, afin de juger par lui-même de leur qualité, refusa constamment d'y aller. Ce n'est qu'après plusieurs demandes à cet effet que l'appelant prit son action pour recouvrer la différence de valeur entre les madriers livrés et la qualité garantie par le contrat.

L'intimé a répondu à cette action par un plaidoyer, alléguant que les appelants n'avaient plus d'intérêts dans les madriers, les ayant vendus avant même que le bois fut coupé et avant la date de la première livraison et qu'ils avaient donné ordre de liver tous les madriers à MM. Price et Pierce, de Londres, représentés à Québec par M. Price, Frères et Cie.

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Que l'intimé avait livré les madriers suivant les instructions reçues à cet effet, conformément aux termes du dit contrat.

Que MM. Price et Pierce avaient reconnu lors de la livraison que les madriers étaient conformes aux stipulations du contrat et qu'ils les avaient pris et reçus en s'en déclarant satisfaits et que l'intimé avait fidèlement rempli son contrat.

Que les dits Price et Pierce avant de recevoir les dits madriers les avaient fait examiner, mesurer et inspecter, et avaient constaté qu'ils étaient en tout égaux en qualité aux stock d'Etchemin, portant la marque "Beaver Brand."

Le plaidoyer allègue ensuite le paiement des dits madriers par l'acceptation des traites tirées sur les appelants et qu'à chaque acceptation des dites traites ainsi que lors du paiement d'icelles, les appelants se sont déclarés satisfaits de la qualité des madriers ; que les appelants ont reçu de Price et Pierce tout le prix de leur bois, et ont cessé depuis d'avoir aucun intérêt dans ce bois qui depuis le commencement de l'année 1882 a passé en d'autres mains, sans aucunes pertes ni dommages, mais au contraire avec profit et avantage.

Sur cette contestation les parties ont procédé à l'enquête et la cause ayant été entendue au mérite, la cour Supérieure à Québec, a rendu jugement renvoyant l'action ; ce jugement a été confirmé par la cour du Banc de la Reine.

Dans le contrat il est stipulé que le bois sera livré à Québec et le jugement déclare que MM. Price et Cie, après l'avoir reçu à Québec l'ont expédié aux appelants en Angleterre, sur leurs vaisseaux, ou vaisseaux loués par eux, conformément aux instructions des appelants ; que les employés de Price Frères et Cie, avaient auparavant examiné ce bois et l'avaient trouvé conforme au

dit contrat et de la qualité connue sous le nom de Beaver Brand.

La preuve ne supporte pas ces considérants.

Messieurs Price Frères et Cie, n'ont point reçu le bois en question pour les appelants. L'honorable Evan J. Price, entendu comme témoin, dit positivement le fait. Sur des instructions reçues de MM. Price et Pierce de Londres, ils se chargèrent de fournir les vaisseaux pour transporter le bois en question en Angleterre. Il s'exprime comme il suit à ce sujet:

A. As far as my recollection goes, we received a cable from London, from Price & Pierce, requesting us to see to the shipment of these cargoes, that they had made arrangements with Stewart Brothers about them. We engaged ship here, and had the deals shipped to London—the deals were shipped by Atkinson, and not by ourselves and he handed us the Bills of Lading after the shipments were made. With the exception of giving Atkinson instructions about the shipping of the deals we practically had nothing to say to them.

A la question de savoir s'ils avaient des instructions concernant la qualité, le témoin répond:

A. It was giving orders for the vessels. We took up ships and gave orders to suit the stocks that might be on hand at the time.

Q. Had you, as acting for Price & Pierce, anything to do with the quality of the deals shipped, or with the accepting of them on their behalf, as being under the contract?

A. Nothing whatever.

Il affirme aussi qu'ils n'ont reçu aucune instruction des appelants et qu'ils n'ont agi que sur celles des MM. Price et Pierce.

Les MM. Price et Frères n'ont pas non plus fait recevoir et examiner le bois en question, ni pour les appelants ni pour eux-mêmes. Ce lot de bois étant sur le marché ils l'ont fait examiner pour leur information seulement, pour se tenir au courant du marché comme ils ont l'habitude de le faire:

Walter J. Ray, le foreman de leur établissement, dit aussi au sujet de la réception des madriers.

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We had nothing to do with the receiving or accepting of the deals here; all we had to do was to see to their shipment under instructions from Price & Pierce.

Il est donc contraire à la preuve de dire que le bois a été reçu et approuvé par Price Frères, comme étant de qualité conforme au contrat.

On voit à la page 93 du dossier, une lettre des appelants informant l'intimé qu'ils ont vendu à MM. Price et Pierce le bois qu'ils ont acheté de lui; mais cette vente ne paraît pas avoir été faite de suite, comme le fait voir la partie suivante du témoignage de M. Price.

Q. Did you become aware at any time after the receipt of that cablegram as a matter of fact Price & Pierce did not purchase these deals?

A. Yes, I knew they did not, but they informed me themselves that they were only handling the deals for Stewart.

On voit aussi par le témoignage de T. L. Pierce, l'un des associés de Price et Pierce, que cette vente n'a pas eu lieu. Le rapport s'exprime ainsi:

He repeats his previous statement that the deals were sold by his firm on account of the plaintiffs (appellants), between 1881 & 1883:

Price et Pierce n'ont en conséquence pas agi pour eux-mêmes dans la réception du bois, soit à Québec lorsqu'il a été mis dans les vaisseaux, soit à Londres, lorsqu'il a été déposé sur les quais. La livraison ayant été ainsi faite sans qu'il y eut quelqu'un de spécialement chargé de le recevoir, il n'est pas extraordinaire que ce bois se soit trouvé d'une qualité inférieure au point de faire dire à un témoin que les meilleurs madriers semblaient avoir été triés avant l'expédition de la cargaison. La valeur en était beaucoup au-dessous des prix du marché.

Plusieurs témoins ont été entendus sur ce sujet et ont positivement établi le fait de l'infériorité de la qualité du bois et constaté que les appelants ont dû nécessairement souffrir des dommages parce que le

bois n'était nullement de qualité conforme à celle du contrat.

Pour constater ce fait, je me bornerai à donner quelques extraits des témoignages.

M. J. L. Pierce dit de plus :

That he knew of the contract and had seen it; that the goods were put into the hands of his firm for sale by the plaintiffs; that they had occasion to examine the same minutely, owing to a report that the quality was not what it ought to be; that he had frequently had occasion, previous to 1881, to see these deals, and that he was able to speak with certainty as to their usual and ordinary quality; that the deals in 1881 were not equal to the usual quality, and not equal to the average of previous years, the culling not so strict as it should have been, and usually had been; and that the inferior quality prevented ready sale, causing extra dock charges and interest to a serious amount; That he was aware the plaintiffs lost money; that he knew that the deals were inspected and surveyed by Mr. W. Browning, a man of great experience in the timber trade; that he knew as a fact that the culling was not in accordance with the usual culling of the Etchemin stock; that the stock had been usually sawn from a run of logs of so good a quality that the brand had been a favourite one; that the deals shipped under this contract were sawn out of logs totally different and of an inferior nature, and that the culling of even these was not so strict as it should have been; that if the deals had come forward of the usual good quality, plaintiffs would have made a profit, and certainly no loss; that they were finally realized for the plaintiffs; that he had seen the Etchemin deals between 1867 and 1881, inclusive and visited the mills personally in 1866 or 1867; that the deals could have been sold for full market price, had they been of the ordinary Beaver Brand. He repeats his previous statement that the deals were sold by his firm on account of the plaintiffs between 1881 and 1883.

Mr. E. G. Price, autre associé de la maison Price et Pierce dans son interrogatoire dit :

That he knew of the contract which was handed to his firm in 1881; that he had seen the deals when they came into their hands for sale, and that he examined them minutely; that he knew what the usual quality was, having had occasion to see them every year from 1872 to 1881; that he had frequently sold them and could speak with certainty as to the usual and ordinary quality; that the deals shipped under this contract were not of the usual quality and not equal to the pre-

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vious years, owing to the first quality being coarser and containing more centre deals cut from smaller logs and the seconds and thirds being also coarse and not equal to the usual quality; he knew the plaintiffs had lost money on the contract; he knew of a survey by Browning which was made at the request of his firm for the purpose of ascertaining whether or not the deals had been shipped according to the usual custom at the Etchemin Mills, with the result that they were not considered equal to the usual quality; and he produces Mr. Browning's letter which is attached to his evidence; that he knew the culling was not as usual, having had occasion to examine the stock in previous years; that he had sold some of these deals at 30 shillings per standard less than the figures at which they were selling other good deals; that on the arrival of the deals they gave samples to different buyers at £11 10s. 0d. per standard, and all declined them although they wanted them badly; that ultimately they sold them at £9 and £9 10s. when they were making for good deals such as they should have been £11 10s. and £12. He speaks of good deals arriving at the same time as these came in, and being sold readily at £11 and £12, while these deals were kept on hand for months and finally disposed of at reduced prices.

This was in reference to the first quality. Buyers of the second and third qualities, he stated, were very such dissatisfied with their purchases and declined to take more. He also states that being specially interested in the spruce trade he had seen and examined these deals every year from 1872 to 1881; that the deals should have brought £11 10s. for first quality, £9 for the second and £8 10s. for third, if they had been of the ordinary quality, and that they could have sold them at these prices; that his firm had sold all these deals for the plaintiffs.

Mr. J. H. Howard, de la Société Pace & Sons, dit:

That he knew of the contract "quite recently"; that he saw part of the deals when being landed and others afterwards, that he had occasion to examine them very minutely, his object being to purchase them for Pace & Sons for the purpose of making match boxes specially; that he reported verbally to his firm that they were of inferior quality and that in consequence they did not buy them; that he knew the usual quality known commonly as "Beaver Brand"; that he had occasion every year since 1870 to examine them; that from 1870 to 1875 he purchased them for Pace & Sons, (of which firm he was a partner); that he is able to speak with certainty as to the usual and ordinary quality; that they were not equal to usual quality although marked with the "Beaver Brand"; that they had 30 per cent of heart or centres and that usually the percentage was 3 per cent; that he estimated

the difference in value from the usual shipments at 30 shillings per standard for first quality and 12s. 6d. for the third quality; his firm did not buy second's; that he knew that the culling was not according to usual culling, that the culling of the stock stood first in London; that there were not deals like them; that they fetched more in the London market than any other; that the deals shipped under this contract were so inferior that they were perfectly useless for the purpose for which they had used them before; that he knew that if they had been according to the usual quality, they would have fetched full market prices, which prices were higher than in 1879 or 1880; that he had seen and examined the stock in Quebec, in 1874, 1876 and 1878, and that he had seen and examined it elsewhere every year from 1870 to 1881; that he had made these examinations for the purpose of purchasing; that the market was not a falling market but a rising one for first quality from 1879; he estimated the values; first quality £11 10s.; third quality, £8 and he knew that they could have been sold for these prices, because he had paid £11 10s. and £8 for goods inferior to the usual "Beaver Brand."

M. E. D. Wilson, un marchand de Londres, dit:

That he had examined the deals minutely as an intending purchaser; he speaks emphatically of knowing what the usual quality was; that he had seen them for six or seven years previous to 1881, and that he had purchased them in very large quantities, he believed about 20 cargoes; that the shipment under the contract in question was not equal to the usual quality, that they were inferior in respect of bad classification, the first quality being very "centry" and the second and third quality being very rough and inferior; and he estimates the difference in value to the usual shipments at 20 shillings per standard on the first quality and 10 shillings on the second and third quality; that he considered the culling was not the usual culling, and that the deals were distinctly inferior both in quality of wood and classification; that he considered the contract would have been a good one for the plaintiffs if the quality had been right; that he knew the deals from having purchased them from first class Quebec shippers who represented them as Etchemin deals under contract, describing them as such, also "Beaver Brand"; that the market was not a falling one and he estimates the values at £11 for first quality, £8 15 0 for second quality and £8 for third quality, and knows that they could have been sold at these prices, because he was able to make a profit on them.

Robert H. Lightburn, un autre témoin, dit:

That he knew of the contract and he proves the payments, and due dates of the drafts drawn by defendant, and also proves that the

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deals were handled by Price & Pierce for the plaintiffs, and an account was rendered of the sales."

A. G. Sheriff dit :

That he knew of the contract and that the plaintiffs had bought the same stock of deals before in 1879 ; and that the deals in question in this case were not equal in quality ; he exhibits an account showing loss to the plaintiffs of £2,521 11s. 7d., proves the payment of the bills and puts in a table showing them to have been drawn between the 25th June, 1881, and the 15th December, 1881, and all paid ; he knew that the deals had been surveyed and the quality generally condemned ; describes his interview with the defendant, in which interview he urged him to go to the docks when in London to see the deals, and the indifference of the defendant to his request ; states that the Beaver Brand is a well known and favourite stock ; and that the quality of the shipments under this contract rendered them useless for what they were usually wanted, otherwise they could readily have been sold. He produces the account of sales, certified by Price & Pierce showing how the deals were sold for account of plaintiffs. He also deposes to having seen the survey of the late Mr. Browning, thus showing this gentleman's death previous to the closing of the commission and the consequent impossibility of examining him.

Tous ces témoins s'accordent à dire que le marché était alors plutôt à la hausse qu'à la baisse ; que la demande était bonne et que du bois de la qualité désignée au contrat se serait promptement vendu, au lieu que la vente de celui envoyé a été retardée.

Atkinson, l'intimé, se trouvant en Angleterre lors de l'arrivée d'une partie de son bois, fut informé par l'appelant de la qualité inférieure du bois, et invité à aller avec eux, l'examiner dans les docks. S'étant une fois rendu chez l'appelant qui se trouvait alors absent, il ne voulut plus y retourner quoique souvent requis de le faire, pour examiner le dit bois. Le dossier contient en outre plusieurs lettres des appelants se plaignant de la qualité du bois et lui demandant des instructions sur la manière d'en disposer ; mais il a toujours refusé de tenir aucun compte des réclamations des appelants. Enfin les appelants se sont décidés à s'adresser à la justice.

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Je crois que les appelants ont fait une fort bonne preuve de leurs dommages et qu'ils ont droit à un jugement en leur faveur.

Je suis d'avis que les dommages devraient être estimés à raison de $3.00 par cent de madriers de première qualité, de l'étalon de St. Petersbourg (per hundred deals) et à raison d'une piastre et cinquante cents par cent madriers de 2e et 3e qualités de l'étalon de St. Petersbourg. Le tout avec frais et dépens.

TASCHEREAU J.—I would allow this appeal for reasons given by my brother Fournier. Damages $3 per hundred St. Petersburg Standard for first class, and $1.50 for second and third class.

GWYNNE J. concurred with FOURNIER J.

SEDGEWICK J. was of opinion that the judgment of the Court of Queen's Bench should be affirmed.

Appeal allowed with costs.

Solicitors for appellants : *Fitzpatrick & Taschereau.*

Solicitors for respondent : *Casgrain, Angers & Lavery.*

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*May 2.

*June 24.

AMOS COWEN (PLAINTIFF).....APPELLANT;

VS.

JAMES S. EVANS (DEFENDANT).....RESPONDENT.

Appeal—Amount in controversy—R.S.C. ch. 135—54 *&* 55 *Vic. ch.* 25—*Costs.*

C. brought an action against E., claiming: 1. That a certain building contract should be rescinded; 2. $1,000 damages; 3. $545 for value of bricks in possession of E., but belonging to C. The judgment of the Superior Court dismissed C.'s claim for $1,000, but granted the other conclusions. On appeal to the Court of Queen's Bench by E., the action was dismissed in 1893.

C. then appealed to the Supreme Court.

Held, that the building for which the contract had been entered into, having been completed, there remained but the question of costs and the claim for $545 in dispute between the parties and that amount was not sufficient to give jurisdiction to the Supreme Court under R.S.C. ch. 135 sec. 29.

APPEAL from a judgment of the Court of Queen's Bench for Lower Canada (appeal side) reversing the judgment of the Superior Court.

The facts of the case are sufficiently stated in the head note and in the judgment of Mr. Justice Taschereau, hereinafter given.

Before the case was inscribed for hearing on the merits, R. C. Smith, for the respondent, moved to quash the appeal on the following grounds:—

1. Because the case is not appealable to this court;

2. Because the matter in controversy herein does not amount to the sum or value of two thousand dollars, nor does it involve the question of the validity of any legislative act or ordinance, nor relate to any fee of office, duty, rent, revenue or any sum of money pay-

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

able to Her Majesty, or to any title to lands or tenements, annual rents or such like matters or things where the rights in future might be bound;

3. Because no question is involved in the present appeal but one of costs;

4. Because appellant acquiesced in the judgment of the Superior Court herein, dismissing his claim for damages and did not appeal therefrom, and the judgment of the Court of Queen's Bench (appeal side) now appealed from, specially reserved to appellant all his rights in the bricks and building material taken by him to respondent's premises, or to their value, and there remains of appellant's original conclusions but the prayer to resiliate a contract of less than two thousand dollars;

5. Because appellant has no interest whatever in bringing the present appeal to demand the resiliation of said contract, the building in question having been completed more than five years ago, and the question of appellant's liability for breach of said contract not arising in this case, but being before this honourable court upon another appeal, to wit, in the case in which the present appellant is appellant, and the present respondent is respondent, wherein appellant was condemned by the judgment of the Court of Queen's Bench (appeal side) to pay to respondent the sum of eight hundred and eighty-two dollars damages, and the present appeal is unnecessary and useless, and involves only the question of costs,

Archibald Q.C. contra.

The judgment of the majority of the court was delivered by:

TASCHEREAU J.—The action was by Cowen against Evans, asking:—

1st. That a building contract for $1,900 be rescinded;

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Taschereau J.

2nd. $1,000 damages;

3rd. $545 for bricks.

The case was pending *en délibéré* in the Superior Court when the statute of 1891, 54 & 55 Vic. ch. 25, was sanctioned.

The judgment in the Superior Court was rendered December 5th, 1891, dismissing the claim for $1,000, but granting the two other conclusions.

The Court of Queen's Bench, in 1893, reversed the judgment of the Superior Court and dismissed the action.

The building, it is admitted, was completed over five years ago, so that there is no question now of annulling a contract which has ceased to exist. The only question is one of costs and the $545 for bricks, for which the judgment of Queen's Bench reserves appellant's recourse. *Fraser* v. *Tupper* (1), *Moir* v. *Corporation of Huntingdon* (2).

The $1,000 damages are not in question, as the judgment dismissing that claim in the Superior Court was acquiesced in by Cowen. Upon these facts the case is clearly not appealable under R.S.C. ch. 135.

GWYNNE J. dissented (3).

R. C. Smith for motion.

J. S. Archibald Q.C. contra.

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(1) Cassels's Digest 421. (2) 9 Can. S. C. R. 363.
(3) See p. 332.

COWEN *v.* EVANS.
MITCHELL *v.* TRENHOLME.
MILLS *v.* LIMOGES.

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*May 2.
*June 24.

Jurisdiction—Right to appeal—54 & 55 Vic. c. 25 sec. 3 ss. 4—Amount in dispute—R.S.C. c. 135 sec. 29.

The statute 54 & 55 Vic. c. 25 sec. 3 which provides that "whenever the right to appeal is dependent upon the amount in dispute, such amount shall be understood to be that demanded and not that recovered, if they are different" does not apply to cases in which the Superior Court has rendered judgment, or to cases argued and standing for judgment *(en délibéré)* before that court, when the act came into force (30th September, 1891). *Williams* v. *Irvine* (22 Can. S. C. R. 108) followed.

In actions for damages claiming more than $2,000, the Court of Queen's Bench for Lower Canada on appeal in one case gave plaintiff judgment for $880, reversing the judgment of the Superior Court which had dismissed the actions, and in the other cases on appeal by the defendants, affirmed the judgments of the Superior Court giving damages for an amount less than $2,000.

Held, following *Monette* v. *Lefebvre* (16 Can. S. C. R. 387) that no appeal would lie to the Supreme Court in these cases by the defendants from the judgment of the Court of Queen's Bench under sec. 29 of c. 135 R. S. C. Gwynne J. dissenting.

COWEN v. EVANS.

APPEAL from a judgment of the Court of Queen's Bench for Lower Canada (appeal side) reversing the judgment of the Superior Court.

This was an action of damages brought by the respondent against the appellant for $3,050 in June, 1887. The case was *en délibéré* before the Superior Court on the 30th September, 1891, when the statute 54 & 55 Vic. c. 25 sec. 3 ss. 4, came into force enacting that the amount demanded and not that recovered should determine the right to appeal when the right to appeal is dependent upon the amount in dispute.

The Superior Court on the 5th December, 1891, dismissed the respondent's action.

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On appeal to the Court of Queen's Bench for Lower Canada (appeal side) the court on the 28th February, 1893, reversing the judgment of the Superior Court, granted $880 damages to the respondent with interest from the 16th June, 1887.

On appeal to the Supreme Court of Canada respondent moved to quash for want of jurisdiction;

Per Curiam. The statute 54 & 55 Vic. c. 25 sec. 3, did not apply to cases pending *en délibéré* before the Superior Court, on the 30th September, 1891, and as the amount of the judgment appealed from was under $2,000 the case was not appealable, following on the question of the nonretroactivity of the statute, *Williams* v. *Irvine* (1), and as to the amount in dispute, *Monette* v. *Lefebvre* (2).

GWYNNE J. dissenting:—It is impossible in my opinion that justice can be done between the parties to these suits unless the two cases (3) should be heard together as one consolidated case, and that as it appears to me is what should be done, and the appeal then heard. Although not formally consolidated in the court below the evidence applicable to both cases was taken in one. Both cases were argued together in the court below and judgment given in both cases at the same time, and by an order made on the appeals to this court the two cases have been ordered to be printed together. I am of opinion, therefore, that the appeals in the two cases should be consolidated and argued as appeal and cross appeal in one suit, as the only way by which justice can be done between the parties and all technical objection removed. The court surely cannot be so powerless as to be unable to put the cases into such a position that justice may be done.

R. C. Smith for motion.

J. S. Archibald Q.C. contra.

(1) 22 Can. S. C. R. 108. (2) 16 Can. S. C. R. 387.

(3) See *Cowen* v. *Evans* p. 328.

MITCHELL *v.* TRENHOLME. 1893

*May 2.
*June 24.

APPEAL from a judgment of the Court of Queen's Bench for Lower Canada (appeal side) confirming the judgment of the Superior Court for the District of Montreal.

Motion to quash for want of jurisdiction.

This was an action brought by the respondents on the 25th July, 1889, claiming $5,000 damages alleged to have been sustained by them by the production of a plea and incidental demand by appellants in a case before the Superior Court for the District of Montreal under number 528. The Superior Court on the 27th day of September, 1890, granted $300 damages to the respondents.

The appellants (defendants) then appealed to the Court of Queen's Bench, and that court, on the 28th day of February, 1893, confirmed the judgment of the Superior Court.

On appeal, the Supreme Court, following the decision of *Williams* v. *Irvine* (1) quashed the appeal for want of jurisdiction, holding that 54 & 55 Vic. c. 25, did not apply.

GWYNNE J. dissenting. No question as to a right of appeal arose in this case until the month of February, 1893, when the judgment of the Court of Queen's Bench was rendered, and when it did arise, sec. 2311, of the Revised Statutes of Quebec, was in force, which declares, in unmistakable language, that whenever the right to appeal is dependent on the amount in dispute, such amount shall be understood to be that demanded and not that recovered, if they are different. Here the amount demanded was $5,000. We are,

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(1) 22 Can. S. C. R. 108.

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Gwynne J.

therefore, in my opinion, bound to conform to the provisions of the statute which declares what shall be the result of the event which has happened, and to declare that the appeal should be heard and the motion to quash dismissed.

J. S. Buchan for motion.

A. Delisle contra.

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*May 8.
*June 24.

MILLS *v.* LIMOGES.

APPEAL from a decision of the Court of Queen's Bench for Lower Canada (appeal side) affirming the judgment of the Superior Court granting to the respondent (plaintiff) one thousand dollars damages.

Motion to quash.

This was an action of damages for $5,000 brought for the death of a person by a consort. The Superior Court in April, 1891, granted $1,000 damages and the judgment was acquiesced in by the plaintiff, but defendant appealed to the Court of Queen's Bench and that court affirmed the judgment of the Superior Court on the 23rd December, 1892. The statute 54 & 55 Vic. c. 25 sec. 3 ss. 4, declaring that "whenever the right to appeal is dependent upon the amount in dispute, such amount shall be understood to be that demanded and not that recovered, if they are different," was sanctioned 30th September, 1891.

Per Curiam. 54 & 55 Vic. did not apply to such a case, and that the case was not appealable under R S. C. ch. 135 s. 29, the amount in dispute being under $2,000. *Monette* v. *Lefebvre* (1) and *Williams* v. *Irvine* followed (2).

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

(1) 16 Can. S. C. R. 357.

(2) 22 Can. S. C. R. Q. 61.

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MILLS v. LIMOGES.

Gwynne J.

GWYNNE J. dissenting:—

No question as to the right of appeal arose in this case until the 23rd December, 1892. At that time sec. 2311 R. S. Q. was in force, which declares that "whenever a right to appeal is dependent upon the amount in dispute, such amount shall be understood to be that demanded and not that recovered." We are in my opinion governed by the above section of the Revised Statutes, which declares what shall be done in the event which has happened, and I can see no reason for not conforming to the provisions of that section. I am therefore of opinion that the appeal lies and should be heard.

*Appeals quashed with costs.**

H. Abbott Q.C. and *E. Lafleur* for appellants.

P. Demers for respondent.

*N.B.—In the October session, 1893, the appeal in *The Montreal Street Railway Co.* v. *Carrière*, in which an action for $5,000 damages was dismissed by the Superior Court prior to the passing of 54 & 55 Vic. c. 25, but maintained by the Court of Queen's Bench on 26th April, 1893, for $600, was also quashed for want of jurisdiction, following this case of *Cowen* v. *Evans*.

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*May 3, 4.

*June 24.

THE QUEBEC CENTRAL RAILWAY CO. (PLAINTIFFS)..... } APPELLANTS;

AND

DOMINIQUE LORTIE (DEFENDANT)....RESPONDENT.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA (APPEAL SIDE).

Railway accident to passenger—Train longer than platform—Damages—Negligence.

L. was the holder of a ticket and passenger of the company's train from Levis to Ste. Marie, Beauce. When the train arrived at Ste. Marie station the car upon which L. had been travelling was some distance from the station platform, the train being longer than the platform, and L. fearing that the car would not be brought up to the station, the time for stopping having nearly elapsed, got out of the end of the car, and the distance to the ground from the steps being about two feet and a half, in so doing he fell and broke his leg which had to be amputated.

The action was for $5,000 damages alleging negligence and want of proper accommodation. The defence was contributory negligence. Upon the evidence the Superior Court, whose judgment was affirmed by the Court of Queen's Bench, gave judgment in favour of L. for the whole amount.

On appeal to the Supreme Court of Canada:

Held, reversing the judgments of the courts below, that in the exercise of ordinary care, E. could have safely gained the platform by passing through the car forward and that the accident was wholly attributable to his own default in alighting as he did and therefore he could not recover. Fournier J. dissenting.

APPEAL from a judgment of the Court of Queen's Bench for Lower Canada (appeal side), confirming the judgment of the Superior Court.

This was an action for $5,000 damages for loss of a leg through the alleged negligence of the Company (appellant.) By his declaration the respondent (plain-

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

tiff) alleged that on the 13th May, 1891, he was a passenger by appellants' express train from Levis to Ste. Marie de la Beauce.

That on arriving at Ste. Marie the train was stopped in front of the station in such a manner that the locomotive was in front of the platform and the passenger cars, including that in which the plaintiff was riding, were left a distance from the platform, and that no stool was furnished to assist the passengers in disembarking.

That the distance between the lowest step of the car and the ground was very considerable; that plaintiff was obliged to get down at that place, and treading on a round stone broke his leg in such a manner as to necessitate amputation, and claimed $5,000 damages.

Appellants filed two pleas:

1st. An express denial of the allegations of plaintiff's declaration.

2nd. That if plaintiff met with an accident and suffered any damage, it was attributable entirely to his own negligence and fault and not to any negligence or fault on the part of the appellants or train employees.

That proper accommodation, suitable to the requirements of the place, is furnished at Ste. Marie to enable people to embark on and disembark from the trains.

That if plaintiff chose to alight from the rear end of the car on to the street which there crosses the railway, he did so at his own risk.

That if plaintiff had passed through the car he could have alighted on the platform as other passengers did, but, in broad daylight he chose to step down into the street, and the injury he sustained in so doing is entirely attributable to his own negligence.

The Superior Court, upon the evidence, found as a matter of fact, that the company had stopped the car upon which the respondent was riding at some dis-

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THE QUEBEC CENTRAL RAILWAY COMPANY v. LORTIE.

tance from the platform of the station and had allowed passengers and the respondent to alight in a dangerous place, and that the company was thereby guilty of negligence and liable. This judgment was affirmed unanimously by the Court of Queen's Bench.

The facts brought out in the evidence upon which the appellant company relied as proving that the accident was attributable to the respondent's own fault are the following:—

The platform at the village of Ste. Marie not being so long as the train on the day of the accident, part of the baggage car, the whole of the second-class car, and nearly the whole of the first-class Q. C. R. car were alongside the platform when the train stopped.

The front end of the Boston and Maine car and the rear end of the first-class Q. C. R. car were on a street crossing and within five or six feet of the station platform.

Respondent and one Vallerand, a resident of Ste. Marie, and well acquainted with the locality, were riding in the B. & M. car without objection from the conductor, who, however, did pass some passengers (ladies) into the car forward.

Respondent was told by this witness Bois that this car was a through car going to Boston and that his place was in the next car.

When the train stopped respondent crossed over from the platform of the B. & M. car to the rear platform of the Q. C. R. car, and there alighted a distance of about two feet, seven inches from the ground having in one hand an overcoat and a "portmanteau" or valise, and so jumping and falling on a round stone broke his leg.

A. J. Brown Q.C. for appellant.

The carrier of passengers is only liable for his negligence. He is not an insurer of the safety of his pas-

sengers, nor responsible for injuries suffered by them from any cause other than the negligence or fault of himself or of persons employed by him. *Daniel* v. *Metropolitan R. Co.* (1); *Readhead* v. *Midland R. Co.* (2); Sherman and Redfield on Negligence (3); *Crofts* v. *Waterhouse* (4), quoted by Chief Justice Ritchie in *The Queen* v. *McLeod* (5).

The passengers themselves must exercise reasonable care.

In this case, if the place of disembarking was dangerous for the plaintiff he should not have attempted it. He was not obliged to get off at that place, and no official of the company invited him to do so.

It is however, quite manifest that there could be no danger in a man of plantiff's age stepping down a distance of two feet seven inches, if he exercised ordinary care.

None of the cases relied on by respondent bear any resemblance to the present. But see *Siner et al* v. *The Great Western Railway Co.* (6); *Cockle* v. *The London & South-eastern Railway Co.* (7); *Rose* v. *North-eastern Railway Co.* (8); *Eckerd* v. *Chicago & North-western Railway Co.* (*Iowa*) (9).

Moreover under the French law, when the proximate and sole cause of the accident was the respondent's own negligence, he cannot recover.

" *Quod quis ex culpa sua damnum sentit, non intelligitur damnum sentire.*"

See Sourdat (10).

In this sense is the judgment in *Recullet* v. *Chemin du Nord* (11).

The learned counsel also relied on *Moffette* v. *Grand*

(1) L. R. 5 H. L. 45.
(2) L. R. 4 Q. B. 379.
(3) 4 ed. sec. 494.
(4) 3 Bing. 319.
(5) 8 Can. S. C. R. 21.
(6) L.R. 3 Ex. 150 L.R. 4 Ex. 117.
(7) L. R. 7 C. P. 321.
(8) 2 Ex. D. 248.
(9) 70 Iowa 353.
(10) Vol. 2 no. 660.
(11) S. V. 85-1-129.

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Trunk Railway Co. (1); *Periam* v. *Dompierre* (2); *Allan* v. *Mullin* (3); *Charbonneau* v. *The Corporation of St. Martin* (4); *Ware* v. *Carsley* (5); *Allan* v. *La Cie d'Assurance Marine des Marchands du Canada* (6); *Mainville* v. *Hutchins* (7); *Central Vermont Ry. Co.* v. *Lareau* (8); *Desroches* v. *Gauthier* (9); *Gray* v. *Mayor &c. of Quebec* (10); *Richelieu and Ontario N. Co.* v. *Desloges* (11).

If there were any negligence or fault, on the part of the company, it was not the proximate cause of the accident; and even if we admit, for the sake of argument merely, that it was one of the causes of the accident, yet there was contributory negligence such as to either defeat recovery or reduce the damages.

J. E. Lavery for respondent.

As to whether respondent should have gone through the first class Quebec Central Car and alighted from the south end of same on to the platform, it is proved that the express train stops but a few minutes at Ste. Marie station, that a good many passengers get off and on the cars there, that the trains only stop for a very short time, that if people start to go from one car to another so as to get off on the platform, they are exposed to be carried on past the station. Vallerand, who spends the summer season at Ste. Marie, swears that for the last twelve or thirteen years, he was obliged more than twenty-five times to get off where respondent alighted, for fear of being carried beyond his destination.

On this point I will cite *Robson* v. *The North-eastern Railway Co.* (12); *Rose* v. *The North-eastern Railway Co.* (13).

(1) 16 L. C. R. 231.
(2) 1 L. N. 5.
(3) 4 L. N. 387.
(4) 16 L. C. R. 143.
(5) 5 R. L. 238.
(6) 18 R. L. 481.
(7) 31 L. C. J. 58.
(8) M. L. R. 2 Q. B. 258.
(9) 3 Dor. Q. B. 25.
(10) Ramsay's App. Cas. p. 49.
(11) 19 R. L. 81.
(12) L. R. 10 Q. B. 271.
(13) 2 Ex. D. 248.

The obligation of common carriers seems to be stricter in the French law than the English law, for not only are they, according to the former, obliged to carry the holder of a ticket to his destination, but they are insurers of his safety.

Article 1675 of the civil code, which comes under the heading "carriers" is as follows: "They (carriers) are liable for the loss or damage of things entrusted to them unless they can prove that such loss or damage was caused by a fortuitous event or irresistible force, or has arisen from a defect in the thing itself."

The authors are unanimous in declaring that this article applies to the carrying of persons as well as things.

Troplong, Louage, (1); Sourdat, Responsabilité, (2); Curasson, Compétence des Juges de Paix, (3); Alauzet, Commentaire du code de commerce, (4); Duvergier, Louage d'ouvrage, (5); Dalloz, Repertoire, Vo. "Commissionnaire," (6); *Wood* v. *South-eastern Ry. Co.*, (7); *Borlase* v. *St. Lawrence Steam Nav. Co.*, (8); *Boulanger* v. *G.T.R. Co.*, (9); *Boulanger* v. *G.T.R Co.*, (10); *Chalifoux* v. *C.P.R. Co.*, (11).

This last case was reversed by the Supreme Court, (12) but only on the ground, as far as can be judged from the short report, that the breaking of the rail was a fortuitous event caused by climatic influences.

If, as we contend, the carrier here was an insurer of the safety of the passenger he was bound to carry him safely and to see him landed safely in a place where

(1) Nos. 904, 905, 906.
(2) Nos. 976, 977.
(3) Vol. 1, no. 228.
(4) Vol. 1, no. 464 *et seq.*
(5) Vol. 4, no. 317.
(6) Nos. 299, 301, 338, 409, 414.
(7) 13 Rev. Leg. 567.
(8) 3 Q.L.R. 329.
(9) 11 Q.L.R. 254.
(10) Cassels's Dig. 2 ed. p. 733.
(11) M.L.R. 2 S.C. 171. M.L.R. 3 Q.B. 324.
(12) Cassels' Dig. 2 ed. 749.

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there was no danger of an injury. Any negligence on the part of the appellants would render them liable for the injury.

Foy v. *The London Brighton and South Coast Railway Co.*, (1); *and Gee* v. *Metropolitan Railway Co.*, (2).

THE CHIEF JUSTICE was of opinion to allow the appeal.

FOURNIER J.—La seule question dans cette cause comme dans celle de *Chalifoux* v. *La Compagnie du Pacifique Canadien* (3), est au sujet de l'étendue de la responsabilité des voituriers qui font traffic de transport des personnes. Les principes qui doivent définir cette responsabilité sont ceux du droit français et particulièrement du Code Civil de la province de Québec, dans laquelle l'accident dont il s'agit est arrivé. Cependant, dans la cause de Chalifoux, la majorité de cette Cour s'appuyant sur le droit anglais et la décision des tribunaux anglais a décidé qu'il était nécessaire de prouver la négligence pour rendre le voiturier responsable, tandis que d'après notre droit, art. 1675 C. C, il est responsable à moins qu'il ne prouve que l'accident est arrivé par cas fortuit ou force majeure.

La preuve de la négligence est requise dans le cas de l'art. 1053, mais ici il s'agit de l'art. 1673 concernant les voituriers et cette preuve n'est pas nécessaire.

L'intimé était passager dans le train rapide allant de Québec à Boston. Dès que le train fut arrêté à la station de Ste-Marie, Beauce, il se rendit sur le plate-forme à l'extrémité du char dans lequel il avait pris place pour descendre. Ce char se trouvait en deça du quai de la gare. L'intimé en sautant du marchepied (une hauteur de 2½ à 3 pieds) se cassa la jambe et dut se la faire amputer quelques jours après l'accident.

(1) 18 C.B. N.S. 225. (2) L.R. 8 Q.B. 161.
(3) Cassels's Dig. 749.

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L'Honorable Juge en Chef, Sir Alexandre Lacoste, a décidé cette cause sur le principe que les règles concernant le transport des marchandises par les voituriers, s'appliquent *mutatis mutandis* au transport des voyageurs.

C'est aussi sur ce principe que la Cour du Banc de la Reine avait décidé la cause de *Chalifoux* v. *Le Pacifique Canadien* (1). En France on applique au transport des personnes, aussi bien qu'au transport des marchandises, la responsabilité établie contre les voituriers par l'art. 1784 C. N. Un arrêt de la Cour Imp. de Paris de 27 novembre 1866 *in re* Compagnie du nord dit à ce sujet : " L'article 1784, qui les rend responsables de l'avarie ou de la perte des objets qu'elles transportent à moins qu'elles ne prouvent le cas fortuit et la force majeure, s'applique *a fortiori* au transport des personnes. La protection due à celles-ci ne peut être moindre que celle que l'on accorde aux marchandises. C'est ce que décide avec raison, un arrêt de la Cour de Paris le 27 novembre 1866 (Droit du 1er décembre 1866).

Le premier considérant de cet arrêt est ainsi conçu

Considérant que le voiturier répond de l'avarie des choses à lui confiées, à moins qu'il ne prouve qu'elles ont été avariées par un cas fortuit ou force majeure.

Sir Alexandre Lacoste avait donc raison de dire que les règles concernant le transport des marchandises par les voituriers s'appliquent au transport des voyageurs.

On doit en dire autant au sujet de l'art. 1675 de notre code qui est presque textuellement le même que l'art 1784 C. N. Mais ceci est rendu plus évident par l'art. 1673, qui applique toute la sec. III des voituriers au transport des personnes, aussi bien qu'au transport des marchandises. Cet article dit (les voituriers) sont tenus de recevoir et transporter aux temps marqués dans les avis publics toute personne qui demande passage, si le transport des voyageurs fait partie de leur trafic

(1) M. L. R. 3 Q. B. 324.

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accoutumé; et tous effets qu'on leur offre à transporter; à moins que dans l'un ou l'autre cas, il n'y ait cause raisonnable et probable de refus.

Le trafic de transport des passagers fait aussi bien partie du trafic de l'appelante que le transport des marchandises.

Dans la cause ci-dessus citée, Cotelle, Législation des chemins de fer (1), fait les observations suivantes sur ce jugement:

> En principe, suivant elle, le voiturier répond de l'avarie des choses à lui confiées, à moins qu'il ne prouve qu'elles ont été avariées par cas fortuit ou force majeure. Ce principe s'applique a plus forte raison au transport des personnes et protège la sécurité des voyageurs. Mais, c'est à la compagnie qu'incombe l'obligation de prouver les faits qui la déchargeraient de sa responsabilité.

L'accident, ainsi qu'il est dit plus haut, est arrivé parce que le train dans lequel se trouvait l'intimé étant beaucoup plus long que la plate-forme de la station, le char dans lequel il était, ne put aborder la plate-forme pour y faire descendre ses passagers. Le train étant un *express* qui n'arrête que quelques instants, les passagers de crainte d'être emmenés à une autre station se précipitent tous aux extrémités du char et souvent s'aperçoivent que le char n'est pas vis-à-vis du quai. Il leur faut rebrousser chemin ou aller plus loin, contre le courant des passagers ou bien sauter du marchepied. Ce mode n'est pas sans inconvénient, mais la compagnie ne peut pas leur reprocher un risque qu'ils ont couru pour ne pas être emmenés à la station prochaine, chaque marchepied est pour le voyageur, une invitation à descendre, et l'arrêt est généralement trop court pour qu'il refuse la première chance qui lui est offerte de laisser le train.

Il est prouvé qu'il y a toujours beaucoup de voyageurs à cette station; il y aussi preuve que plusieurs

(1) T. 2, p. 136, n° 203.

ont été entrainés aux stations voisines parce que le temps d'arrêt est trop court. L'intimé qui voyageait pour affaire, craignant ce résultat, sauta du marchepied à une hauteur de 2½ à 3 pieds de la dernière marche, mais malheureusement à quelque pieds de là se trouvait une grosse pierre dont la forme était ovale sur laquelle il mit le pied, tomba et se cassa la jambe. L'intimé n'est pas le seul qui a pris cette direction pour sortir du char. Le témoin Vallerand dit que plusieurs passagers les ont suivis, et entre autres une Dlle Noonan, qu'il a descendue dans ses bras parce qu'elle ne voulait pas sauter Il ajoute, elle aussi aurait pu traverser l'autre char, mais elle trouvait le voyage trop long.

Il est aussi prouvé que la plate-forme est trop petite, qu'il y a beaucoup de voyageurs à cette station et que la compagnie a un terrain qui lui permet de l'agrandir facilement. Elle est coupable de négligence en ne faisant pas cette amélioration si nécessaire.

Les observations suivantes de Sir Alexandre Lacoste au sujet du soin que doit apporter le voiturier pour protéger ses passagers sont parfaitement correctes.

Le voiturier est tenu d'user de la plus grande vigilance pour protéger ses passagers, contre les périls du voyage, tandis qu'il ne peut exiger d'eux que la prudence ordinaire. Si, par sa négligence, il soumet un voyageur à quelqu'inconvénient, il doit s'attendre que celui-ci prendra les moyens que sa discrétion lui suggérera pour se tirer d'embarras, et pour cela il encourra même un certain risque s'il le faut, et le voiturier sera responsable de l'accident qui surviendra, a moins qu'il ne pronve que le voyageur a agi avec une imprudence inexcusable.

Toute compagnie de chemin de fer est tenue de procurer à ses voyageurs un débarcadère convenable. S'il n'y a pas de quai, elle doit pourvoir à un autre moyen facile de descente et indiquer aux voyageurs où il devront débarquer, si les chars dépassent le quai.

D'après le droit français, la responsabilité de la compagnie ne paraît pas douteuse, car l'imprudence même du voyageur n'excuse pas les torts du conducteur. Dalloz, Vo. Responsabilité n° 510.

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Par tous ces motifs, et pour les raisons données par Sir Alexandre Lacoste, C.J., je suis d'avis que le jugement doit être confirmé.

TASCHEREAU J.—I would allow the appeal.

GWYNNE, J.—The case is, in my opinion, free from all doubt. I cannot see anything which can be pronounced to be negligence of the company. The accident is attributable wholly to the plaintiff's own default in alighting as he did. Every man travelling by rail, in this country, must have known that it was not the way he should have alighted or by which there was any necessity for his so alighting or was ever intended that he should alight.

SEDGEWICK, J., was also of opinion to allow the appeal.

Appeal allowed with costs.

Solicitors for appellant: *Brown & Morris.*

Solicitors for respondent: *Casgrain, Angers & Lavery.*

G. M. KINGHORN (PLAINTIFF CONTESTING OPPOSITION) ..... APPELLANT;

AND

A. LARUE (OPPOSANT) .....RESPONDENT.

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*Oct. 3.
*Oct. 23.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA (APPEAL SIDE).

Opposition afin de conserver on proceeds of a judgment for $1,129—*Amount in dispute—Right to appeal—R. S. C. c.* 135, *sec.* 29.

K. (plaintiff) contested an opposition *afin de conserver* for $24,000 filed by L. on the proceeds of a sale of property upon the execution by K. against H. & Co. of a judgment obtained by K. against H. & Co. for $1,129. The Superior Court dismissed L.'s opposition but on appeal the Court of Queen's Bench (appeal side) maintained the opposition and ordered that L. be collocated *au marc la livre* on the sum of $930 being the amount of the proceeds of the sale.

Held, that the pecuniary interest of K. appealing from the judgment of the Court of Queen's Bench (appeal side) being under $2,000 the case was not appealable under R.S.C. c. 135 sec. 29. *Gendron* v. *McDougall* (Cassels's Dig. 2 ed. 429) followed:

Held also, that sec. 3 of 54 & 55 Vic. c. 25 providing for an appeal where the amount demanded is $2,000 or over has no application to the present case.

APPEAL from a judgment of the Court of Queen's Bench for Lower Canada (appeal side) reversing the judgment of the Superior Court which had rejected an opposition *afin de conserver* filed by the respondent. The appellant, Kinghorn, in this case obtained judgment at Quebec, for $1,125 against the executors of late Dame Patterson, widow of late G. B. Hall. A writ of execution was issued to the Sheriff of the District of Quebec, and a return of *nulla bona* made thereon. A writ *de terris* was then issued to the Sheriff of the Dis-

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trict of Three Rivers, upon which a large block of land, known as the St. Joseph Forge Lands, was seized and sold, realizing a sum of $950.

The respondent having filed an opposition *afin de conserver* for $24,000 claiming to be collocated on this sum of $930 *au marc la livre*, the appellant contested his opposition and the Superior Court maintained his contestation. On appeal to the Court of Queen's Bench for Lower Canada (appeal side) that Court reversed the judgment of the Superior Court, and maintained the respondent's opposition, ordering that he be collocated *au marc la livre* on the sum of $950.

The respondent moved to quash the appeal for want of jurisdiction.

Belcourt for motion cited and relied on *Flatt* v. *Ferland* (1); *Gendron* v. *McDougall* (2); *Chagnon* v. *Normand* (3).

Stuart Q. C. for appellant contended that the amount of the demand in the Superior Court being $24,000, the case was appealable under 54 & 55 Vic. c. 25 sec. 4, and cited and relied also on *Doutre* v. *Gosselin* (4); *Beaudry* v. *Desjardins* (5); and art. 2311 R.S.Q.

The judgment of the court was delivered by

TASCHEREAU J.:—This case is before the court on a motion by the respondent to quash the appeal taken by Kinghorn from a judgment of the Court of Appeal, in Montreal, dismissing his, Kinghorn's, contestation of an opposition *afin de conserver* for $24,000 filed by the respondent on the proceeds of a sale upon the execution by Kinghorn against Hall & Co., of a judgment by him obtained against the said Hall & Co., for $1,129, the judgment now appealed from, having

(1) 21 Can. S.C.R. 32.
(2) Cassels's Dig. 429.
(3) 16 Can. S.C.R. 631.
(4) 7 L. C. Jur. 290.
(5) 4 Rev. Leg. 555.

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maintained the said opposition for $24,000, and ordered that the respondent be collocated *au marc la livre.*

The proceeds of the sale amount to $930. I am of opinion that this appeal must be quashed, according to the well settled jurisprudence on this point, viz., that it is the interest of the party appealing from a judgment that has to be taken into consideration, to determine whether the case is appealable or not. Here the appellant's judgment is for $1,129, and to that amount and that amount alone, is he pecuniarily interested in the present case The case of *Gendron* v. *McDougall* (1) is clearly in point. In that case, Gendron had obtained a judgment against one Ogden for $231, and in execution thereof seized an immovable worth $2,000. McDougall filed an opposition *afin de distraire* claiming the land so seized as his property. Gendron contested that opposition. The Court of Queen's Bench dismissed his contestation and maintained McDougall's opposition. Gendron then appealed to the Supreme Court, but, though the question at issue on McDougall's opposition was one of title to a piece of land, and that piece of land was worth $2,000, this Court quashed Gendron's appeal, on the ground that his pecuniary interest on his appeal was limited to $231, the amount of his judgment. That case, which is binding upon us, seems conclusive upon the question. The appellant invoked in support of his right to appeal the case of *MacFarlane* v. *Leclaire* (2), but as I view that case it does not help him.

The facts of that case were as follows:

Leclaire brought an action in the Superior Court against one Delesderniers for £417.0.8, Canadian currency, with a *saisie-arrêt* or attachment before judgment in the hands of MacFarlane. MacFarlane upon the *saisie-arrêt* denied that he had any goods, effects,

(1) Cassels's Dig. 2 ed. 429. (2) 15 Moo. P. C. 181.

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&c., of Delesderniers' in his possession, but that the property alleged to be the property of Delesderniers had been purchased by him for £1,642.14.5, from one Prévost and were his property. Leclaire, the plaintiff, contested this declaration and alleged that the sale invoked by MacFarlane was null and made in fraud of Delesderniers' creditors. The Superior Court dismissed the contestation on the declaration of the *tiers-saisi*, on the ground that as Prévost was not a party to the proceedings, the court could not declare the transfer of the property to the *tiers-saisi*, MacFarlane, by Prévost, to be fraudulent; the Court of Queen's Bench on appeal reversed the judgment of the Superior Court, maintained the contestation by Leclaire of MacFarlane's declaration and declared the goods in MacFarlane's hands to have been those of Delesderniers.

The appellant, MacFarlane, being dissatisfied, applied for and leave was granted by the Court of Queen's Bench to appeal to the Privy Council. Leclaire then applied by petition to the Privy Council to have the leave rescinded on the ground that the matter in dispute did not exceed the sum or value of £500 sterling, the amount fixed by 34 Geo. III., c. 6, sec. 30, and therefore that the judgment of the Court of Queen's Bench was final. But the Privy Council dismissed that petition, and held that MacFarlane's pecuniary interest on the appeal being over £500 sterling, the case was appealable under the statute. Now it is evident that in that case all of MacFarlane's goods, amounting in value to £1,600, were put in jeopardy by the judgment maintaining the contestation of his declaration, as every article of it might have been sold to satisfy Leclaire's writ of execution. And MacFarlane, in that case, stood in the position that Larue, the respondent occupies in the present case, whilst Leclaire occupied a position analogous to the position Kinghorn, the

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present appellant occupies here. And their Lordships in the Privy Council clearly intimate, though of course without determining it, that, had the judgment in the case of *MacFarlane* v. *Leclaire* (1) been against Leclaire, he, Leclaire might not have had a right of appeal, because in such a case, Leclaire's pecuniary interest on the appeal would not have amounted to £500 sterling.

In a case of *Gugy* v. *Gugy*, as long ago as 1851 (2) under an analagous statute, Sir James Stuart laid down the rule that on a judgment dismissing an opposition for £10,000 filed by a defendant against an execution for £200 being the balance of a judgment against him for £900 the case was not appealable to the Privy Council. The case of *L'Espérance* v. *Allard*, in a foot note to that case of *Gugy* v. *Gugy* (2), is in the same sense. I refer also to *Bourget* v. *Blanchard* (3) and in appeal (4) and for the facts of the case (5). See also *Champoux* v. *Lapierre* (6); *Martin* v. *Mills* (7); *Russell* v. *Graveley* (8). The statute 54 & 55 Vic. does not affect this case. This is not a case where the amount demanded and the amount granted, are different.

Appeal quashed with costs.

Solicitors for appellant: *Caron, Pentland & Stuart.*

Solicitors for respondent: *L. P. Guillet.*

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(1) 15 Moo. P. C. 181.
(2) 1 L. C. R. 273.
(3) 9 Q. L. R. 262.
(4) 6 Legal News 51.
(5) Cassels's Dig. 2 ed. 423.
(6) Cassels's Dig. 426.
(7) 12 Q. L. R. 98.
(8) 2 L. C. R. 494.

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*May 7.

*June 24.

THE CORPORATION OF THE CITY OF THREE RIVERS (OPPOSANT).... } APPELLANT;

AND

LA BANQUE DU PEUPLE (CONTESTANT)..... } RESPONDENT.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA (APPEAL SIDE).

Bonus—By-law—Conditions of—Conditional mortgage.

By a by-law passed by the city of Three Rivers on the 3rd March, 1886, granting a bonus of $20,000 to a firm for establishing a saw-mill and a box factory within the city limits, and a mortgage for a like amount of $20,000 granted by the firm to the corporation, on the 26th of November, 1886, it was provided that the entire establishment of a value equivalent to not less than $75,000 should be kept in operation for the space of four consecutive years from the beginning of said operation, and that 150 people at least should be kept employed during the space of five months of each of the four years.

The mill was in operation in June, 1886, and the box factory on the 2nd November, 1886. They were kept in operation, with interruptions, until October, 1889, and at least 600 men were employed in both establishments during that time.

On a contestation by subsequent hypothecary claimants of an opposition *afin de conserver*, filed by the corporation for the amount of their conditional mortgage on the proceeds of sale of the property.

Held, reversing the judgment of the courts below, that even if the words "four consecutive years" meant four consecutive seasons, there was ample evidence that the whole establishment was not in operation as required until November, 1886, when the mortgage was granted, the mill only being completed and in operation during that season and therefore there had been a breach of the conditions. Fournier J. dissenting.

APPEAL from the Court of Queen's Bench for Lower Canada (Appeal side) confirming the judgment of the

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Superior Court on a contestation by respondent of appellant's opposition *afin de conserver*.

The facts connected with this litigation are as follows:—

In the winter and spring of 1886, a negotiation took place between the firm of Hall, Neilson & Co. and the city of Three Rivers, in reference to the removal to that city of Messrs. Hall & Co.'s lumber mills and the establishment of a box factory.

Messrs. Hall, Neilson & Co. wrote to the city authorities, on 19th January, 1886, that being about to reconstruct their lumber mills at the Grandes Piles, influential citizens of Three Rivers had suggested to them the advantages to the working classes if the mills were removed to that city. That they, Messrs. Hall, Neilson & Co. also intended to establish a box factory, in connection with their mill, which latter was specially adapted for providing the kind of lumber necessary for making boxes. That the operation of said mill and of said box factory would require the employment of at least 150 persons and could provide labour for at least 500 men and 125 horses during the winter season. That in order to realize these advantages, viz., the construction of the said saw-mills and box factory, the said Hall, Neilson & Co. would require assistance from the city of Three Rivers in the form of a cash bonus of $25,000 and exemption from taxation for 20 years.

Some verbal communications passed between the city authorities and Messrs. Hall, Neilson & Co. and on 22nd February, 1886, a letter of Messrs. Hall & Co. was laid before the City Council, accepting a verbal proposition which had been made by the city, which Messrs. Hall & Co. repeated as follows:—

The bonus to be $20,000 and the exemption from taxes 10 years, the property to be hypothecated to the city for a term of four years, to the extent of said

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$20,000, as a guarantee for the fulfilment of the two following conditions, viz.: That Messrs. Hall & Co. should furnish employment during the four years to a sufficient number of employees to equal the work of 150 men during five months each year, and 2nd, the total value of the establishment and dependencies, when completed, to be not less than $75,000. Messrs. Hall & Co. also undertook in addition, to enter into a personal obligation to continue the establishment in operation for six additional years after the expiry of the four covered by the mortgage. Thereupon the Council by resolution unanimously accepted this proposal and undertook to pay the said bonus of $20,000 upon the conditions of that letter, and ordered a by-law to that effect to be prepared and submitted to the ratepayers.

These conditions are stated in the by-law as follows:—

1st. The establishment that the Messrs. Hall, Neilson & Co. are at present operating at the locality known as Grandes Piles, on the River St. Maurice, consisting of saw-mills, dryers, machinery, etc., to be transferred to, and rebuilt within the limits of the city of Three Rivers, in a place on the south-west side of the River St. Maurice, and to be there put in operation between this date and the close of the summer of the present year, and further, within same delay and said limits, a box factory to be also constructed and put in operation; and the entire establishment when finished to be of a value equivalent to not less than seventy-five thousand dollars.

2nd. During the course of the fifteen years following the operation of said establishment, the said establishment to be kept in operation for the space of four consecutive years from the beginning of said operation: One hundred and fifty people at least to be kept employed during the space of five months of each of

the four years, and at the termination of said four years said establishment to be continued in operation for at least six of the eleven following years; and the number of people employed during said eleven years to be equivalent to the number of one hundred and fifty people during five months of the year, for the space of six years.

This by-law was afterward formally adopted by the Council and subsequently, on the 31st March, 1886, by the electors. In fulfilment of their part of the contract, Messrs. Hall, Neilson & Co. proceeded at once to acquire the necessary site within the limits of the city and removed to it their lumber mill from the Grandes Piles and set them in operation in July of that year, 1886.

The box factory was completed on the 2nd November, 1886, and the total cost of the whole establishment is proved to have exceeded $100,000.

On the 5th November, 1886, Messrs. Hall, Neilson, & Co. wrote to the city that the conditions of the by-law on their part had been fulfilled, entitling them to the payment of the bonus. The City Corporation paid over the $20,000 without protest or objection, receiving from Messrs. Hall & Co. the four years guarantee in the form of a mortgage. This bore date November 29th, 1886.

The establishment continued in operation until October, 1889, when in consequence of a change in the United States tariff in reference to the admission of boxes, Messrs. Hall & Co. were obliged to discontinue work. They had in the meantime given a second mortgage upon their Three Rivers property to the Banque du Peuple for advances. Financial difficulties followed the closing of the establishment and the property was afterwards sold at sheriff's sale. The city of Three Rivers claimed from the proceeds, by special privilege, the payment of three years arrears of taxes

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and two years water rates, amounting with interest to $2,555, and in addition the payment of the $20,000 amount of their mortgage. The bank did not dispute the claim for special water rates but contested the claims for taxes and also for any claim under the mortgage, on the ground that its conditions had been fulfilled, viz., that Hall & Co. had made the expenditure originally stipulated and had employed the equivalent of 150 men for five months of each of four years.

Irvine Q.C. for appellants.

The question on this appeal is whether the appellants are entitled to recover on their hypothecary guarantee that Messrs. Hall & Co. would keep in operation, for four consecutive years, 150 men employed during five months in each year at their mill establishment and box factory in the city of Three Rivers. The court below has held that they cannot on the ground that the Messrs. Hall & Co. have executed and fulfilled their obligations *per equipollens*. As the box factory was not completed till November 2nd, 1886, and the whole establishment only began operations in October, 1889, I do not think it can be contended that there has been a specific performance of the conditions upon which the ratepayers voted the bonus and it is the conditions and obligations contained in the by-law itself and not in Messrs. Hall, Neilson & Co.'s letters and petitions, that Messrs. Hall, Neilson & Co. accepted by their hypothecary guarantee in favour of the city. How it can be said that four years means four seasons, and that operations commenced in November, 1886, would be equivalent to one season, I cannot understand.

Then the object of the city being to have a number of men to settle in the town as citizens it cannot be said that it is equivalent to have 600 men employed during one year to 150 men during four consecutive years.

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Martel Q.C. and *Geoffrion* Q.C. for respondent.

The main point to be decided according to our contention is whether the first season's operations, some of them prior to the execution of the mortgage and the payment of the bonus, are to be reckoned as one of the four years during which Hall & Co. guaranteed the establishment should be in operation. If it is then there is ample evidence that more than 150 men were employed in Three Rivers in connection with the whole establishment during the season of 1886. Now as the box factory could not be in operation for five months during that season we have complied with that condition, *per equipollens*. See *Simard* v. *Fortier* (1). Moreover this is the interpretation put on the contract by the city, for when on the 5th November, 1886, Messrs. Hall & Co., when the box factory was only just completed, wrote to the City Council that the conditions of the by-law had been fulfilled and that they had paid wages to date for over 26,200 days, an excess over the contract requirement of 6,700 days, and that the cost of the establishment considerably exceeded their agreement in that respect, the council, who had daily seen the work progressing, paid over the bonus before the expiry of that month and did not collect any taxes for 1886. Nor did the council intimate any different view during the seasons of 1887, 1888 and 1889. No taxes were imposed and no objection made in any form, either that the stipulated expenditure had not been made or that 150 men were not employed in the box factory.

The only claim the appellant could set up might be the personal one (*créancier chirographaire*) as a creditor of Hall, Neilson & Co. for a sum of $12,000.00 in case the firm of Hall, Neilson & Co. or their assigns neglected fulfilling the conditions of the by-law applying to the six years operation following the first four years; but

(1) Q. R. 1 S. C. 191.

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that firm or its assigns have plenty of time left to yet fulfil these remaining conditions.

BY THE COURT.—The agreement upon which the $20,000 bonus was lent by the corporation to the respondents is to be found in the by-law of the 3rd March, 1886, and in the mortgage dated the 26th November, 1886. It is apparent that the four consecutive years during which the establishment was to be kept in operation under the second condition of the said by-law, can only date from the month of November, 1886, when the box factory (an important part of the proposed establishment of Messrs. Hall, Neilson & Co.) was completed and put in operation and when the mortgage was granted on a completed establishment of the value of $75,000, and that the appellants had not in November, 1889, complied with the said second condition of the by-law, viz., the establishment "to be kept in operation for the space of four consecutive years.

FOURNIER, J. dissenting.—Le trois mars 1886, après certains procédés préliminaires, la cité des Trois-Rivières adopta un règlement municipal dans le préambule duquel il est dit que les messieurs Hall, Neilson et Cie ont, par leurs lettres du 25 janvier 1882 et du 22 février 1886, fait application au conseil de la ville des Trois-Rivières pour une aide ou *bonus* et une exemption de taxes municipales en faveur d'une manufacture de boîtes—et attendu qu'il est avantageux d'accéder à la demande des dits Hall, Neilson et Cie, et de leur accorder un *bonus* de $20,000 et une exemption de taxes sur la dite manufacture, il est en conséquence ordonné:

Sec. 1. Un bonus de $20,000 et une exemption de taxes municipales sur les immeubles, bâtisses, machineries et outillages érigés et affectés spécialement et

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uniquement aux fins de la manufacture, consistant en moulins à scies, séchoirs, manufacture de boîtes et les bureaux de l'établissement, sont accordés aux conditions suivantes :

1° L'établissement que les messieurs Hall, Neilson et Cie exploitent actuellement à l'endroit appelé les Grandes Piles, sur la rivière St-Maurice, consistant en moulins à scies, séchoirs, machineries, etc., devront être transportés et rebâtis dans les limites de la cité des Trois-Rivières, au sud-ouest de la dite rivière St-Maurice, et mis en opération d'hui à la fin de l'été de la présente année, de plus il sera construit et mis en opération, dans les mêmes limites et dans le même délai, une manufacture de boîtes, et tout l'établissement une fois terminé, devra valoir au moins soixante et quinze mille piastres.

2° Dans le cours des quinze années qui suivront la mise en opération du dit établissement, le dit établissement devra être tenu en opération pendant au moins quatre années consécutives à compter de sa mise en opération, et cent cinquante personnes, au moins, devront y être employées pendant l'espace de cinq mois par année, et à l'expiration des dites quatre années, le dit établissement sera tenu en opération pendant au moins six ans pendant les onze années qui suivront, et le nombre de personnes employées pendant les dites onze années, sera équivalant à un nombre de cent cinquante personnes durant cinq mois par année pendant l'espace de six ans.

Messieurs Hall, Neilson et Cie acceptèrent les obligations contenues dans le règlement, transportèrent le moulin à scies qu'ils possédaient aux Grandes Piles et construisirent la manufacture de boîtes dans les limites de la cité des Trois-Rivières.

L'établissement fut mis en opération partie en juillet et le reste en novembre 1886.

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Le 29 novembre 1886, la somme de $20,000, montant du *bonus*, fût payée à messieurs Hall, Neilson et Cie.

C'est cette somme que l'appelante réclame par une opposition en cette cause, en alléguant que messieurs Hall, Neilson et Cie n'ont pas rempli les obligations et conditions auxquelles la dite somme leur avait été accordée. L'intimée a lié contestation.

La seule question qui se présente est de savoir si messieurs Hall, Neilson et Cie ont rempli leurs engagements, 1o, la mise en opération pendant quatre années consécutives depuis la date de sa mise en opération, 2o, si pendant ce temps ils ont employé à leur établissement au moins 150 personnes durant cinq mois chacune des dites années ?

Ce qui a fait la principale cause de la difficulté, c'est l'interprétation erronée que l'appelante a donnée aux règlements. Se fondant sur le préambule des règlements, elle prétend qu'il avait principalement pour but d'établir une manufacture de boîtes et non pas un moulin à scies pour faire concurrence à ceux qui existaient déjà.

La proposition de l'appelante, serait vraie si le règlement consistait dans le préambule seulement. On y voit en effet que messieurs Hall, Neilson et Cie. ont demandé un *bonus* et une exemption de taxes en faveur d'une manufacture de boîtes.

On peut bien invoquer le préambule d'un règlement pour le faire servir à l'interprétation de clauses obscures ou douteuses, mais on ne peut pas plus le faire servir à limiter l'effet des dispositions précises du règlement, qu'on ne pourrait étendre les dispositions d'un statut en se fondant sur les considérants de son préambule.

Dans son factum devant cette cour l'appelante (p. 20) dit que Hall et Cie devront employer durant les quatre premières années d'opération de la manufac-

ture de boîtes, cent cinquante hommes. Elle s'exprime ainsi :

Moreover the terms of the said by-law are clear and formal and we do not find therein any mention of an equivalent as to the number of men which Messrs. Hall, Neilson & Co. should employ during each of the four first years in *the operating of this box factory, and it is the conditions and obligations contained in the by-law itself* and not in Messrs. Hall, Neilson & Company's letters and petitions, that Messrs. Hall, Neilson & Co. accepted by their hypothecary guarantee in favour of the appellants, dated the 29th November, 1886 (see page 27 and 28 of the case).

La même manière de voir est exprimée comme suit dans son factum du Banc de la Reine.

" Comme on le voit, l'affaire principale, l'objet en vue pour toutes les parties, était la création d'une industrie nouvelle, l'établissement d'une manufacture de boîtes à Trois-Rivières."

Cette manière de voir qui ferait de la manufacture de boîtes l'objet principal, et presque unique, du règlement n'est pas soutenue par le paragraphe n° 1 du règlement où il est dit que l'établissement que Hall et Cie exploite aux Grandes Piles, sur le St-Maurice, *consistant en moulin à scie, séchoirs, machineries, etc., devront être transportés et rebâtis dans la cité* de Trois-Rivières et mis en opération d'hui à la fin de l'été ; de plus il sera construit dans les mêmes limites et dans le même délai, une manufacture de boîtes, et *tout l'établissement* une fois terminé devra valoir au moins soixante et quinze mille piastres.

Les avantages accordés par le règlement étaient donc tout aussi bien pour le transport des moulins des Grandes Piles à Trois-Rivières, que pour la manufacture de boîtes. Le règlement ne fait aucune distinction quelconque entre les deux ; mais au contraire ne les considère tous deux que comme un seul établissement, *et tout l'établissement une fois terminé*, dit le

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règlement devra valoir au moins soixante et quinze mille piastres.

Le règlement ne fait non plus aucune distinction entre les moulins à scies et la manufacture de boîtes quant au nombre d'hommes qui devront y être employés. Au n° 2 du dit règlement, il est dit que le dit établissement devra être tenu en opération pendant au moins quatre années consécutives à compter de sa mise en opération, et cent cinquante personnes, au moins, devront y être employées pendant l'espace de cinq mois par année.

Il est évident que le nombre d'hommes qui doivent être employés est fixé pour tout l'établissement, à être, sans doute, distribués suivant le besoin des opérations.

Il est indubitable que l'interprétation émise par l'appelante sur le règlement est erronée.

La preuve faite par l'intimée a établi de la manière la plus positive qu'elle a rempli la première condition, qui était que l'établissement devait être mis en opération avant la fin de l'été 1886 et valoir au moins $75,000. La preuve a établi ces deux faits de la manière la plus complète.

Quant à la seconde question, au sujet de la durée des opérations et au nombre des personnes qui devaient être employées chaque année à l'établissement, il a été prouvé également que l'établissement a été mis en opération au moins pendant cinq mois chaque année, et pendant plus de vingt mois pour les quatre premières années, et que le nombre de personnes qui y ont été employées excédait celui fixé par le règlement. Il est vrai que ce nombre n'a jamais été employé à la fois dans la manufacture de boîtes qui n'en pouvait pas contenir plus de trente, mais ce que l'intimée affirme et a prouvé, c'est que ce nombre, et au delà, a été employé dans tout l'établissement pendant le temps voulu. C'était suffisant de la part de messieurs Hall, Neilson

et Cie pour remplir leurs obligations, et le règlement n'exigeait rien de plus.

Après un examen sérieux de la preuve, je me suis convaincu que les deux cours qui ont déjà prononcé sur cette cause, en ont fait une juste et correcte appréciation et que leur jugement doit être confirmé avec dépens.

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Appeal allowed with costs.

Solicitor for appellant: *L. D. Paquin.*

Solicitor for respondent: *P. N. Martel.*

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*May 3, 9.
*June 24.

JOEL C. BAKER *et al.* (PLAINTIFFS)....APPELLANTS;

AND

LA SOCIÉTÉ DE CONSTRUCTION MÉTROPOLITAINE (DEFENDANTS) } RESPONDENTS.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA (APPEAL SIDE).

Action en déclaration d'hypothèque—Translatory title—Good faith—Arts. 2251, 2202, 2253 *C. C—Judicial admission—Art.* 1245 *C. C.—Art.* 320 *C.C.P.*

The respondents having lent a sum of money to one Liboiron, subsequently, on the 9th May, 1876, took a transfer of his property by a deed *en dation de paiement*, in which the registered title deed of Liboiron to the same was referred to and by which it also appeared that the appellants had a *bailleurs de fonds* claim on the property in question. Liboiron remained in possession and sub-let part of the premises, collected the rents and continued to pay interest to the appellants for some years on the *bailleurs de fonds* claim. In 1887 the appellants took out an action *en déclaration d'hypothèque* for the balance due on their *bailleurs de fonds* claim. The respondents pleaded that they had acquired in good faith the property by a translatory title, and had become freed of the hypothec by ten years possession. Art. 2251 C. C.

Held, reversing the judgments of the courts below, that the oral and documentary evidence in the case as to the actual knowledge on the respondents' part of the existence of this registered hypothec or *bailleurs de fonds* claim, was sufficient to rebut the presumption of good faith when they purchased the property in 1876, and therefore they could not invoke the prescription of ten years. Art. 2251 C. C. Fournier J. dissenting.

In their declaration the appellants alleged that the respondents had been in possession of the property since 9th May, 1876, and after the *enquête* they moved the court to amend the declaration by substituting for the 9th May, 1876, the words "1st Dec., 1886." The motion was refused by the Superior Court which held that

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

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the admission amounted to a judicial avowal from which they could not recede. On appeal to the Supreme Court it was

Held, reversing the judgment of the court, below that the motion should have been allowed so as to make the allegation of possession conform with the facts as disclosed by the evidence. Art. 1245 C.C. Fournier J. dissenting.

APPEAL from a judgment of the Court of Queen's Bench for Lower Canada (appeal side) rendered on the 23rd December last (1892) allowing the personal claim of $92.92 made by appellants, but affirming that portion of the judgment of the court below by which appellants' hypothecary action was dismissed.

This was an action *en déclaration d'hypothèque* for $3,544, being the balance due on the purchase price of the property known as lots 443 and part of lot 442 in the Parish of Montreal, secured by a *bailleurs de fonds* privilege. The action was brought by the appellants on the 26th January, 1887, as representatives of the estates of William Workman and Alexander Maurice Delisle, alleging that on the 2nd December, 1874, they sold the property to Léon Poiriaux and Pierre Demeule for $2,235, the purchasers agreeing to pay $2,235 in seven annual consecutive payments, the first of which was to be $320 and the last $315; the first to be made on the first day of November then next, and thereafter half yearly on the first days of May and November in each year, with interest at seven per cent counting from the 11th November then next, the purchasers to keep the building insured for the vendors' benefit and also to pay to the vendors the sum of $60 towards the cost of a drain: that to secure these terms and conditions the land was hypothecated by a *bailleur de fonds* privilege and the deed was registered on the 10th December 1874; that the said purchase price with interest, insurance, cost of said drain added, made a total of $4,216.10, and the balance due after crediting what had been received on account of

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said sale was $3,544.34, and that in addition thereto the appellants had paid and had a right to charge against the defendants a sum of $92.92 paid by appellants for taxes; that the defendants were in possession of the said immoveable property since the 9th May, 1876, as proprietors thereof; that in consequence the said plaintiffs were well founded in bringing the present action and demanding that the said property be declared hypothecated to them for the sum of $3,544.34, inasmuch as the defendant refused to pay the same although thereunto lawfully required, and in asking that defendants be condemned to pay the said further sum of $92.92.

The respondents pleaded that they had acquired the immoveable in question in good faith by translatory title, to wit, by deed of sale from Liboiron on the 29th May, 1876, and had become freed from the hypothec by ten years' possession thereunder. By another plea they alleged that they did not owe personally the capital nor the interest of the price of sale, and that as to the items of account for insurance, taxes, and sixty dollars for a drain, they were prescribed, and further, had never been authorized or expended with the respondents' knowledge.

No answer was made to that plea. Issue was joined and by the oral and documentary evidence adduced, which is reviewed in the argument of counsel, it appeared that Messrs. Poiriaux and Demeule on the 10th December, 1874, by deed registered 21st December, 1874, sold this property to Mr. Antoine Liboiron, who assumed the obligations of the vendors towards (the representatives of) Workman and Delisle. Mr. Liboiron borrowed money from the respondents, and gave them a mortgage on the property as security, by notarial deed of date 6th February 1875; and on the 29th May 1876, before Marion, notary, he trans-

ferred this property to respondents by way of *dation en paiement*; and he also, by the same deed, ceded to the respondents the rents due and to become due on the property, including some eight tenements. They had previously instituted an action agaist Liboiron, as *tiers détenteur*, and there was evidence that the appellants had no direct knowledge of this deed. Liboiron remained in possession and continued for a time to pay out of the rents he received from sub-tenants the interest due to the appellants upon their *bailleur de fonds* claim.

After the *enquête* was closed the plaintiffs moved the court to be allowed to amend the allegation in their declaration that the defendants had been in possession of the property as proprietors since the 9th May, 1876, their declaration to accord with the proof by striking out the words "9th May, 1876" and by substituting therefor the words "1st December, 1886."

The Superior Court refused the motion and held that the judicial admission in the plaintiffs' declaration was complete proof against them as to the ten years' possession, and that under their translatory title the respondents were entitled to plead prescription against the appellants' claim. Art. 2251 C. C. The Court of Queen's Bench for Lower Canada (appeal side) unaninously affirmed this judgment.

The question which arose on this appeal was whether the respondents had acquired the property in question in good faith under a translatory title duly registered on the 26th May, 1876, and were now in a position to prescribe the ownership thereof, and liberate themselves of the claim of *bailleur de fonds* registered prior to the deed of acquisition of the 9th May, 1876.

H. Abbott Q. C. for appellants:

The pleas raise, in the first place, the question of whether or not the respondents can set up against the

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appellants a ten years' possesion under a title acquired in good faith. It appears from the evidence that Liboiron remained in possession of the property up to within a couple of years before the institution of the action. It also appears that during those years, say from 1876 to 1884, the rents were collected by him. In making this latter statement I must refer to the evidence of Mr. Christin, who states that during a part of the year 1876 and 1877 he collected certain rents for the Building Society. This evidence is not the best evidence that could be adduced of these payments, inasmuch as the receipt books of the society from which Mr. Christin said he refreshed his memory and made up his statement were not produced; and there is nothing to show whether the rental during those years was collected by special authority of Mr. Liboiron or not. There is moreover no evidence that there has been actual physical possession by the purchaser exclusive of that of the personal debtor. *Stuart* v. *Bowman* (1); *Vaillancourt* v. *Lessard* (2).

We then have against the contention of good faith the fact that the respondents had a second mortgage upon the property for money lent. There can be no doubt they had examined the titles, and must have been acquainted with the fact that the property was originally a part of the Workman and Delisle estates and had been alienated subject to a *bailleur de fonds* claim. The deed of transfer from Liboiron to them mentioned the deed of sale from Poiriaux and Demeule to him, and the date of its registration. Mr Marion, the notary of the Building Society, admits that he took notes of this deed of sale, and that the titles were examined by the society's solicitor. Now this deed of sale makes express mention of the *bailleur de fonds* claim held by Messrs. Workman and Delisle, and by

(1) 2 L.C.R. 369; 3 L.C.R. 309. (2) 9 L. N. 267.

its terms the property is mortgaged to secure the payment. This shows actual knowledge on their part of the existence of the mortgage apart from the constructive knowledge to be presumed from the registration of the deeds, upon which appellants strongly rely. *Carter* v. *Molson* (1).

With this knowledge they took from Liboiron a transfer of the land in payment of the amount due by him. This transfer they did not avail themselves of for a period of years, during which term, instead of compelling Liboiron to pay over to them the rents and profits of the property, which they were entitled to take by the terms of their deed, they allowed him to remain in possession, he or the appellants paying the taxes, the insurance, the repairs, the cost of drains upon the property, and the Church cotisations, and during the greater part of the time, Liboiron paying also the *bailleur de fonds* interest and instalments as far as he could. In addition to these facts, we have the statement by Mr. Matthew and by Liboiron, that Mr. Brunet, the manager of the defendant company was aware of the existence of the mortgage.

When this company took the deed of transfer from Liboiron it was making a bad debt. If the good faith existed, which the respondents pretend, why did they not during the period of ten years endeavour to realize upon that property in some way or another. No steps have been taken to do this, and no rental has come in, nor have the assessments been paid by them. Briefly, the condition of affairs is not consistent with the assumption that the respondents were *bonâ fide* owners of this property for value, and looked upon it as theirs and managed it. It is consistent with an assumption that having made a bad debt respondents took a transfer of the property for what it was worth, and

(1) 10 App. Cas. 664.

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knowing that it was not more than would pay off the *bailleur de fonds* claim, left it alone hoping to come in later if the property greatly increased in value. However, it was only necessary to constitute the respondents in bad faith to show knowledge on their part of the existence of the *bailleur de fonds* claim. *Blain* v. *Vautrin* (1). And this knowledge has been clearly shown as already pointed out.

The court below, however, confirmed the judgment of the Superior Court holding that there had been a possession in good faith for ten years. In doing so, the court seems to have gone entirely on the fact that the appellants, in their declaration, alleged that the respondents had been in possession as proprietors since the 9th May, 1876, and that this allegation constituted a judicial avowal from which the appellants could not recede. The court seems to have ignored the evidence of bad faith on the part of respondents shown by their knowledge of the appellants' hypothec. As to the allegation in the appellants' declaration with regard to possession it was never accepted or acted upon by the respondents, who went to proof in order to establish their possession. Their own witnesses proved that they had not had a continuous uninterrupted possession for ten years, but only since December, 1886. The appellants thereupon moved, under art. 320 C.C.P. to amend their declaration so as to agree with the facts proved. This motion was refused by the court.

The appellants submit that they should have been allowed to amend their declaration in the manner specified. The allegation as made in the declaration was not intended to mean more than that the respondents had not had possession such as described in their deed of transfer, that is to say, the legal possession which the execution of such a deed gives to the trans-

(1) 23 L. C. Jur. 81 ; 10 R. L. 200

feree by the code. It was not intended thereby to allege that they had had actual physical possession of the property, as this certainly was not the case. Finding the court disposed to consider that this clause constituted an express admission as to physical possession from which they could not recede, and the facts in evidence showing an actual possession of a much more limited extent, the appellants moved to be allowed to amend their pleadings to accord with the evidence, and this they submit was then their right, and should have been granted; otherwise their clients would be made to suffer by the putting of a too strained construction upon that allegation, and the holding it, as did the court below, to be a judicial avowal.

Even if this allegation were to be looked upon as a judicial avowal, it is submitted that the appellants had a right to revoke it or recede from it when it was found to be erroneous in fact (1); especially when it had not been accepted or availed of by the opposite party; Pandectes Françaises (2); Sirey (3); Dalloz (4); Pothier (5); Nouveau Denizart (6); Merlin Rep. (7); Toullier (8).

Laflamme Q. C. and *T. Fortin* for respondents:

The only question which comes up upon the issues as joined, is whether the respondents have had possession of the property in question for more than ten years previous to the institution of this action—and whether, as a consequence, the appellants' action is prescribed.

The courts below have found that the respondents' plea has been established, and we submit that their judgment is correct.

(1) C. C. Art. 1245.
(2) Vo. Aveu. Nos. 393, 405.
(3) 65, 1 184.
(4) 37, 1 440.
(5) Obligations (N. 830.)
(6) Vo. Aveu, p. 634.
(7) Vo. Preuve, sec. 11, par. 1, n. 6.
(8) T. 10, No. 287.

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The law on the subject is contained in article 2251 of our Civil Code.

The deed of the respondents is filed by both parties, the copy filed by the respondents bearing upon its face a certificate of registration. It is a translatory title, being a deed of sale.

Now the appellants allege in the following words that the respondents have been in possession of said property, as owners thereof, since the 9th of May, 1876, viz.:

"That the defendants are in posession of the said immovable property herein above described and have been since the 9th of May, 1876, as proprietors thereof."

This constitutes the best evidence that can be made. Indeed, it is sufficient of itself to support the plea of the respondents; it is a judicial admission, which forms complete proof against the party making it. Art. 1245 C. C.; Demolombe (1).

And this admission is corroborated by the title deed filed by the appellants themselves.

The appellants, realizing the position they had made to themselves by their allegations, moved the court to be allowed to amend their declaration by striking out the words "9th May, 1876," and substituting therefor, the words "1st December, 1886."

This motion was presented after the trial and was submitted with the whole case. No error is alleged in the motion, no affidavit is filed in support of it; nothing but a bare application to amend. It is not even asked to reopen the *enquête* in order to adduce more evidence, or at least, to give the respondents the opportunity of adducing more.

The court below very properly found that the averments in the declaration constitute an admission in favour of the respondents on which they had relied

(1) 30 Vol. nos. 536 *et seq.*

and of which they could not be deprived; and the evidence on that point being insufficient it dismissed the motion. This was approved of by the Court of Appeals and seems to us indisputable law.

The article just quoted says clearly that the admission cannot be revoked unless it is proved to have been made through an error of fact. Now here no such error is even alleged, still less proven.

With this allegation of the appellants, no evidence was necessary on behalf of the respondents. The possession is explicitly alleged, good faith is presumed by law, there is no allegation of bad faith; so that the respondents were not obliged to adduce any evidence whatever.

Nevertheless, whatever evidence is found in the record is, we submit, in their favour.

As to the question of good faith the learned counsel reviewed the evidence and cited and relied on Art. 2202, 2040, 2253 C. C. *Lepage* v. *Chartier* (1); *Primeau* v. *Guerin* (2); *Kaigle* v. *Pierce* (3); Aubry & Rau (4) and Troplong (5); and in addition contended that the question being mainly one of fact, the judgments should not be disturbed. *Ryan* v. *Ryan* (6).

H. Abbott Q. C. in reply: *Kaigle* v. *Pierce* (3) relied on by respondents, has been virtually overruled by *Blain* v. *Vautrin* (7).

BY THE COURT.—There was sufficient evidence of the knowledge by the respondents of the existence of the *bailleur de fonds* claim when they acquired the property in May, 1876, to constitute them in bad faith and therefore they could not invoke the prescription of ten years. See *Blain* v. *Vautrin* (7). The motion

(1) 11 L. C. Jur. 29.
(2) 30 L. C. Jur. 21.
(3) 15 L. C. Jur. 227.
(4) 2 Vol. 385.
(5) Priv. et Hyp. p. 8.
(6) 5 Can. S.C.R. 406.
(7) 23 L. C. Jur. 81.

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to amend the plaintiffs declaration so as to make the allegation as to the possession of the property conform to the facts as disclosed by the evidence should have been allowed. Art. 1245 C. C.

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FOURNIER, J. dissenting.—L'action des appelants est en déclaration d'hypothèque accompagnée d'une demande de $92.92 pour taxes payées par les appelants à l'acquit de l'intimée. L'action a été renvoyée *in toto* par le jugement de la Cour Supérieure, à Montréal, le 3 novembre 1890.

En appel, la cour du Banc de la Reine a confirmé cette partie du jugement renvoyant l'action hypothécaire, et infirmé l'autre partie du même jugement qui avait aussi renvoyé cette partie de l'action réclamant $92.92 pour taxes payées à l'acquit de l'intimée.

Les appelants, comme représentants de feu William Workman et Alexandre Maurice Delisle, allèguent que ces derniers ont vendu à Léon Poiriaux et Pierre Demeule l'immeuble décrit en leur déclaration, pour la somme de $2,235, payable en sept versements annuels consécutifs, le premier devant être de la somme de $320, et le dernier de celle de $315, en commençant le premier novembre prochain, et à continuer tous les six mois, les premiers de mai et novembre de chaque année, jusqu'à parfait paiement avec intérêt de sept par cent. Pour sûreté de ces paiements la propriété vendue fut hypothéquée avec privilège de *bailleur de fonds*.

Le dix décembre, Poiriaux et Demeule vendirent le dit immeuble à Antoine Liboiron, qui se chargea des obligations des vendeurs envers Workman et Delisle.

Le 29 mai 1876, Liboiron vendit cette propriété à l'intimée.

Les appelants allèguent spécialement que l'intimée est en possession du dit immeuble, comme propriétaires

d'icelui, depuis le 9 mai 1876, et après avoir établi la balance de leur réclamation hypothécaire à la somme de $3,544.34, ils prennent les conclusions ordinaires de l'action hypothécaire.

Les appelants réclamaient aussi personnellement la somme de $92.92 qui leur fut accordée par la Cour du Banc de la Reine; comme il n'y a pas de contre-appel à cette cour à ce sujet, le jugement quant à cet item est chose jugée entre les parties.

L'intimée a d'abord plaidé à cette action par une défense au fond en droit devenue inutile par suite de l'amendement à la déclaration ; et ensuite par un autre plaidoyer, alléguant spécialement qu'elle avait acheté la propriété en question de Antoine Liboiron, le 29 mai 1876, par acte authentique dûment enregistré le même jour, et que par une possession de plus de dix ans avant la date de l'action des appelants (26 janvier 1887), leur propriété avait été libérée de la dite hypothèque par l'effet de la prescription.

Il n'y a pas eu de réponse à ce plaidoyer.

Ainsi la seule question soulevée par la contestation liée entre les parties est de savoir si l'intimée a eu la possession de la propriété en question pendant plus de dix ans avant l'institution de l'action en cette cause et si l'action des appelants n'est pas en conséquence prescrite.

Les deux cours ont donné gain de cause à l'intimée.

La loi concernant la prescription de dix ans est l'article 2251 du Code Civil, qui déclare: "Celui qui acquiert de bonne foi et par titre translatif de propriété, un immeuble corporel en prescrit la propriété, et se libère des servitudes, charges et hypothèques par une possession utile en vertu de ce titre pendant dix ans."

Article 2253. Il suffit que la bonne foi des tiers-acquéreurs ait existé lors de l'acquisition, quand même

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que leur possession utile n'aurait commencé que depuis.....

Ainsi les conditions pour acquérir la prescription de dix ans se réduisent à trois, 1° l'acquisition de bonne foi par un titre translatif de propriété ; 2° une possession utile en vertu de ce titre ; 3° cette possession doit durer dix ans.

Les appelants n'ont pas répondu au plaidoyer des intimés invoquant la prescription.

L'acte d'acquisition de l'intimée est produit par les deux parties; la copie produite par l'intimée porte certificat de son enregistrement—c'est un acte de vente *en dation en paiement* par Liboiron pour demeurer quitte envers l'intimée d'une certaine obligation qu'il avait consentie en sa faveur. Cet acte est translatif de propriété, et d'après l'art. 1592 C.C. la dation en paiement n'est parfaite que par la délivrance de la chose.

La preuve de la possession de l'immeuble en question est faite par les appelants eux-mêmes qui ont allégué dans leur déclaration dans les termes suivants: "That the defendants are in possession of the said immovable property hereinbefore described and have been since the 9th of May, 1876, as proprietors thereof." La preuve résultant de cette admission est en outre corroborée par le titre d'acquisition de l'intimé produit par les appelants eux-mêmes.

Cette admission constitue la preuve la plus complète qui peut être faite de la possession de l'intimé, et elle suffit à elle seule pour prouver le plaidoyer de l'intimé. C'est un aveu judiciaire qui, d'après l'article 1245 C. C., fait pleine foi contre celui qui l'a fait. L'article ajoute qu'il ne peut être révoqué, à moins qu'on ne prouve qu'il a été la suite d'une erreur de fait.

Les appelants s'étant aperçu que par cette admission ils avaient dispensé l'intimé de faire preuve de sa possession, cherchèrent à se tirer de la fausse position dans

laquelle ils s'étaient placés en faisant motion pour amender leur déclaration en retranchant les mots " 9th May, 1876," pour y substituer les mots " 1st December, 1886."

Cette motion faite après l'enquête fut plaidée en même temps que le mérite de la cause. Il n'est pas même allégué qu'il y a eu erreur et aucun affidavit n'est produit à son soutien. Il n'y a que la simple demande d'amender, sans même une demande de rouvrir l'enquête pour produire de nouvelles preuves, ou du moins pour donner occasion à l'intimée de faire la preuve dont elle avait été dispensée par l'aveu des appelants.

Cette motion fut renvoyée par la Cour Supérieure dont le jugement a été confirmé par la Cour d'Appel. C'est évidemment conforme à l'article 1245 C. C., qui déclare que l'aveu ne peut être révoqué à moins qu'il ne soit prouvé qu'il a été fait par suite d'une erreur de fait. Loin d'en avoir tenté la preuve, l'erreur de fait n'a pas même été alléguée. Les appelants ne s'étant pas conformés à la condition de l'article 1245 C. C., qui exige la preuve de l'erreur, la permission de révoquer leur erreur devait être refusée.

Si les appelants n'eussent pas considéré qu'indépendamment de leur aveu, il y avait au dossier une preuve suffisante de la possession de l'intimée, ils n'auraient pas négligé d'invoquer un moyen plus sûr et plus facile de se débarrasser des conséquences de l'aveu en ayant recours au désaveu de leurs procureurs. En effet ceux-ci n'avaient pas mission de faire des aveux, ces actes étant exclus de leur mandat, mais cependant les appelants étaient tenus de les désavouer, pour empêcher que leur silence ne fut pris pour une ratification. Ce moyen est indiqué par Toullier (1),

(1) Vol. 10, n° 293, p. 400.

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Il pouvait sans doute révoquer l'aveu indiscret fait par son mandataire, ou du moins en anéantir les effets et les conséquences en prouvant que l'aveu est la suite d'une erreur ; mais il n'est point obligé de suivre cette marche, qui le charge du fardeau d'une preuve souvent difficile. La loi lui en indique une plus simple et qui rejette la preuve sur l'adversaire, celle du désaveu, fondé sur ce qu'il n'a point autorisé l'aveu dont il se plaint. Il n'a dans ce cas aucune preuve à faire ; c'est au procureur désavoué dont la conduite est inculpée, ou à l'adversaire qui veut en tirer avantage, de prouver que le désaveu est mal fondé.

La marche à suivre dans ce cas est tracée par le code de procédure, par les articles 192 jusqu'à 199, inclusivement. L'article 1166 donne le droit de faire cette procédure même en appel.

L'aveu au sujet de la possession rendait inutile toute preuve de la part de l'intimée. Cependant celle que l'on trouve dans le dossier est en sa faveur.

Il est prouvé que l'intimée a pris possession de la propriété en question le jour même de l'acte de vente, vingt-neuf mai 1876, ainsi qu'elle y était autorisée par la clause suivante de son titre :

> Pour du dit terrain et dépendances jouir, user, faire et disposer par la dite acquéreur, ses successeurs et ayant cause, en toute propriété, en vertu des présentes, et en prendre *possession immédiatement*.

Le même jour, 29 mai 1876, l'intimée loua un des logements de cette propriété à Liboiron, l'ancien propriétaire, qui paya loyer à l'intimé pendant quelque temps et fut ensuite évincé pour défaut de paiement.

Bien que le bail à loyer consenti à Liboiron par l'intimée n'ait pu être produit, il n'est pas moins légalement prouvé qu'il y en a eu un qui n'a pas été retrouvé. Le notaire Marion, qui l'avait passé, ayant été requis d'en produire une copie en fit la recherche dans ses minutes et ne put la trouver, la dite minute ayant été perdue. Mais il se souvient parfaitement d'avoir passé le dit bail qui est régulièrement entré dans son répertoire. Cette preuve est corroborée par

le témoignage de Christin qui a été employé comme collecteur pour les loyers dus par les locataires de cette propriété et qui déclare positivement qu'il a retiré le loyer dû par Liboiron comme un des locataires. Ce témoignage positif est confirmé par un état (p. 15 du dossier) produit par Christin des collections qu'il a faites et dans lequel on voit que Liboiron ne lui a pas fait moins de six paiements de loyer.

Après que Christin eût laissé l'emploi de l'intimé, Liboiron paraît avoir été autorisé à collecter les loyers des autres locataires. Cette autorisation fut ensuite révoquée, ainsi que le dit Marion, p. 40 du dossier. Liboiron ne payant pas son loyer, fut évincé. C'est sans doute pour ce motif que dans son témoignage il s'est montré si hostile à l'intimée. Il va même jusqu'à dire qu'il a toujours été en possession de la propriété comme propriétaire jusqu'à ce qu'il en ait été évincé. Il va même jusqu'à dire qu'il n'a jamais vendu la propriété à l'intimée ; qu'il n'en a jamais loué une partie de l'intimée et qu'il a toujours collecté les loyers pour lui-même et en son nom. Son ressentiment l'a emporté à dire toutes ces choses qui sont toutes absolument fausses et contredites par la preuve. Certainement qu'il jure faux, lorsque en face de son acte de vente il ose dire qu'il n'a jamais vendu la propriété et qu'il n'en a jamais loué une partie, lorsque l'existence du bail qui lui en a été fait est parfaitement prouvée et que le paiement du loyer de la partie louée est si positivement prouvé par Christin, auquel il a fait au moins six paiements de son loyer. Il nie aussi avoir reçu avis de cesser de faire la collection des loyers, lorsque ce fait est si positivement prouvé par le notaire Marion.

Toutes ces contradictions sont évidemment de nature à rendre le témoin tout à fait indigne de foi lorsqu'il dit que l'intimée savait qu'il y avait une hypothèque en faveur de Workman et Delisle.

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La question suivante lui est faite à ce sujet :

Q. Quand vous avez donné une hypothèque à la Société de Construction est-ce que la Société savait dans le temps qu'il y avait une hypothèque en faveur de la succession Workman & Delisle ?

R. Comme de raison qu'elle le savait.

Q. Est-ce que ça été mentionné dans le temps ?

R. Ça ne faisait pas plus que sept a huit jours que j'avais acheté de Monsieur Demeule ; par exemple l'argent retournait à la Société.

Q. Mais quand vous avez emprunté de l'argent de la Société, la Société savait dans le temps qu'il y avait cette hypothèque ?

(Objecté à cette question comme suggestive. Objection réservée.)

R. Oui, c'était la première hypothèque.

En se bornant à répondre seulement "comme de raison qu'elle le savait" il est évident qu'il n'en savait rien lui-même, et que sa réponse n'est basée que sur une supposition et non sur un fait positif. Ceci est confirmé par une autre réponse évasive qu'il donne à la question suivante : "Est-ce que ça été mentionné dans le temps ?" En se contentant de dire qu'il n'y avait pas plus de sept à huit jours qu'il avait acheté, au lieu de dire si oui ou non la chose avait été alors mentionnée, il est évident qu'il a voulu éviter de dire une fausseté de plus et qu'il craignait de trop s'avancer en donnant un détail qui pourrait être contredit.

Dans ses transquestions sur le même sujet, il finit par avouer qu'il n'a pas dit à la Société qu'il y avait une hypothèque, voici ce qu'il dit :

Q. Comment avez-vous dit cela à la Société qu'il y avait une hypothèque ; à quel propos leur avez-vous dit cela ? Avez-vous dit, d'abord, à la Société qu'il y avait une hypothèque.

R. Quand une personne achète une terre à crédit, une place, je suppose que le fonds se trouve la première hypothèque.

Q. Alors, ils ont dû le comprendre ?

R. Bien .....

Q. Mais vous ne leur avez pas dit cela ?

R. Je ne leur ai pas dit.

Q. Ils ont dû le voir ?

R. .....

Et le déposant ne dit rien de plus.

En affirmant le fait que l'intimée connaissait l'existence de l'hypothèque des appelants on voit évidemment que ce n'est qu'une pure supposition de la part de Liboiron. "Quand une personne achète, dit-il, une terre à crédit, une place, je suppose que le fonds se trouve la première hypothèque," Après avoir hésité il finit par avouer qu'il n'a pas parlé à la Société (l'intimée) de l'hypothèque de Workman et Delisle.

Il résulte de toutes ces contradictions que le fait qui eût pu avoir de l'importance sur le sort de la cause comme tendant à prouver que l'intimée n'était pas de bonne foi dans sa possession, n'est nullement prouvé. Ce témoignage n'a pas contredit la preuve de possession faite par les autres témoins, Marion, Christin, etc.

Comme je l'ai déjà dit, et ainsi qu'il est démontré par le dossier, les appelants n'ont fait aucune réponse au plaidoyer de prescription, de sorte que toute la preuve qui peut être faite pour établir la mauvaise foi de la part de l'intimée est tout à fait illégale parce qu'il n'y a aucune allégation à laquelle on puisse l'appliquer. Et il serait contraire à toutes les règles de la procédure de prendre en considération une preuve ainsi faite, surtout lorsque la partie adverse n'a pas eu l'occasion de faire une contre-preuve. Si la mauvaise foi ou l'irrégularité avait été alléguées, l'intimée aurait alors eu l'occasion de prouver sa bonne foi et la régularité de sa possession.

Malgré l'illégalité de cette preuve, les appelants ont produit trois témoins pour prouver que l'intimée connaissait l'existence de la réclamation des appelants. Ce sont les témoins Matthews, Baker, l'un des appelants, et Liboiron. J'ai déjà parlé plus haut du témoignage de ce dernier, et fait voir qu'il est impossible d'y ajouter aucune foi. On a vu aussi qu'il avait fini par rétracter le fait qu'il avait parlé à l'intimée de

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l'existence de l'hypothèque des appelants et que son témoignage sur ce point se réduit absolument à rien.

Le témoin Matthews dit d'abord qu'en 1878, il a donné à Brunet, secrétaire de l'intimée, un état de la réclamation des appelants au sujet de la propriété, mais ensuite il reconnaît que ce n'est qu'en 1884 ou 1885 qu'il a vu Brunet à ce sujet pour la première fois.

Baker, l'un des appelants qui, comme l'un des demandeurs dans la cause, ne pouvait pas être légalement témoin en sa faveur, commence aussi par dire qu'en 1878, après la mort de Workman, "en examinant les affaires" on a découvert que l'intimée avait sur la même propriété une hypothèque postérieure à la leur et qu'il leur proposa de leur céder l'hypothèque de Workman et Delisle. Mais plus loin dans son témoignage il ajoute que ceci se passait en 1889.

Si cette hypothèque existait pourquoi n'a-t-elle pas été légalement prouvée. Rien n'empêchait les appelants de produire une copie authentique de leur acte d'obligation. D'après la loi de Québec toutes les hypothèques sont en forme authentique—et la seule manière légale d'en faire preuve est d'en produire une copie,—ce qu'ils n'ont pas fait.

D'après Matthews ce serait en 1884 ou 5 qu'il avait produit à Brunet un compte de la réclamation des appelants, c'est-à-dire sept ou huit ans après la date de leur acte d'acquisition et d'après Baker lui-même ce ne serait que beaucoup plus tard, en 1889, qu'il avait proposé à l'intimée d'acquérir leur hypothèque. L'intimée était alors propriétaire depuis le 29 mai 1876, c'est-à-dire depuis au moins onze à douze ans.

Voilà toute la preuve offerte par les appelants pour prouver la mauvaise foi de l'intimée. Ils ont failli de la manière la plus complète de faire aucune preuve que l'intimée avait connaissance de la réclamation des

appelants lorsqu'elle a fait en 1876 l'acquisition de la propriété.

Au soutien de cette preuve, aussi insuffisante qu'illégale, les appelants ont invoqué la cause de *Carter* v. *Molson*, pour établir la mauvaise foi contre l'intimée (1).

Mais la question décidée dans cette cause est tout à fait différente de celle dont il s'agit ici. Dans celle-là il s'agissait de la validité du titre de Molson à la propriété sur laquelle il avait donné une hypothèque à son créancier Carter. Dans l'hypothèque il y avait référence à tous ses titres de propriété et spécialement au testament de feu l'honorable John Molson, son père. Ce dernier par son testament avait créé en faveur de la femme et des enfants de son fils, une substitution avec clause d'insaisissabilité et défense d'aliéner et hypothéquer les propriétés qui étaient données pour les aliments et le soutien de la famille,

Le partage des biens avait pris la forme d'une vente dans laquelle on avait vendu, ou plutôt donné en partage à Molson, sous la forme d'une vente, des propriétés au montant de sa part dans l'héritage. Mais ce n'était en réalité qu'un partage des biens sujets à la substitution. En référant aux titres cités dans son hypothèque, Carter se serait de suite aperçu que Molson n'était propriétaire que sous la charge de substitution et que son titre lui faisait défense de l'aliéner ou hypothéquer les biens substitués. Le Conseil Privé a décidé que Carter, dans ces circonstances, devait être traité comme ayant eu une connaissance complète que le testament avait établi une substitution en faveur de la femme et des enfants.

Dans l'acte d'acquisition de l'intimée, il est vrai qu'il est fait mention du titre de Liboiron, mais cette vente était faite expressément, comme il est dit dans l'acte, *sans aucune réserve* par le dit vendeur pour l'avoir

(1) 10 App. Cas. 664.

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acquis de Léon Poiriaux et Pierre Demeule. Cette vente était faite sans autre mention que la date du titre du vendeur et n'obligeait nullement l'acheteur. d'après le Droit français, de faire la recherche des hypothèques qui pouvaient exister sur la propriété. Il lui suffisait pour les fins de la prescription d'un titre translatif de propriété, et son acte de vente en était un évidemment.

Dans la cause de *Molson v. Carter* (1) il ne s'agissait pas d'une vente, mais d'une hypothèque donnée par Molson, acceptée par Carter, sur des propriétés qui n'appartenaient pas à son débiteur, mais qui étaient, au contraire, par le testament de feu John Molson, la propriété de la femme et de la famille de Molson. Le créancier Carter, par la référence à tous les titres cités dans l'acte constituant son hypothèque et, entre autres, au testament, pouvait facilement s'assurer que son débiteur n'était pas le propriétaire des immeubles hypothéqués. L'examen du testament l'aurait convaincu du fait.

Dans le cas actuel l'acte de vente était fait sans réserve et n'obligeait pas l'acheteur à faire des recherches, pour s'assurer de l'existence d'hypothèques sur la propriété achetée. Il était garanti par son acte de vente.

Dans la cause de *Molson v. Carter*, (1) il s'agissait de savoir si les propriétés hypothéquées par le débiteur Molson lui appartenaient ou n'étaient pas plutôt substituées en faveur de sa femme et de ses enfants.

Dans celle-ci, il ne s'agit que de savoir si l'intimée a un titre suffisant pour invoquer la prescription.

Cette décision est évidemment inapplicable à la question de prescription qui se présente ici, et ne peut contrebalancer l'effet des décisions de nos cours et les nombreuses autorités citées ci-après.

(1) 10 App. Cas. 664.

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En l'absence de toute preuve pour établir la connaissance par l'intimée de l'hypothèque des appelants au moment de son acquisition, il est impossible de mettre en doute sa bonne foi; et sa position comme acquéreur de bonne foi, lui permet d'invoquer la prescription de dix ans. La connaissance qu'elle a eu plus tard de l'existence de cette hypothèque ne la constitue pas en mauvaise foi et ne peut l'empêcher de plaider prescription. Ceci est conforme à l'art. 2253, qui déclare:

Il suffit que la bonne foi des tiers acquéreurs ait existé lors de l'acquisition, quand même leur possession utile n'aurait commencé que depuis.

L'article 2202, indiqué dans notre code comme droit nouveau, dit que "la bonne foi se présume toujours. " C'est à celui qui allègue la mauvaise foi à la prouver." D'après cet article, pour avoir droit de prouver la mauvaise foi il faut l'avoir alléguée parce qu'elle ne se présume jamais. Les appelants n'ont donc pas droit d'en fournir la preuve puisqu'ils ne l'ont pas alléguée.

L'hypothèque de Workman et Delisle n'ayant pas été déclaré dans le titre de l'intimée, on ne peut dire que l'intimée a dû en avoir connaissance. Ceci est conforme à l'opinion de Troplong, Commentaires des privilèges et hypothèques (1), où il dit:

Si l'hypothèque n'a pas été déclarée, on peut dire pour soutenir qu'il y a mauvaise foi, que le tiers-acquéreur a dû en avoir eu connaissance par l'inscription, car il est peu probable qu'un individu se décide à acheter un bien sans s'assurer préalablement des hypothèques qui le grèvent.

Mais il faut répondre que la bonne foi se suppose toujours, et que pour établir qu'il y a mauvaise foi, le créancier devait prouver que le tiers-détenteur a eu connaissance des inscriptions au moment de l'acquisition.

Je dis au moment de l'acquisition, car une connaissance postérieure ne pourrait nuire. Arrêt de Cass. du 26 août 1825 (2).

Il ajoute au numéro 880. 2° 11:

(1) Ed. Belge, vol. 2, p. 346, n° 800. (2) Dalloz 28, 2, 219.

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Mais si le créancier vient à prouver que l'acquéreur a eu connaissance positive de l'hypothèque *lors de l'acquisition*, je crois qu'alors la bonne foi manquera dans le cours de sa possession.

Mais au numéro suivant, 881, il reconnaît cependant que ce n'est pas l'opinion de Rousseau, de Lacombe, de Catelan, de Grenier, de Delvincourt.

Mais notre code dont les dispositions sur le sujet de la prescription sont plus positives que celles du code Napoléon dit qu'il *suffit* (art. 2253) *que la bonne foi des tiers-acquéreurs ait existé lors de leur acquisition.* Voir à ce sujet l'opinion de Zachariæ, de Grenier, de Persil et de Delvincourt, Battur n° 772, Carrier n° 299, de Duranton n° 315. Les opinions de ces différents auteurs sont citées dans le même vol. de Troplong, dans les notes.

Cette doctrine est aussi celle d'Aubry et Rau (1), où il est dit :

La bonne foi n'est exigée qu'au moment de l'acquisition, c'est-à-dire lorsqu'il s'agit d'une transmission opérée par acte entre-vifs, au moment de la conclusion de la convention translative de propriété, et en matière de legs, au moment où le légataire a manifesté l'intention d'accepter le legs. La connaissance que le possesseur obtiendrait ultérieurement des droits du véritable propriétaire ne forme aucun obstacle à l'inscription. Art. 2269.

Nos cours se sont constamment conformées à ce principe, comme on peut le voir par les décisions suivantes : *Primeau* v. *Guérin*, (2) où il a été décidé—

Que pour prescrire par dix ans et faire les fruits siens, il suffit que le tiers-détenteur ait été de bonne foi au moment de son acquisition ; la connaissance des vices de son titre ou de celui de son auteur survenue au tiers-détenteur depuis son acquisition, ne peut vicier sa possession. Art. 2283.

Dans la cause de *Lepage* v. *Chartier*, (3) il a aussi été décidé par la Cour de Révision, entre autres questions,—

Que pour prescrire par dix ans et faire les fruits siens, il suffit que le tiers-acquéreur ait été de bonne foi au moment de son acquisition ; la

(1) Vol. 2, p. 385. (2) 30 L.C.J. p. 21.
(3) 11 L.C.J., p. 29.

connaissance des vices de son titre ou de celui de son auteur survenue au tiers-détenteur depuis son acquisition ne peut vicier sa possession.

Je ne puis m'empêcher de citer le paragraphe suivant du jugement de feu l'honorable juge Loranger, car il me semble résumer parfaitement la doctrine de notre droit au sujet de la bonne foi en matière de prescription. Les arguments sont d'une application si évidente au présent litige qu'on le dirait écrit pour cette cause (1) :

En matière de possession, quelle est l'époque à laquelle doit remonter la bonne foi du possesseur ? En quel temps doit-il avoir connu l'empêchement pour être réputé en mauvaise foi ?

S'il était de bonne foi lors de son acquisition, et qu'il n'ait connu les vices de son titre que plus tard, cette connaissance fait-elle obstacle à sa possession, et à la prescription qui est fondée sur elle ?

Le principe en matière de bonne ou mauvaise foi est que c'est à celui qui allègue la mauvaise foi à la prouver. Tel est le sens textuel du second paragraphe de l'article 2202 du code civil du Bas-Canada, emprunté à notre ancien droit, et de l'article 2268 du code Napoléon, qui porte que la bonne foi est toujours présumée, et que c'est à celui qui allègue la mauvaise foi à la prouver. L'article 2253 de notre code ajoute : Il suffit que la bonne foi des tiers-acquéreurs ait existé lors de l'acquisition, quand même leur possession utile n'aurait commencé que depuis.

L'article 2269 du code Napoléon porte : Il suffit que la bonne foi ait existé au moment de l'acquisition.

Que peut-il y avoir de plus clair pour démontrer que la connaissance survenue au tiers-détenteur postérieurement à son acquisition avant ou pendant la possession utile ne peut vicier sa possession s'il l'ignorait quand il a acquis les vices de son titre ou de celui de son auteur. Et tel est le cas du défendeur. C'était aux demandeurs à prouver sa mauvaise foi, sa bonne foi étant présumée, et hormis qu'ils prouvent qu'au moment de son acquisition le défendeur connaissait l'existence du douaire et l'imperfection du titre de son auteur, ce qu'ils ont failli d'établir, ils n'ont point repoussé son plaidoyer de prescription contre l'action de Domitilde Lepage.

Ce principe a encore été maintenu par la cour du Banc de la Reine dans la cause de *Kaigle v. Pierce*, (2). Cette cour a décidé que la connaissance par le donateur d'une hypothèque sur la propriété acquise, au temps de l'acquisition ne le constituait pas en mauvaise foi et

(1) 11 L.C.J., p. 33.

(2) 15 L.C.J. p. 227.

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qu'il pouvait invoquer la prescription de dix ans. Cette question de droit a été savamment discutée, comme on peut s'en convaincre par la lecture des nombreuses autorités citées dans le rapport. Troplong, au n° 660, dit: "La bonne foi existe quand même le tiers-détenteur aurait su que le prix était dû, car il a pu légitimement penser que le vendeur originaire serait payé par son acquéreur direct."

Duranton, (1) dit la même chose en ces termes:

> Le sous-acquéreur peut opposer la prescription de dix ou vingt ans à l'action en résolution, s'il y a juste titre; *et la connaissance qu'il aurait au temps de la vente, que son vendeur doit encore tout ou partie du prix, ne le constituerait pas en mauvaise foi, à l'effet de l'empêcher d'invoquer cette espèce de prescription.*

La doctrine contenue dans ces deux dernières autorités est adoptée par feu l'honorable juge Caron, qui s'exprime en ces termes: "Cette doctrine est confirmée par les auteurs cités au factum."

Ces autorités vont peut-être un peu plus loin qu'il ne faut pour les besoins de cette cause. Il suffit, dans le cas présent, d'établir que l'intimée n'avait, au temps de son acquisition, aucune connaissance de l'hypothèque des appelants pour avoir le droit de plaider la prescription de dix ans.

Dans la cause de *Blain* v. *Vautrin* (2), la cour du Banc de la Reine semble, à première vue, avoir décidé au contraire, que la connaissance de l'hypothèque constituait le tiers-détenteur en mauvaise foi. La raison de cette différence d'opinions est fondée sur la différence des faits. Dans la cause de *Kaigle* v. *Pierce* (3), la donation avait déclaré la propriété franche et quitte de toutes réclamations quelconques, tandis que dans celle de *Blain* v. *Vautrin* (2), l'hypothèque était formellement mentionnée dans le titre d'acquisition.

Aussi, l'honorable juge qui a prononcé le jugement termine ses remarques sur ces deux causes en disant:

(1) Tome 16, Vente n° 364. (2) 23 L.C.J. 81.
(3) 15 L.C.J. 227.

Je ne veux pas dire, néanmoins, que je ne suivais pas la jurisprudence établie par le jugement de la Cour d'Appel *in re Pierce* v. *Kaigle* (1), si ce cas était parfaitement analogue, mais ici il y a dans l'acte d'acquisition du possesseur la reconnaissance formelle de l'hypothèque.

On voit par ces différentes décisions que la doctrine est bien établie que pour prescrire par dix ans, il suffit que le tiers-acquéreur ait été de bonne foi au moment de son acquisition. L'existence d'hypothèques enregistrées, dont il n'est pas prouvé que l'acheteur a eu connaissance au moment de son acquisition, ne détruit pas sa bonne foi. S'il en était autrement, l'article 2251, au sujet de la prescription, se trouverait sans effet—et, contrairement au principe que la prescription court au profit de l'acheteur à partir du jour même de l'entrée en possession utile, elle serait suspendue par un moyen que la loi n'indique point.

Les causes qui peuvent interrompre la prescription sont mentionnées aux articles 2222, 2223 C.C. et suivants.

L'acte d'acquisition de l'intimée ayant été enregistré immédiatement après sa possession, les appelants se trouvaient informés du changement de propriétaire et pouvaient empêcher la prescription de courir au profit du nouvel acquéreur, en prenant le moyen indiqué par l'article 2224, d'une demande en justice.

Il est prouvé que les appelants ont eu connaissance de la vente faite à l'intimée plusieurs années avant l'expiration du terme de la prescription. Ils auraient pu, s'ils l'eussent voulu, empêcher la prescription d'être acquise en prenant une action ou déclaration d'hypothèque contre l'intimée. S'ils en souffrent aujourd'hui, la faute en est à eux seuls. L'intimée se trouvant dans toutes les conditions pour acquérir par la prescription, elle doit en avoir le bénéfice. L'appel devrait être renvoyé avec dépens.

Appeal allowed with costs.

Solicitors for appellants: *Abbotts, Campbell & Meredith.*

Solicitors for respondents: *Fortin & Laurendeau.*

(1) 15 L.C.J., 227.

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*Mar. 17.

*Nov. 20.

SYLVESTER NEELON (DEFENDANT).....APPELLANT;

AND

THE CORPORATION OF THE TOWN OF THOROLD (PLAINTIFFS)..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Corporation—Stock in—Payment on shares—Appropriation of payment by company—Portion treated as paid up—Legality of company's action.

N., a director and shareholder of a railway company, agreed to lend the company $100,000 taking among other securities for the loan 168 shares held by B. which were to be paid up. B. owned 188 shares on which he had paid an amount equal to 40 per cent of their value, but being unable to pay the balance the directors of the company agreed to treat the sum paid as payment in full for 75 of the 188 shares and B. consented to transfer that number to N. as fully paid up. N. agreed to this and B. signed a transfer which was entered on the books of the company. There was no formal resolution by the board of directors authorizing the appropriation of the money paid by B.

A judgment creditor of the railway company whose writ of execution had been returned *nulla bona* brought an action against N. for payment of his debt claiming that only 40 per cent had been paid on the 75 shares and that the remaining 60 per cent was still due the company thereon. A judgment in favour of N. was affirmed by the Divisional Court but reversed by the Court of Appeal on the ground that the appropriation by the directors of the money paid by B. was invalid for want of a formal resolution authorizing it.

Held, reversing the judgment of the Court of Appeal, Gwynne J. dissenting, that the company having got the benefit of loan by N. were estopped from disputing the application of the money paid by B. in such a way as to constitute N. the holder of the 75 shares upon the security of which the loan was made and creditors, not having been prejudiced, are bound in the same way; and the transaction being binding between B. and the company, and not objectionable as regards creditors, N. could accept the 75 shares in lieu of the 168 he was entitled to.

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

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APPEAL from a decision of the Court of Appeal for Ontario (1) reversing the judgment of the Divisional Court (2) in favour of the defendant.

The material facts of the case are as follows:—

By an agreement in writing entered into November 1st, 1887, the defendant Neelon agreed to advance to the St. Catharines & Niagara Central Railway Company $100,000, taking as security, among other things, a number of paid up shares in the stock of the company specified in a schedule attached to the agreement. Among the said shares were 168 held by one Blain, who owned in all 188, upon which he had paid $3,750 equal to about 40 per cent of their value. Before the agreement was consummated Blain had got into financial difficulties and was unable to pay the balance of his subscription to the stock and at a meeting of the directors of the company it was proposed that the said sum of $3,750 be appropriated to payment in full of 75 of Blaine's shares and that number be transferred to Neelon instead of the 168. This was agreed to by the board, but no formal resolution was passed authorizing it. The secretary sent a transfer to Blain of the 75 shares in favour of Neelon and it was executed by Blain and accepted by the defendant who was aware of what had transpired at the meeting of the board. The transfer was entered in the books of the company as of 75 fully paid up shares and the remainder of Blain's shares he retained as stock upon which nothing was paid.

The plaintiff corporation had obtained judgment against the railway and issued execution which was returned *nulla bona*. They then brought an action against Neelon claiming that only 40 per cent had been paid on the 75 shares received from Blain and the

(1) 18 Ont. App. R. 658. (2) 20 O.R. 86.

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balance was still due the company and liable to satisfy their judgment debt.

At the trial judgment was given in favour of Neelon, the trial judge finding as facts that while he, Neelon, had a general knowledge of all that had been done he received the 75 shares believing that they were fully paid up and relying upon the representations of the proper officer of the company to that effect. Also that he would not have received them, nor advanced his money to the company, if there had been any doubt about the legality of the transaction. The judgment at the trial was affirmed by the Divisional Court but the Court of Appeal held that the want of a formal resolution by the board of directors authorizing the appropriation of the money paid by Blain to the 75 shares made the transaction void and the judgment of the Divisional Court was accordingly reversed.

W. Cassels Q.C. and *Cox* for the appellant referred to *Miles* v. *New Zealand Alford Estate Co.* (1); *McCracken* v. *McIntyre* (2).

Collier for the respondents.

THE CHIEF JUSTICE.—In my opinion the judgment of the Divisional Court delivered by Mr. Justice Ferguson as regards the appellant's liability in respect of the seventy-five shares acquired by him from Blain as paid-up shares, was entirely right.

There can be no doubt that under the agreement of the 1st November, 1887, made under the seal of the railway company, the appellant was entitled to have paid-up shares. From Blain he was to receive 168 paid-up shares. No variation in this agreement was assented to by the appellant, further than this: finding that all the 168 shares to be transferred by Blain were

(1) 32 Ch. D. 266. (2) 1 Can. S. C. R. 479.

not paid-up, he made a concession in favour of the company and agreed to take less than he was entitled to, namely, 75 shares in lieu of 168. These 75 shares were accordingly transferred to him, with a certificate of the proper officer of the company that they were paid-up, and on the faith of this and on the security of these shares the appellant honestly advanced his money.

Mr. Justice Robertson, who tried the action without a jury, found as follows:—

I also find, that according to the terms of the said agreement the stock was to be paid-up stock, and the defendant received it believing and relying on the representations of the proper officer of the company that the stock was fully paid-up at the time it was transferred to him. I also find that, had there been any doubt in the mind of the defendant at the time the said stock was transferred to him that the said stock was fully paid-up he would not have received the same, nor would he have made the advance of $100,000, or any part thereof, to the company. I also find that there never was any contract between the defendant and the railway company, or with the said parties of the second and third parts to the said agreement, to take, accept or receive the said stock or any part thereof other than on the terms mentioned and set forth in the said agreement.

These findings were fully warranted by the evidence.

Mr. Blain had originally acquired 188 shares of $50 each, upon which there had been paid $3,750. The transaction between Blain and the company, as regards these shares, was entered in the stock ledger of the company by charging Blain with $9,400 as for 188 shares at $50 per share, and giving him credit generally for $3,750 in a gross sum, as having been paid on account of these shares, without any specification of the particular shares sold to him, and without any specific application of the money paid, either as distributed amongst all the shares ratably, or as having been applied to any particular shares.

The first question which arises is as to the powers of the company to apply this money to 75 shares in full

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payment for these shares. Blain does not appear to have made any objection to such a proceeding but, on the contrary, to have fully assented to it. Then, apart from the rights of creditors if the company, either acting as any creditor has a right to do in applying money not particularly appropriated by a debtor, or even having made originally an application of the money by which it was ascribed ratably to all the shares, had thought fit, Blain consenting, to re-appropriate it and treat it as a payment in full for 75 shares, I am at a loss to see why they should not have been free to do so. No authority has been, or could be, invoked to show that such a simple transaction was *ultra vires*. Blain would still have continued to be the holder of shares in the company to the amount of $9,400, upon which $3,750 had been paid, and its appropriation, or re-appropriation, to particular shares could have made no difference to him.

Then no prejudice to creditors can be suggested.

As Mr. Justice Ferguson in his judgment says this transaction had not the effect in any way of derogating from the rights of creditors. In the words of the learned judge:

> Mr. Blain's liability remained for the same amount as before this transaction. What the creditor really complains of, is that he is not permitted to gain an accidental advantage by making his claim against a man of wealth rather than against one who, however high his financial standing had been, was, and I suppose is, more or less embarrassed by reason of the occurrences before alluded to.

It was, however, considered by the Court of Appeal that the transaction as regards the imputation of all cash paid to the 75 shares was invalid by reason of the want of any formal resolution of the board of directors authorizing it. Blain having consented to the transfer of the credit, and the creditors' rights not being

in any way affected by the appropriation made, this must be regarded purely as a question between the appellant and the company.

The first observation I have to make on this is, that we are not dealing with a case between the directors and the whole body of the shareholders. The company got the money loaned by Mr. Neelon on the strength of their 75 shares being fully paid-up, and without that, as he swears and as the learned trial judge has found, the advance would not have been made. Surely, under these circumstances, as between the company and Mr. Neelon, if the latter was seeking to deal with these shares by transferring them as paid-up shares, the company would not be permitted now to allege the want of a resolution as a ground for refusing to register the transfer. In such a case, they would undoubtedly be held to be estopped from insisting on such a dishonest defence to a proceeding to compel registration.

I am further of opinion that the high authority of Lord Justice Bowen may also be invoked for the appellant. I refer to his judgment in the case of *Miles* v. *New Zealand Alford Company* (1), cited in the judgment of the learned Chief Justice of Ontario. In that case the Lord Justice was of opinion that the want of formality in the proceedings of the company could not affect a third party with whom it was dealing. The other Lord Justices differed, it is true, but on a ground which did not call for any opinion on this point. It has long been the doctrine of the courts, as I understand it, that mere irregularities in the internal proceedings of corporations and joint stock companies do not affect persons contracting with the corporation or company. I do not think that such a doctrine is the less applicable in the present case for the reason that Mr.

(1) 32 Ch. D. 289.

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Neelon was himself a director and had notice of all that was done.

Then the deed of the 1st November, 1887, was authorized by the resolutions of the 12th and 13th October, 1887, and was recognized as binding by the resolution of the 10th November, 1887.

By this agreement Mr. Neelon was entitled to 168 paid-up shares from Blain. Surely there could be no reasonable objection why he should not take less than he had stipulated to receive, viz., 75 shares in lieu of the 168. If a resolution of a board of directors authorizes the payment to a creditor in full it could not be said that having received a part payment only he was disentitled to retain it because he did not get all the resolution authorized. I cannot distinguish that case from this.

It appears to me, therefore, that there are two distinct grounds upon which the allowance of this appeal may be rested: first, the company having got the benefit of the loan by the appellant were estopped from disputing the application of the money paid by Blain, in such a way as to constitute him the holder of the 75 shares upon the security of which the loan was made, and creditors, not having been prejudiced, are bound in the same way; secondly, the transaction having been perfectly binding as between Blain and the company, and not objectionable as regards creditors, there was no reason why the appellant should not have been at liberty to do as he did in accepting 75 shares instead of 168, which, under the agreement duly authorized by the resolution of October, 1887, he was entitled to call for.

The appeal must be allowed with costs, and the judgment of Mr. Justice Robertson restored, with costs to the appellant, in all the courts below.

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Gwynne J.

FOURNIER J.—Concurred.

TASCHEREAU J.—I would allow this appeal and dismiss the action. I agree with the opinion of Robertson J. at the trial and of Mr. Justice Ferguson in the Divisional Court.

GWYNNE J.—I am of opinion that this appeal should be dismissed with costs, for the reasons given in the judgment of the learned Chief Justice of the Court of Appeal for Ontario. The appellant not having acquired the stock from Blain in virtue of the arrangement authorized by the St. Catharines & Niagara Railway Company, but in virtue of a private arrangement with Blain himself not authorized nor sanctioned by the company can take under Blain's transfer of the stock to the appellant no greater right than Blain himself had, that is to say, as liable to the creditors of the Railway Company which the respondents are to the amount which at the time of the transfer of the stock to the respondent remained unpaid thereon.

SEDGEWICK J.—I concur in the judgment delivered by the Chief Justice.

Appeal allowed with costs.

Solicitors for appellant: *Cox & Yale.*

Solicitors for respondents: *Collier & Shaw.*

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*May 4.
*Nov. 20.

SAMUEL M. BROOKFIELD AND ALFRED B. SHERATON (DEFENDANTS) ..... } APPELLANTS ;

AND

CHARLES E. BROWN AND OTHERS (PLAINTIFFS) ..... } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Practice—Parties to action—Trespass to mortgaged property—First and subsequent mortgages—Owner of equity of redemption—Transfer of interest before action.

Under the Nova Scotia Judicature Act the owner of the equity of redemption can maintain an action for trespass to mortgaged property and injury to the freehold though after the trespass and before action brought he has parted with his equity. Gwynne J. dissenting.

Mortgagees out of possession cannot, after their interest has ceased to exist, maintain an action for such trespass and injury committed while they held the title.

Per Gwynne J.—A mortgagee in possession at the time the trespass and injury is committed is the only person damnified thereby and can maintain an action therefor after he has parted with his interest, nor is he estopped therefrom by having consented to a sale to one of the trespassers of the personal property as to which the trespass was committed. The tort feasors could not set up such estoppel even though the amount recovered from them with the sum received by such mortgagee for his interest should exceed his mortgage debt.

APPEAL from a decision of the Supreme Court of Nova Scotia (1) affirming a judgment at the trial against the defendants.

The action in this case was for trespass to mortgaged property and injury to the freehold by removal of fixtures. The plaintiffs were Brown the first mortgagee,

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

(1) 24 N. S. Rep. 476.

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Horton the third mortgagee, Robinson the owner of the equity of redemption at the time of the trespass and Hesslein the assignee of such equity and of the third mortgage. The second mortgagee was Brookfield one of the defendants. The first mortgagee, Brown, had foreclosed his mortgage and the property was sold two days after the trespass, realizing sufficient to pay off the first two mortgages. The plaintiff Hesslein was the purchaser at said sale and on the same day that the property was conveyed to him by sheriff's deed the plaintiff Horton assigned to him the third mortgage and the equity of redemption was conveyed to him by Robinson.

There was no question at the trial that a trespass had been committed and the only matter in dispute was as to which, if any, of the plaintiffs could maintain the action. The defendants claimed that the right to sue was in Horton if in any one and that he was estopped by having, prior to the trespass, given his consent to a sale under chattel mortgage of the personal property in respect to which the trespass was committed to the defendant Brookfield.

The trial judge held that Brown, the first mortgagee, could maintain the action as he must be considered to be a trustee for subsequent incumbrancers. The majority of the court *in banc* differed from this view, but gave judgment against defendants in favour of Robinson the owner of the equity of redemption at the time of the trespass.

Ross Q.C. for the appellants. The plaintiff Robinson was not damnified to an extent that would entitle him to damages, *Hosking* v. *Phillips* (1); and see *Tucker* v. *Vowles* (2).

(1) 3 Ex. 168.

(2) [1893] 1 Ch. 195.

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Borden Q.C. for the respondents. As to the right of the mortgagees to sue see *King* v. *Bangs* (1); *Higginbotham* v. *Hawkins* (2); *Mann* v. *English* (3); and as to estoppel of Horton *Moore* v. *Spiegel* (4); *Smith* v. *Cropper* (5); *Maddison* v. *Alderson* (6); *Town of Clinton* v. *Haddam* (7).

THE CHIEF JUSTICE.—I entirely agree in the judgment of Mr. Justice Townshend. It is manifest that the appellants were guilty of an unjustifiable act of spoliation which caused injury and damage to the owner of the property.

It would be much to be lamented if for any technical difficulty regarding the proper person to sue for an indemnity in respect of this injury the appellants should evade liability. I am of opinion, however, that there is really no such difficulty. Under the Nova Scotia Judicature Act, which amalgamates the jurisdictions of law and equity formerly exercised separately, it is open to the owner of the equity of redemption to sue for this injury to his equitable and beneficial estate just as a reversioner though not in possession might at law have sued for an injury to his reversion. Had the old procedure been still in force by which law and equity were separately administered there can be no doubt that in favour of the plaintiff Robinson, the owner of the equity of redemption, a court of equity, even if it would not have given him full relief, would at least have restrained the appellants from setting up the outstanding mortgages and the want of possession as a defence, and thus have removed all impediments in the way of his right to recover.

(1) 120 Mass. 514.
(2) 7 Ch. App. 676.
(3) 38 U. C. Q. B. 240.
(4) 143 Mass. 413.
(5) 10 App. Cas. 249.
(6) 8 App. Cas. 467.
(7) 50 Conn. 84.

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Now that the jurisdictions are combined that can be done in one action which would formerly have required two. The respondent, Robinson, was clearly an owner of the equity of redemption at the time of the wrongful acts complained of which were committed on the 12th June, 1890. The conveyance of the equity of redemption by Marr, the mortgagor, to Robinson was on the 24th March, 1890. No justification for the appellants' conduct has or could have been shown. The only question is. Who is entitled to sue them for it? Brown, the first mortgagee, could not sue as he has been paid off. Horton having transferred his mortgage for value is also without any *locus standi* as it appears to me. Hesslein could not sue as his purchase was not until the 14th June, 1890, after the wrongs had been committed and no right of action was or could have been assigned to him. There remains only Robinson and it is no answer to his action to say that he has conveyed away the estate. Presumably the estate was sold for so much less by reason of the removal of these fixtures and the consequent injury to the freehold. The quotation from Rolle's Ab. in the judgment of Mr. Justice Townshend clearly establishes the proposition that the owner of land upon which trespass has been committed may recover for the injury after having conveyed away his estate. All principle and reason point to a like conclusion.

The appeal must be dismissed with costs.

FOURNIER J.—I am of opinion that the appeal should be dismissed.

TASCHEREAU J.—I have some hesitation in agreeing to dismiss this appeal. I was at one time inclined to give judgment the other way but as the majority of the court are in favour of dismissal I will not dissent.

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GWYNNE J.—I am of opinion that this appeal should be dismissed with costs, and that the person entitled to recover the amount assessed by the jury for the very unjustifiable tort committed by the defendants, and as the value of the fixtures severed by them from the premises and taken away by them and disposed of to their own use, is the plaintiff Horton, who, although third mortgagee of the premises, was in actual possession thereof as mortgagee at the time of the commission by the defendants of the serious damage to the premises of which he was so in actual possession, and who alone appears to have been the person pecuniarily damnified by the defendant's outrageous act of wrong, and whose cause of action as the person in actual possession of the injured premises was complete the moment the tort was committed. The judgment should, in my opinion, be varied accordingly, so as to enable Horton to recover the amount assessed by the jury, with full costs. There seems to be no foundation whatever for the contention that Horton was estopped from suing for the tort committed to premises of which he was in actual possession, nor are the tort feasors persons who can be heard to urge any such objection, or any objection to his right to maintain this suit for such tort or to recover the damages awarded by the jury against the defendants as the tort feasors. If the amount recovered from the defendants for the gross wrong committed by them, together with the amount for which the mortgagee Horton afterwards, when his mortgage security was so reduced in value by the defendants' wrong, assigned and transferred his mortgage, would exceed the amount of his mortgage debt that is not a matter of which the tort feasors could claim the benefit; it would be a matter with which the mortgagor, or the person or persons entitled to his equity of redemption would be alone concerned, and they can be trusted

to look after their own interests in such a case, as being better able to do so than the defendants who have committed the wrong complained of, and whose sole object in resisting the present action is to endeavour to escape being made responsible to any one for the outrage they have committed.

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Appeal dismissed with costs.

Solicitor for appellant Brookfield: *Adams A. Mackay.*

Solicitor for appellant Sheraton: *Arthur Drysdale.*.

Solicitor for respondents: *W. A. Lyons.*

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*Mar. 10.
*Nov. 20.

M. O'GARA (DEFENDANT)..... .....APPELLANT;

AND

THE UNION BANK OF CANADA (PLAINTIFFS)..... } RESPONDENTS;

AND

STARRS, ASKWITH & CO.; JOHN E. ASKWITH, J. L. P. O'HANLY, M. STARRS..... } DEFENDANTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Surety—Interference with rights of surety—Discharge.

The Union Bank agreed to discount the paper of S., A. & Co. railway contractors, indorsed by O'G. as surety, to enable them to carry on a railway contract for the Atlantic & North-west Ry. Co. O'G. endorsed the notes on an understanding or agreement with the contractors and the bank that all moneys to be earned under the contract should be paid directly to the bank and not to the contractors, and an irrevocable assignment by the contractors of all moneys to the bank was in consequence executed. After several estimates had been thus paid to the bank it was found that the work was not progressing favourably, and the railway Co. then, without the assent of O'G. but with the assent of the contractors and the bank, guaranteed certain debts due to creditors of the contractors and out of moneys subsequently earned by the contractors made large payments for wages, supplies and provisions necessary for carrying on the work. In October, 1888, the bank, also without the assent of O'G., applied for and got possession of a cheque of $15,000 which had been accepted by the bank and held by the company as security for due performance of the contract, in consideration of signing a release to the railway company "for all payments heretofore made by the company for labour employed on said contract and for material and supplies which went into the work." The contract under certain circumstances gave the right to the company to employ men and additional workmen, &c., as they might think proper, but did not

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

give the right to guarantee contractors' debts or pay for provisions and food, &c.

Held, that there was such a variation of the rights of O'G. as surety as to discharge him.

Taschereau and Gwynne JJ. dissenting.

APPEAL from a decision of the Court of Appeal for Ontario affirming the judgment of the Common Pleas Division of the High Court of Justice, dismissing the appellants' motion to set aside the findings and judgment of Mr. Justice Ferguson.

The action was commenced by the respondents, the bank, in the Common Pleas Division of the High Court of Justice for Ontario upon four promissory notes held by the bank, upon which the defendants, Starrs, Askwith & Co. were sued as makers, and the defendants, John E. Askwith, J. L. P. O'Hanly, M. Starrs and M. O'Gara were sued as indorsers.

Judgment was entered at the trial by consent against all the defendants except the defendant O'Gara, who pleaded and went to trial upon a special defence, alleging that after the contract for constructing a line of railway known as the Short line through the State of Maine was awarded to Starrs, Askwith & Co. the contractors negotiated with the respondents' bank for a line of credit, which the bank agreed to make, provided they could procure the appellant to indorse their notes.

That after some time the appellant agreed to indorse for them, provided they would as security assign to the bank the moneys to be earned under the contract. This being done the appellant from time to time indorsed the notes of the firm to the bank which were from time to time renewed.

That the bank received all the moneys earned by the contractors down to March, 1888, which was partly applied on the notes and partly in the making of new

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advances, but in March, 1888, the C. P. R. Co. disregarded the assignment and paid the moneys earned to the other creditors of the contractors.

That afterwards the bank neglected to enforce its assignment or to collect the moneys earned, and on the 27th of October, 1888, without consulting with the appellant, and without any notice to him, the bank confirmed the payments already made by the C. P. R. Co. amounting to about $75,000.00.

That he was a surety on the faith of the security he had procured to be given to the bank, that the bank had wasted the security without his knowledge, that he was absolutely discharged by reason of the bank not fulfilling its duty to collect the money or at all events to the extent of the payments made by the C. P. R. Co.

The action was tried at the sittings of the court for the trial of action in the Chancery Division before Mr. Justice Ferguson, without a jury.

The documentary and oral evidence given at the trial in support of appellant's defence and the other material facts and pleadings are reviewed in the judgments hereinafter given.

Mr. Justice Ferguson gave judgment in favour of the plaintiff bank for the sum of $36,872.31 and costs of suit.

The defendant, O'Gara, thereafter moved in the Common Pleas Division of the High Court of Justice to set aside the findings and judgment of Mr. Justice Ferguson.

The motion was argued and judgment given therein against the defendant, directing the dismissal of his motion with costs.

The defendant O'Gara then appealed to the Court of Appeal for Ontario.

The Court of Appeal was divided, the learned Chief Justice and Mr. Justice Osler being in favour of dismissing the appellant O'Gara's appeal, and Mr. Justice Burton and Mr. Justice Maclennan in favour of allowing the appeal, and the appeal was therefore dismissed.

D. McCarthy Q.C. and *A. Ferguson* Q.C. for appellants: There is no dispute as to the terms of the agreement or understanding upon which Mr. O'Gara undertook to indorse the contractor's notes, and both parties agree with the findings of the learned judge at the trial as to particular terms of agreement. The equitable assignment of the contract moneys was drawn up by the bank and sent to them and acted upon. There was, therefore, something more than the mere agreement to indorse; there was a pre-existing agreement between the contractors, the bank and Mr. O'Gara.

The payments of some $125,000 made under another and subsequent arrangement between the bank and the contractors and the company were made without the knowledge or consent of Mr. O'Gara, and as the work was never taken out of the contractors' hands under clauses 23 or 24 of the contract, the legal effect is that the indorser is released.

Amounts were paid directly by the company to parties who furnished supplies and although the company, by obtaining the release which the bank signed and for which the bank got back a sum of $15,000 which had been deposited as security for the due performance of the contract, cannot be sued, yet the indorser can claim that all such moneys so paid were diverted and not paid in accordance with the terms of the equitable assignment upon the faith of which alone Mr. O'Gara consented to become a surety. The law as stated in the following authorities is applicable to the facts of this case, viz.: *Walker* v. *London* and *North-*

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western Railway Co. (1); Hudson on Building Contracts (2); *Brice* v. *Bannister* (3); *Drew* v. *Josolyne* (4); *Polak* v. *Everett* (5).

Meredith Q.C. and *Chrysler* Q.C. for respondents: The main position of the appellant, Mr. O'Gara, is that being a surety he is entitled to avail himself of the equitable defences of a surety, and that in the present case his rights have been interfered with. In the first place we contend that the appellant was not a surety but a co-adventurer in the enterprise, being entitled to a share of the profits, and that the only contract with the bank was the obligation to pay at maturity if the notes he indorsed were presented for payment dishonoured, and notice of dishonour given to him. When in October, 1888, the contract proved to be a losing one, and when it was found that the $15,000 were in jeopardy, an arrangement was arrived at with Mr. O'Gara (for he was in daily communication with the contractors), by which, for the benefit of all concerned, the works were continued.

The findings of the trial judge are to that effect, and if they remain there is an end of the case.

But as it is contended that there was an equitable assignment of all moneys to be earned and that it constituted the bank assignee in equity of a chose in action, relying on *Brice* v. *Bannister* (3). We answer that that case is distinguishable, for if we adopt the reasoning of one of the judges, Lord Justice Bramwell, who stated an hypothetical case which is practically this case, we find there is no room for argument.

Is it not a fair answer to the appellant's contention to say that no moneys were subsequently earned after arrangement of October, 1888, because no supplies were furnished by the contractors?

(1) 1 C.P.D. 518.
(2) P. 420.
(3) 3 Q.B.D. 569.
(4) 18 Q.B.D. 590.
(5) 1 Q.B.D. 669.

Then again, we submit there has been no practical binding acceptance by the company of this assignment, for under section 27 of the contract the Atlantic and North-western Railway might have refused to be bound by the order on the Canadian Pacific Railway Company, and that all payments made are justified by sections 23 of the contract and 101 of the specifications and notices given thereunder.

The bank further contends that O'Gara was not a proper surety for the principal debtors at the date that the bank assented to the payments made by the Canadian Pacific Railway Company, because he was then merely an indorser of notes not then dishonoured nor overdue. Lord Blackburn in *Duncan Fox & Co.* v. *North and South Wales Bank* (1), and Lord Watson in same case at pages 21 and 22. Further, we say that there was no change or variation of any contract between the bank and the promissors so as to release the indorser O'Gara. The arrangement as to the estimates was purely collateral. *Sanderson* v. *Aston* (2). Parol evidence is not admissible to vary the terms of the contract embodied in the promissory notes. *Abrey* v. *Crux* (3).

Counsel also relied on *Buck* v. *Robson* (4); *Ex parte Nichols. In re Jones* (5); *Taylor* v. *Bank of New South Wales* (6); *Ward* v. *National Bank of New Zealand* (7); *Western Wagon Company* v. *West* (8); *Pearl* v. *Deacon* (9); Benjamin on Surety (10); Grant on Suretyship (11).

THE CHIEF JUSTICE and FOURNIER J. concurred with SEDGEWICK J.

TASCHEREAU, J.—I would dismiss this appeal.

(1) 6 App. Cas. 18.
(2) L.R. 8 Ex. 78.
(3) L.R. 5 C.P. 41, per Bovill C.J.
(4) 3 Q.B.D. 686.
(5) 22 Ch. D. 782.
(6) 11 App. Cas. 596.
(7) 8 App. Cas. 755.
(8) [1892] 1 Ch. 271.
(9) 24 Beav. 186.
(10) P. 238.
(11) Par. 373.

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I think that the defence fails for the reasons given by the learned Chief Justice in the court appealed from.

I cannot see, as a matter of fact, that the position of the appellant as surety has been in any way injuriously affected by any of the dealings that have been proved to have taken place between Starrs & Co. and the Bank or the Railway Company.

GWYNNE J.—This is an appeal by the indorser of certain promissory notes made by a firm of contractors, styled Starrs, Askwith & Co., payable to the appellant and indorsed by him, and, as so indorsed, discounted for the makers by the plaintiffs, in the course of their business as bankers, against a judgment rendered in favour of the plaintiffs in an action upon the promissory notes against the makers and indorsers.

A thorough understanding of the facts of the case is all, as it appears to me, that is necessary to remove all difficulty attending the determination of the appeal; and, first, as to the relationship which existed between the Canadian Pacific Railway Company and the Atlantic and North-western Railway Company, with which latter company the firm of Starrs, Askwith & Co. entered into the contract out of which the transaction which is the subject of litigation in the present suit arises, for the construction of a portion of their railway, situate in the State of Maine, one of the United States of America.

The Canadian Pacific Railway Company were no doubt interested in the construction of the work which Starrs, Askwith & Co. contracted with the Atlantic and North-western Railway Company to perform, because the Canadian Pacific Railway Company had accepted a lease whereby they were to be lessees of the railway as soon as it should be constructed by the

Atlantic and North-western Railway Company, which company had entered into a covenant with the Canadian Pacific Railway Company to build the railway, and entered into a contract with Starrs, Askwith & Co. for the construction by them of two sections of the railway. The proceeds of the sale of certain bonds of the Atlantic and North-western Railway Company were placed in the hands of the Canadian Pacific Railway Company to be disbursed by them by their cheques to the contractors, upon the authority and direction of the Atlantic and North-western Railway Company.

To this extent then, in so far as the present action is concerned, and to this extent only, can the Canadian Pacific Railway Company be said to have been the agents of the Atlantic and North-western Railway Company, namely, to pay out of the funds of that company placed in their hands the moneys which, from time to time, they should be authorized by the Atlantic and North-western Railway Company to pay to the persons with whom the latter company had entered into contracts for the construction of the railway.

Then, secondly, as to the terms of the contract entered into by and between Starrs, Askwith & Co. and the plaintiffs, there appears to be no reason to doubt the evidence of Mr. O'Hanly, one of the members of the firm of Starrs, Askwith & Co., upon that point; and the learned trial judge has expressly found the contract to have been as stated by him, and at the trial it was finally conceded by the appellants so to be. Now, O'Hanly's evidence, in substance, is that in order to obtain the contract it was necessary for the firm to deposit with the Atlantic and North-western Railway Company $15,000 in money, or in a cheque accepted and certified as good by a bank. They therefore applied to Mr. Anderson, the plaintiffs' agent and manager at their Ottawa branch, and informed him that they

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wanted, in the first place, $15,000 as a security deposit, and afterwards, $25,000 to enable them to carry on the work, in all $40,000. The firm wanted to get the accommodation which they required upon their own security alone, but the plaintiffs' agent declined to give the accommodation without a good indorser. Eventually an agreement was arrived at between the firm and the plaintiffs, through their agent Mr. Anderson, to the following effect:—The bank agreed to give their acceptance of the firm's cheque for $15,000, and to honour the drafts of the firm to the further amount of $25,000, as they should want funds to carry on the work, upon their supplying their notes, with an approved indorser, the firm also agreeing that all moneys coming to them under their contract, upon their progress estimates, should be paid into the bank at Ottawa, against which the firm were to be at liberty to draw in order to carry on the work, and that, for so much of the notes discounted by the bank for the firm as upon maturity the firm could not afford to pay out of the progress estimates, these notes should be renewed by the bank until the work should be completed under the contract, which time was, by the contract, declared to be the first of November, 1887; and Mr. O'Gara was agreed to be accepted by the bank as an approved indorser.

Accordingly, on the 24th May, the bank discounted a note of the firm, dated 23rd May, and indorsed by Mr. O'Gara, for $15,500, payable six months after date, the proceeds of which, amounting to $15,023.53 were placed to the credit of the firm in the bank, and the firm drew thereon a cheque for $15,000 payable to the Canadian Pacific Railway, or order (security contract, sections one and two, Short Line Railway), which the bank certified as good. This cheque, so certified, was handed by the firm to a Mr. Ross, manager of the

Atlantic and North-western Railway Company. On the 1st of June, 1887, the bank discounted for the firm another note of that date for $10,000, made by the firm and indorsed by the appellant, and placed the proceeds to the credit of the firm; at the same time the firm left with the plaintiffs' manager, at their Ottawa branch, a letter dated the 30th May, 1887, addressed to the Canadian Pacific Railway Company, as follows:—

GENTLEMEN,—Please make all cheques payable to us for work done on our contract on Atlantic and North-western Railway (International Maine Division) to the order of the Union Bank of Canada, and send to their Ottawa branch, or any other estimate for said work, and we hereby agree that this authority shall be irrevocable on our part, without the assent of the said bank.

Yours truly,

(Sgd.) M. STARRS,
" JNO. E. ASKWITH,
" J. L. P. O'HANLY.

This letter the plaintiffs' agent at Ottawa enclosed in a letter dated 1st June, 1887, addressed and sent to W. Sutherland Taylor, treasurer of the Canadian Pacific Railway Company, which letter is as follows:—

DEAR SIR,—I enclose an authority from Messrs. Starrs, Askwith and O'Hanly, contractors for work on International Maine Division of the Atlantic and North-western Railway, requesting your company to make all payments, by cheque or otherwise, due them for work, to this bank, and to have same sent here when due. Will you please acknowledge this and say if you will comply therewith. If you are not the proper officer of the Canadian Pacific Railway Company to take this, will you kindly forward it to the proper person and notify me, and oblige.

Yours truly,
M. A. ANDERSON,
Manager.

To this letter Mr. Taylor replied by a letter, dated the 2nd June, 1887, as follows, addressed to Mr. Anderson:—

DEAR SIR,—I am in receipt of yours of yesterday. The order which you enclose is not satisfactory in so far as the firm of contrac-

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tors do not give the bank the authority to sign binding receipts to this company on their behalf for the moneys which may be monthly remitted to the bank as per estimates. Please supplement order in that way. I enclose form for the signature of firm.

The form sent in the above letter was signed by Starrs, Askwith & Co. per M. Starrs and as so signed is as follows :—

To the Canadian Pacific Railway Company.

The Union Bank of Ottawa is hereby empowered by us to grant valid and binding receipts on our behalf to you for moneys remitted by you in payment of our estimates under contract on Atlantic and North-western Railway, as per order given by us dated 30th May, 1887.

(Signed) STARRS, ASKWITH & CO.
Per M. STARRS.

This paper so signed Mr. Anderson enclosed in a letter dated June 3rd, 1887, addressed and sent by him to Mr. Taylor as follows :—

DEAR SIR,—I have received your letter of the 2nd inst., and now enclose form sent by you duly signed by firm. I suppose I may now consider the power of attorney to draw their estimates irrevocable by contractors for this work.

At the same time that Starrs, Askwith & Co. gave to the plaintiffs' agent the above letter of the date of 30th May, addressed to the Canadian Pacific Railway Company, they gave to him also the following letter :—

UNION BANK OF CANADA,
OTTAWA, May 30th, 1887.

Manager Union Bank,
Ottawa.

DEAR SIR,—Having requested the Canadian Pacific Railway to make all estimates for our work on the Main Division of the Atlantic and North-western Railway payable to you and sent to your office, we now hereby authorise you to use such estimates for the payment of any advances made by you to us and to charge such notes to our account by which ever of us made, without notice or protest of any kind, and we hereby waive all such notice and protest and ratify and confirm all agreements in this letter.

Yours truly,

Signed M. STARRS,
" JOHN E. ASKWITH.
" J. L. P. O'HANLY.

Afterwards the bank, from time to time, discounted for the firm other promissory notes made by them and indorsed by Mr. O'Gara to an amount in the whole of about $55,000, including the note for which the bank gave their acceptance of the said cheque for $15,000 as deposit security.

As to the terms upon which Mr. O'Gara agreed with Starrs, Askwith & Co., to indorse their paper for them, there is a discrepancy between the evidence of Mr. O'Hanly and of the appellant as to the time when that agreement was entered into. Mr. O'Hanly says that when Mr. O'Gara indorsed the note of the 23rd of May for $15,000, no agreement was entered into or spoken of; that Mr. O'Gara indorsed that note as he had frequently been in the habit of indorsing paper for Starrs & O'Hanly before they had formed a partnership with Askwith and the agreement was first spoken of and entered into upon the 31st May, and signed by Askwith and O'Hanly on the 1st of June, when O'Gara indorsed the note of that date for $10,000, as follows:

In consideration of Mr. O'Gara indorsing for us we agree to indemnify him against such indorsations and to pay him twelve and a half per cent of the net profits of our contracts on the short line of the Canadian Pacific Railway Company, we to charge for expenses only our actual expenses.

Signed JOHN E. ASKWITH.
" J. L. P. O'HANLY.

June 1st, 1887.

Mr. O'Gara's recollection on the contrary is that the terms upon which he should indorse the firm's paper were discussed upon different occasions and finally verbally agreed upon before he indorsed the note of the 23rd May and that on the 1st June when asked to indorse the note of that date, he had it reduced into writing and signed, because in the interval he had become afraid "least there should be a failure of these people and he being paid by a percentage or promised

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to be paid by percentage, that might by any means be made out a partnership."

In the view which I take this discrepancy in the evidence is immaterial and the agreement both as to its terms and as to the time of its having been entered into may be taken as stated by the appellant. He says that when first applied to by Starrs and O'Hanly to indorse the paper of the firm for the contract under construction he at first refused; that his recollection is that he refused for a day or two; that he was reluctant to go into anything of the kind that would be dangerous; that although he had before indorsed for Starrs and O'Hanly he had security for such previous indorsations; that to the best of his recollection he held the matter in abeyance for a day or two, but finally, after it was talked over, his objections were overcome by the discussion which took place that there would be no risk; that all the moneys would come into the hands of the bank and that upon that understanding and upon that stipulation he agreed to indorse for them and did accordingly indorse the note of the 23rd May and when asked to indorse the note of the 1st of June he says that he "again spoke of the assignment to the bank and that it was then stated either that it was done or that it should be done at once" and thereupon he indorsed the note of the 1st June and had the agreement as above set out reduced into writing as he had fears there might be a misunderstanding as to what was the position he occupied. He was afraid that it might be argued, in the event of failure of the firm, that he was a partner, and so for his own protection he had the agreement reduced into writing. Then there is a discrepancy also between the evidence of Mr. O'Gara and Mr. Anderson upon the point whether Mr. Anderson had knowledge that O'Gara had made it a condition of his indorsing the

paper of the firm that the moneys coming to the firm should be assigned to the bank. Mr. O'Gara says that Mr. Anderson had such knowledge for he says that they both repeatedly discussed the matter and spoke of the moneys coming into the hands of the bank being the only security which the appellant had whereas Mr. Anderson expressly denies that any such conversation ever took place between him and the appellant, or that he had ever heard that there was any understanding of any sort between the firm and Mr. O'Gara upon the faith of which Mr. O'Gara had indorsed the paper of the firm. In the view which I take it is unimportant also whether Mr. Anderson had or had not any knowledge or notice of the terms upon which Mr. O'Gara indorsed the firm's paper.

At an early period of the progress of the work under the contract it became apparent that the work contracted for could not be performed at the prices fixed in the schedule of prices forming part of the contract, although, at the time the contract was entered into, it was deemed that the contract was a very profitable one. Influence on behalf of the contractors was exercised upon the Atlantic and North-western Railway Co., to try and get them to make alterations in the specifications and prices more favourable to the contractors. The contractors and their friends failed to succeed in the efforts in this behalf during the period limited in the contract for the completion of the work, but on the 7th November, 1887, seven days after the time limited by the contract for its completion, and while the work remained quite incomplete, an agreement was entered into by an indenture expressed to be made between the Atlantic and North-western Railway Co. represented herein by Thomas O'Shaughnessy, the company's assistant General manager of the one part, and Starrs, Askwith & Co. of Ottawa, Ontario, contractors

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of the other part, whereby it was mutually agreed that the specifications attached to the contract between the railway company and the firm should be and were altered in certain particulars in the interest of the contractors and whereby the prices named in the contract for certain work were increased and made more favourable for the contractors, and whereby it was expressly stated to be mutually agreed that the original contract should remain in full force and effect in all respects except those to which the alterations made therein in the interest of the contractors related.

Now the work having been continued upon these altered terms in favour of the contractors after the time fixed by the contract for the completion of the work contracted for, it is obvious that the company could not avail themselves of any of the provisions of the contract relating to the event of the work not being proceeded with with such diligence and such a force as to justify the expectation that the work contracted for should be completed by the 1st of November, 1887, the time named in the contract for its completion; but, whether the agreement of 7th of Novenber had been entered into or not the work subsequently done must be taken to be subject to all the other provisions of the contract and among these to all the provisions of secs. 23, 24 and 27 of the contract and of sec. 101 of the specifications which relate to other matters than the not proceeding with the work with such diligence and force as to justify the expectation that the work contracted for should be completed by the 1st of November. Sections 23 of the contract, and 101 of the specifications which form part of the contract are to the same purport and effect. As regards the work in progress subsequently to the 1st of November, sec. 23 will read as follows, omitting all that relates to the not proceeding with such diligence

and force as to justify the expectation of the work being completed by the first of November:—

If the manager shall at any time consider that the works are not, or that some part thereof is not, being carried on with due diligence, then in every such case the manager may by written notice to the contractors require them to employ or provide such additional workmen, horses, machinery, or other plant or materials as the manager may think necessary. And in case the contractors shall not thereupon within three days or such longer period as may be fixed by any such notice in all respects comply therewith, the manager may at the expense of the contractors, provide and employ such additional workmen, horses, machinery and any other plant, or such additional materials respectively as he may think proper and may pay such additional workmen such wages and for such horses, machinery and other plant and materials respectively such prices as he may think proper, and all such wages and prices respectively shall thereupon at once be repaid by the contractors or at the option of the company the same may be retained and deducted out of any moneys at any time payable to the contractors, and the company may use in the execution or advancement of the said work not only the horses, machinery and other plant and materials so in any case provided on the company's behalf, but also all such as have been or may be provided by or on behalf of the said contractors

So, in like manner, sec. 101 of the specifications will read as follows:—

If at any time in the opinion of the manager the works are, or some part thereof is, not carried on with due diligence then the said manager shall have the power to notify the contractors in writing to employ or provide such additional workmen, horses, material or plant as the said manager may think necessary; and in case the said contractors shall not thereupon within three days, or such longer time as may be fixed by any such notice, in all respects comply therewith, the manager shall have power to provide any workmen, horses, material or plant he may think proper and all moneys so expended by the company shall thereupon be paid by the contractors or may be deducted or retained out of any moneys due or to become due to the contractors, and should these moneys be insufficient the balance shall be recoverable in the usual way as a debt due by the contractors to the company.

Sec. 24 relates to the event of the company taking the work absolutely out of the contractors' hands and need not be here set out.

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Sec. 27 provides that the company may from time to time "pay all wages of mechanics and men employed in and about the works and charge the contractors therewith, and deduct the same from any moneys then due or afterwards to become due to the contractors."

In the month of February, 1888, Mr. Lumsden the manager in charge of the construction of the railway for the Atlantic and North-western Railway Company, being of opinion that the works contracted for by Starrs, Askwith & Co., were not being carried on with due diligence, served the contractors with the notice of the 25th February, 1888. This notice not having had the desired effect, Mr. Lumsden on the 14th of March, 1888, addressed and sent to the contractors the notice of that date.

The contractors were wholly unable to comply with these requirements. In the month of February, 1888, the men employed by one of the sub-contractors on the work had stopped working because of their not being paid. Mr. O'Hanly says that the work turned out quite different from what they had expected when the contract was entered into; that at that time they expected to realize a profit of three or four thousand dollars a mile, but that no one of the greatest experience could have foreseen the difficulties they encountered in executing the work; and the consequence was that in March, 1888, after having put all they had into the work, they had become practically insolvent and the contract itself had become their sole remaining asset. In short, not only had the men on the work been ceased to be paid their wages, but the credit of the contractors had become so destroyed that persons with whom they had contracted or were desirous of contracting for the supply of materials and supplies generally, and absolutely necessary for carrying on the works, refused to supply such materials at all upon the credit of the

contractors, nor unless they should receive the guarantee of the company for their payment. In fact Mr. O'Hanly was of opinion that the best thing the firm could do would have been to abandon the contract and he himself, on the 22nd of March, 1888, withdrew from the firm. Such was the state of things, that it was apparent that of necessity the work must have been utterly abandoned by the contractors, or taken off their hands under sec. 24 of the contract, if the company had not, upon the application and request of the contractors, come to their relief, which they did in the following manner: namely, they undertook to assume the payment of the wages of the men employed upon the work and to authorize Mr. Lumsden, the superintendent of construction, to purchase all materials and supplies necessary for the works upon the credit and guarantee of the company. Accordingly, in this manner the work was proceeded with from the month of April until the month of September or October, 1888, when, the work being still incomplete, the company assumed its completion themselves and under this arrangement so entered into for the benefit of and in the interest of the contractors, the company disbursed $79,160 in payment of the wages of the men employed on the work and $24,983 in the purchase through Mr. Lumsden, upon the credit of the company, of timber, lumber, iron, hay, oats and other things which were absolutely necessary for the carrying on of the work, and for this amount the Canadian Pacific Railway Company was authorized by the Atlantic and North-western Railway Company to issue and did issue their cheques in favour of Mr. Lumsden for payment of the materials so supplied. It is admitted by the appellant that $79,160 paid as the wages of the men employed on the work, was properly paid to them under sec. 27 of the contract, but the contention of the appellant is that the contractors were

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entitled to be allowed credit in their estimates for, and to be paid, the said sum of $24,983 so as aforesaid paid by the company to the persons from whom materials to that amount had been purchased and used in the works, in discharge of Mr. Lumsden's liability to such persons on behalf of the company; that is to say, that notwithstanding the arrangement between the contractors and the company of the month of March or April, 1888, the company were liable to pay twice for the said materials, namely, to the persons selling the materials upon the company's credit, and also to the contractors who never did supply the materials in question; and the appellant contends that the bank, in virtue of the contractors' letters of June, 1887, and so likewise the appellant, as indorser of the notes of the firm discounted by the bank, had a legal claim upon such amount, as being money due and payable to the contractors under their contract, and that, as is further contended, the bank, by the document in evidence dated 27th October, 1888, released and discharged such claim to the prejudice of the appellant, and have thereby discharged the appellant from all liability as indorser of the notes of the firm, or at least to the said amount of $24,983. But the contractors, under their contract, were only entitled to claim payment of certain scheduled prices for certain specified materials furnished by them in the fulfilment of their contract, and it cannot, I think, admit of a doubt that the contractors had a perfect right to enter into the arrangement which they did, for their benefit, with the Atlantic and North-western Railway Company in the month of March or April, 1888, in virtue of which the materials for which the said sum of $24,983 was paid were furnished upon the credit of the company, and that the payment of such sum by the company, in the manner in which it was paid, was authorized by section 23 of

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the contract and section 101 of the specifications, as the payment of the men's wages was authorized by section 27, and so the amounts of $79,160 and $24,983, amounting together to $104,183, so paid by the company, never became due by the company to the contractors, nor had the contractors any right to have had either of those sums, or any part thereof, allowed to them as being due and payable to them under their contract, and as the bank had no claim whatever upon anything except the amount actually due and payable to the contractors under their contract, and which, as such, the Canadian Pacific Railway Company were authorized to issue their cheques in favour of the bank, the appellant could not be in any respect prejudiced even by a formal release, if any such had been executed by the bank, expressly releasing the Atlantic and North-western Railway Company, and also the Canadian Pacific Railway Company from all claim against them for the said several sums amounting to the $104,183, so as aforesaid paid by the company, at the request of the contractors. But in truth no such release was ever executed. It is admitted that the appellant has no defence whatever to the action brought by the bank against him as indorser of the notes sued upon, unless he can establish his contention that the bank has executed a document amounting in law to a release of a legal claim which they had against the Canadian Pacific Railway Company and the Atlantic and North-western Railway Company, to demand and receive payment of the said sum of $24,983, so paid as aforesaid by the latter company, the effect of such release being, as is contended, to deprive the appellant of a common fund specially assigned to the bank for payment of the notes indorsed by the appellant. The document which is relied upon as such release was signed by the solicitor of the bank, having been first approved by Starrs, Ask-

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with & Co., who expressly authorized and directed the same, and is as follows:—

Whereas, on the 23rd of May, 1887, Starrs, Askwith & Co. deposited with the Canadian Pacific Railway Company a certified cheque of the Union Bank of Canada for $15,000, to be held by the railway company as security for the performance of a certain contract by Starrs, Askwith & Co. on the Atlantic and North-western Railway;

And whereas, by orders made in June, 1887, said contractors assigned, and directed payment of all moneys payable under said contract to the said bank;

Application, therefore, having been made by the bank to the railway company to return to the said bank the said $15,000, the railway company have consented to do so on receiving from the bank the receipt for the same, it being understood that any payments heretofore made by the company for labour employed on same contract, or for material and supplies which went into the said work, were for the benefit of all concerned and not in conflict with the orders in favour of the bank;

Except as above, this receipt is not to affect the order in favour of the bank. Dated Montreal, the 27th October, 1888.

This document was signed for the Union Bank by their solicitor, J. Travers Lewis, having been first approved in writing by Starrs, Askwith & Co. as the terms upon which the cheque of the firm for the $15,000 deposit security should be and was given up to the bank, and when given up, the amount was carried to the credit of the contractors' account with the bank,

The payments referred to in the above receipt as having been made by the company for labour and materials and supplies are the payments of $79,160 and $24,983 respectively, already mentioned, and made in pursuance of the arrangement entered into in March or April, 1888, between the contractors and the Atlantic and North-western Railway Company, whereby the company abstained from taking the contract absolutely out of the hands of the contractors as they might under the circumstances have done under section 24, and agreed to proceed in the manner in which they did and as they were authorized to do under the provisions of section

23 of the contract and section 101 of the specifications. Now it cannot be disputed that the payments so made were made for the benefit of the contractors and so also of the appellant who was interested to the extent of 12½ per cent of the profits of the contractors, and the payments having been made by the authority of the contractors and in pursuance of provisions in the contract, authorizing them to be made as they were made under the circumstances which arose, they cannot be said to have been made in conflict with the orders of June, 1887, in favour of the bank which orders only authorized the bank to receive whatever sums should become payable to the contractors under the contract. The insertion, therefore, in the receipt signed by the bank's solicitor upon behalf of the bank of a statement which, as appears, was absolutely true and which was expressly authorized by the firm of contractors to be inserted in the receipt, was free from all objection and there is nothing in the receipt so signed which can be construed as being a release by the bank of any claim which the bank in law had against either the Canadian Pacific Railway Company or the Atlantic and North-western Railway Company. The appellant has not been in any manner prejudiced by anything contained in that receipt, nor has he been thereby deprived of any right, if any he had, to compel the payment of these sums or any of them a second time by the Atlantic and North-western Railway Company or by the Canadian Pacific Railway Company in liquidation of any part of the moneys due to the bank upon the notes of the firm indorsed by the appellant; and it is admitted by the appellant that he has not and that he does not claim to have any defence to the present action, unless the same can be found in the terms of the said receipt.

The utmost right insisted upon by the appellant is that as indorser of the notes of the firm of contractors,

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he had a right to require the bank to realize the equitable assignment which, as he contends, was executed to the bank as well for the security of the appellant as of the bank, and that the bank have released the railway company from all liability upon such equitable assignment, and have thereby discharged the appellant from all liability as indorser of the notes of the firm of contractors, and the sole question is whether the facts of the case bring it within principle and authorities applicable to such contention, and I am of the opinion that they do not.

The cases cited on behalf of the appellant are all distinguishable from the present; that chiefly relied upon as having most resemblance, was *Brice* v. *Bannister* (1), but in that case the judgment of Lord Justice Cotton proceeded upon the foundation that the advances made by Bannister to Gough for which the defendant Bannister claimed credit in preference to an equitable assignment made by Gough to the plaintiff Brice of the specific sum of £100 due or to become due to Gough under his contract with the defendant, were in no way sanctioned by Bannister's contract with Gough. The learned Lord Justice says:

> The advances made by the defendant were in no way sanctioned by the contract, and in no sense an equity between Gough and the defendant existing or arising from circumstances existing at the time of the notice to the defendant of the assignment to the plaintiff. The plaintiff was the assignee for value of the moneys payable under the contract, without any deduction for cost of materials or other cost of construction. The defendant for his own purposes determined not to complete the ship himself, but to let Gough do it under the contract. To enable him to do so, he, after notice of the assignment to the plaintiff paid money to Gough so as to exhaust the contract price. By so doing, he could not, in my opinion, defeat or prejudice the plaintiff's right.

But in the present case the moneys advanced by the Atlantic and North-western Railway Company, in

(1) 3 Q.B. D. 569.

payment of wages and materials and supplies furnished and purchased by the railway company under the arrangement of March, 1888, were, as already shown, made in the interest of the contractors, and so in the interest of the appellant who was interested in the success of the contractors to the extent of 12½ per cent of their ultimate profits, and were also, as also already shown, sanctioned by the original contract between the contractors and the railway company, so that in the present case the element exists, the absence of which, in *Brice* v. *Bannister* (1), was made the foundation of the judgment of the Lord Justice Cotton. Then the language of Lord Justice Bramwell, who concurred in the result arrived at by Lord Justice Cotton upon the facts of that case, is very applicable in the present case against the contention of the appellant.

If, says the learned judge, it were only money payable according to the terms of the contract, the plaintiff would fail, for no money became due according to the terms of the contract.

In the present case the order of June, 1887, which is claimed to be an equitable assignment to the bank, had relation only to such moneys as should become due and payable to the contractors under their contract. But the moneys which are under consideration, and which were paid by the order and authority of the Atlantic and North-western Railway Company, under the arrangement with the contractors made in March or April, 1888, for wages to the men employed, and for materials, &c., &c., furnished, not by the contractors, but purchased upon the credit of the railway company, and so supplied by them to their contractors, were not moneys which ever became due and payable to the contractors, who, by their contract, were only entitled to certain scheduled prices for such materials, &c., &c., as should be supplied by them.

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The present case, therefore, is very distinguishable in its facts from *Brice* v. *Bannister* (1), and the judgment in that case can afford no support to the contention of the appellant in the present case.

For the above reasons, I am of opinion that this appeal must be dismissed with costs.

SEDGEWICK J.—This action is brought upon four promissory notes amounting in the aggregate to $40,000, made by the firm of Starrs, Askwith & Company, and indorsed by several persons, among others the appellant O'Gara.

The action was tried before Mr. Justice Ferguson, who gave judgment in favour of the plaintiff bank. This judgment was sustained by the unanimous decision of the Common Pleas Divisional Court, as well as by the Court of Appeal that court being equally divided. The facts would appear to be somewhat as follows:—

On the 24th May, 1887, the firm of Starrs, Askwith & Company entered into a contract with the Atlantic and North-western Railway Company for the purpose of constructing a portion of a railway known as the Short Line Railway, through the State of Maine. It was necessary that the contractors should from time to time obtain advances in addition to the moneys payable under the contract, and an arrangement was thereupon entered into by which it was agreed that all moneys payable to the contractors under the contract should be assigned to the Union Bank; that the contractors should deposit with the bank, from time to time, negotiable paper indorsed by Mr. O'Gara and others, which paper was to be discounted in the ordinary way as the contractors might require funds. The trial judge states his finding as follows:—

(1) 3 Q. B. D. 569.

I find the real understanding and agreement was that the moneys referred to in these papers were to come to the plaintiff's bank, and that the contractors were to draw out of the same from time to time sufficient money to carry on the contract and that the security in this respect to the bank and to the defendant O'Gara was the fact that the whole of the moneys was to come to the bank, so that any surplus there might be, after the amounts necessary to carry on the work, should be in the bank (the plaintiff's bank) to meet advances made.

In other words, the defendant O'Gara indorsed the notes in question upon the understanding, not only between himself and the contractors, but also with the manager of the bank itself, that all the moneys payable to the contractors under the contract were to be paid, not to them but directly to the bank. After the execution of the contract the contractors signed and sent to the Canadian Pacific Railway Company the following document:—

Please make all cheques for work done on our contract on Atlantic and North-western Railway (International Maine Division) payable to the order of the Union Bank of Canada and sent to their Ottawa branch or any other estimates for said work. And we hereby agree that this authority shall be irrevocable on our part without the consent of the said bank.

On the same day they gave to the plaintiff's bank the following document:—

Having requested the Canadian Pacific Railway Company to make all estimates for our work on the Maine Division of Atlantic and North-western Railway payable to you and sent to your office, we now hereby authorize you to use such estimates for the payment of any advances made by you to us, and to charge such notes to our account by whichever of us made without notice or protest of any kind, and we hereby waive all such notice or protest and ratify and confirm all agreements in this letter.

In reply to the letter sent to the Canadian Pacific Railway Company inclosing the first document that company pointed out that it was not stated that the bank had power to give binding receipts and asked to have it supplemented, when a further document

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signed by the contractors was sent to the Canadian Pacific Railway which is as follows:—

The Union Bank of Canada is hereby empowered by us to grant valid and binding receipts on our behalf to you for moneys remitted by you in payment of our estimates under contract on Atlantic and North-western Railway, as per order given by us dated 30th, May, 1887.

The connection of the Canadian Pacific Company with the Atlantic and North-western Railway Company was as follows:—The Canadian Pacific Railway Company had no charter to build a railway through the State of Maine, the Atlantic and North-western Railway Company had. An arrangement was entered into by which the road was to be nominally built by the Atlantic and North-western Railway Company, but was to be paid for and operated when completed by the Canadian Pacific Railway Company. As a matter of fact, all moneys which went into the construction of the road were moneys raised by the Canadian Pacific Railway Company and actually disbursed by them, that company being the agents of the Atlantic and North-western Railway Company for the purpose of paying any obligations which the latter company might assume in connection with the work. The whole transaction having reference to the assignment of the moneys payable under the contract clearly constitutes an equitable assignment of that fund, absolute in its terms and irrevocable without the consent of all parties affected by it. It was not merely an assignment of cheques which might be issued in favour of the contractors, but of all moneys found due the contractors under the estimates referred to in the contract, and it conferred upon the Union Bank the sole right of obtaining from the company all moneys which might under the provisions of the contract at any time become payable to the contractors.

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The work was proceeded with. The rights of the Union Bank under the equitable assignment were recognized by the Canadian Pacific Railway Company and for several months all moneys estimated as due the contractors were paid direct to it. About the month of March, 1888, the contractors, it would seem, were not apparently in possession of sufficient funds to carry on the work with due expedition, and the company was obliged to pay the wages of the workmen employed by the contractors, as it had a right to do under clause 27 of the contract.

On the 14th March, however, Mr. Lumsden, the superintendent of construction for the company, purported to give notice in pursuance of clauses 23 and 24 of the contract making certain demands upon the contractors, requiring them, among other things, to provide additional men, plant, machinery and material, and notifying them that in case of default in carrying out that requisition for six days the company would take the work out of their hands and employ such means as it might see fit to complete the same.

The evidence as to what was done under this notice is unsatisfactory. It is certain, however, that the work was not taken off the contractors' hands; they went on as theretofore and completed it. I gather from Mr. Lumsden's evidence that all that they did was to pay debts which the contractors had contracted either before or after the giving of the notice. In other words, he paid certain of their debts contracted before the giving of the notice, and in respect of other goods purchased by the contractors subsequent to that time he guaranteed the payment. He admits that he paid or guaranteed the payment of accounts which certain parties had for supplying the contractors with butter, beef, pork, hay, oats and other provisions. The evidence does not show the exact amount

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paid in this way by the contractors. The first payment guaranteed, Mr. Lumsden says, amounted to something like $10,000, and the whole amount guaranteed was largely in excess of that sum. These payments made directly to the contractors or to their creditors notwithstanding the provisions of the equitable assignment, were made possibly without the knowledge, but certainly without the consent, either of the Union Bank or Mr. O'Gara. It is now contended by the bank that these direct payments were payments under the provision of sections 23 and 24 of the contract.

I think the payment of wages by the company was within the contract, but that the payments for provisions, &c., referred to in the evidence of Mr. Lumsden were not within the contract. Clause 23 of the contract is the only authority for such payment and it does not authorize the payment of money for provisions or food supplies such as those indicated by Mr. Lumsden. The company could under certain circumstances provide and employ such additional workmen, horses, machinery or any other plant or such additional materials respectively as it might think proper and deduct the sum from any moneys payable to the contractors, that is all. It does not, it seems to me, authorize the guaranteeing by the company of any contractors' debts, even though those debts had reference to horses, machinery and plant, such less does it justify a deduction from the amount due the contractors of any debts which the company might have guaranteed in connection with provisions—"provisions" not being "material" within the meaning of the contract.

Matters went on until the month of October, 1888.

There had been all along on deposit with the Canadian Pacific Railway Company an accepted cheque of the contractors upon the plaintiffs' bank for $15,000,

that amount having been deposited with the company as security for the performance of the contract, and the bank was anxious to obtain possession of this cheque in order to reduce the amount of the contractors' liability to it, and made application to the Canadian Pacific Railway Company for it. The Canadian Pacific Railway had been, from time to time, paying directly to the contractors, or to their creditors, the moneys above referred to, and were probably doubtful as to whether such payments might not be in violation of the bank's rights under its equitable assignment of the contract moneys, and thereupon an agreement was entered into between the Canadian Pacific Railway Company, the bank and the contractors, of which the following is a copy:—

Memorandum of Agreement between the Union Bank of Canada and the Canadian Pacific Railway Company.

Whereas, on the 23rd of May, 1887, Starrs, Askwith & Co. deposited with the Canadian Pacific Railway Company a certified cheque on the Union Bank of Canada for $15,000, to be held by the railway company as security for the performance of a certain contract by Starrs, Askwith & Co. on the Atlantic and North-western Railway.

And whereas, by orders made in June, 1887, said contractors assigned and directed payment of all moneys payable under the said contract to the said bank.

Application therefor having been made by the bank to the railway company to return to the bank the said $15,000, the railway company have consented to do so on receiving from the bank the receipt for the same, it being understood that any payments heretofore made by the company for labour employed on said contract, or for material and supplies which went into the said work, were for the benefit of all concerned, and not in conflict with the orders in favour of the bank.

Except as above, this receipt is not to affect the order in favour of the bank. Dated Montreal, the 27th October, 1888.

For the Union Bank (Ottawa).

(Sgd.) J. TRAVERS LEWIS,
Solicitor.

" W. SUTHERLAND TAYLOR,
Treasurer, C.P.R.

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MONTREAL, October 27, 1888.

We, Starrs, Askwith & Co., of Ottawa, contractors on the Atlantic and North-western Railway, having been consulted by the Union Bank of Canada with respect to the conditions of the release by the C.P.R. Co. of the $15,000 deposit with that company to the said bank, and having read the memorandum of agreement made this day between the railway company and the bank, hereby agree to and confirm the same, and authorize and direct the bank to sign said memorandum so far as we are concerned.

(Signed,) STARRS, ASKWITH & CO.
J. E. A.
M. STARRS,
JOHN E. ASKWITH.

To this agreement Mr. O'Gara was not a party, nor did he ever assent to it in any way, and the question now is: To what extent did these documents affect his liability to the bank upon his indorsations? The ratification by the bank in the month of October of all payments made by the company for labour employed or for material and supplies has the same effect as if there had been an agreement between the bank and the company before these payments were made.

The transaction was substantially this: The bank said, in consideration of your paying to us the $15,000 which you hold as security for the completion of the contract we authorize you, instead of paying all the contract moneys to us under the equitable assignment which we hold, to pay out direct to the contractors all such moneys as you please for the work, material and supplies in connection with the contract. This was, I take it, a clear variation from the terms of the original understanding between the bank and Mr. O'Gara in regard to the equitable assignment, upon the faith of which he made the indorsement in question. If this is the correct view the principles of law applicable to the case are not in the least difficult.

Any material variation of the terms of the original contract made between the principal debtor and the

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creditor will always discharge the surety. *The General Steam Navigation Company* v. *Rolt* (1). *Calvert* v. *London Dock Co.* (2). If it clearly appears that the surety became surety on the faith of the original contract he is likewise discharged irrespective of the question of materiality. *Sanderson* v. *Aston* (3).

A *fortiori* must this be so where, as in the present case, the surety actually stipulates that securities shall be given to the creditor, and the creditor, without the assent of the surety, subsequently relinquishes such securities.

Execution by the plaintiff company of the document of the 27th October, 1888, being as I think unquestionably a variation of the contract between the principal debtors and the bank to the effect that all the contract moneys were to be paid directly to the bank and not to other parties, absolutely released the defendant O'Gara from his obligations as indorser of the notes sued on. The contention that if there was a release at all it was a release *pro tanto* only does not, I think, apply. The principle, I take it, is that there is a total discharge where there is any variation by the creditor in a contract upon the faith of which the surety entered into his obligation. Where, however, the creditor has assets or securities in his hands (the surety having no connection with them) which may be applied by the creditor in reduction of the debt secured, any improper or careless dealing in respect of such securities may discharge the surety to the extent of the loss occasioned thereby. If, in the present case, after Mr. O'Gara had indorsed the notes in question, the bank as security for the payment of the contractors' indebtedness had obtained from them the assignment of their contract without the knowledge of, or apart altogether from,

(1) 6 C. B. (N.S.) 550. (2) 2 Keen 638.
(3) L. R. 8 Ex. 73.

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Mr. O'Gara, and if the bank through its negligence had failed in its duty in respect of such assignment so that a loss occurred, Mr. O'Gara would be released only to the extent of the loss, but certainly not to a greater extent. The following authorities may be usefully referred to in support of the above propositions. *Wulff* v. *Jay* (1); *Capel* v. *Butler* (2); *Strange* v. *Fooks* (3); *Pledge* v. *Buss* (4).

See also *Duncan Fox & Co.* v. *North & South Wales Bank* (5); *Brice* v. *Bannister* (6).

I am of opinion the appeal should be allowed.

Appeal allowed with costs.

Solicitor for appellant: *A. Ferguson.*

Solicitors for respondents: *Chrysler & Lewis.*

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(1) L. R. 7 Q. B. 756.
(2) 2 Sim. & Stu. 457.
(3) 4 Giff. 408.
(4) Johns. 663.
(5) 6 App. Cas. 1.
6) 3 Q. B. D. 569.

THOMAS WEBB AND OTHERS (DEFENDANTS)..... } APPELLANTS; 1893

*Mar. 18, 20.

*Nov. 20.

AND

GEORGE H. MARSH AND OTHERS (PLAINTIFFS)..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Title to land—Crown grant—Disseisin of grantee—Tortious possession—Conveyance to married woman—Effect of execution of, by husband—Statute of Maintenance, 32 Hen. 8, c. 9—Statute of limitations.

In 1828 certain land in Upper Canada was granted by the crown to King's College. In 1841, while one M. who had entered on the land was in possession, King's College conveyed it to G. In 1849 G. conveyed to the wife of M., and M. signed the conveyance though not a party to it. In an action by the successors in title of M.'s wife to recover possession of the land the defendants, claiming title through M., set up the statute of limitations, alleging that M. had been in possession twenty years when the land was conveyed to his wife, and that the conveyance to G., in 1841, the grantor not being in possession, was void under the statute of maintenance, and G. had, therefore, nothing to convey in 1849.

Held, that it was not proved that the possession of M. began before the grant from the crown, but assuming that it did M. could not avail himself of the statute of maintenance as he would have to establish disseisin of the grantor and the crown could not be disseised; nor would the statute avail as against the patentee as the original entry not being tortious the possession would not become adverse without a new entry.

Held further, that if the possession began after the grant the deed to G. in 1841 was not absolutely void under the statute of maintenance but only void as against the party in possession and M. being in possession a conveyance to him would have been good under sec. 4 of the statute and the deed to his wife, a person appointed by him, was equally good. Further, M. by his assent to the conveyance to his wife and subsequent acts was estopped from denying the title of his wife's grantor.

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

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WEBB v. MARSH.

APPEAL from a decision of the Court of Appeal for Ontario (1) affirming the judgment of the Divisional Court (2) in favour of the plaintiffs.

The action in this case was to recover possession of land to which defendants claimed title through one George S. Marsh, and plaintiffs through his wife.

In 1828 the land was granted by the crown to King's College, who conveyed to one Greenshields in 1841. Greenshields conveyed to Mrs. Marsh in 1849, and Marsh executed the conveyance though a party to it. Marsh had been in possession of the land since about 1831, though defendants claimed, and some of the judges in the courts below held, that his possession dated back to 1823 or 1824.

The defence set up was the statute of limitations, founded on possession for twenty years before 1849, and that the conveyance to Greenshields was void under the statute of maintenance, 32 Hen. 8, ch. 9, and the conveyance to Mrs. Marsh was necessarily void also as Greenshields had nothing to convey.

The trial judge held that defendants' claim under the statute of maintenance was valid and gave judgment in his favour. This judgment was reversed by the Divisional Court, and the latter decision was affirmed by the Court of Appeal.

Riddell and Webb for the appellants. As to the statute of maintenance, see *Elvis* v. *Archbishop of York* (3); *Johnson* v. *McKenna* (4).

The execution by Marsh of the conveyance to his wife cannot be invoked as an estoppel. *Doe d. Chandler* v. *Ford* (5); *Doe d. Preece* v. *Howells* (6); Bigelow on Estoppel (7).

(1) 19 Ont. App. R. 564.
(2) 21 O. R. 281.
(3) Hobart 322.
(4) 10 U.C.Q.B. 520.
(5) 3 A. & E. 649.
(6) 2 B. & Ad. 744.
(7) 5 ed. p. 530 *et seq.*

Roaf, for the respondent, referred to *Bishop of Toronto* v. *Cantwell* (1); *Kennedy* v. *Lyell* (2).

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THE CHIEF JUSTICE.—I am unable to concur in the view taken by Mr. Justice Maclennan in the able judgment delivered by him, though I entirely agree in the statement of the law contained in that judgment. I differ from him, however, in the conclusion at which he arrived as to the evidence. I do not think it is established with sufficient certainty that George S. Marsh was in possession at a date anterior to the crown grant to King's College in 1828. The learned judge who tried the action, Mr. Justice Rose, says in his judgment that Marsh "was in possession as early as 1831 and probably prior to 1829." Abraham Singleton, a witness for the plaintiff, does indeed say that he was at the date of the trial in May, 1891, seventy-three years old and that he could remember "from when he was five or six years old and that as long back as he can remember George S. Marsh was living there." This would carry back Marsh's possession to about 1823 or 1824. It was for the learned trial judge to say whether or not he considered this evidence entitled to weight. If he had considered it safe to act upon it he would no doubt have given effect to it by placing his judgment on the Statute of Limitations which was pleaded and which was relied on by the defendants' counsel at the trial. For that it was so relied on appears very clearly from the record before us where Mr. Riddell is reported as saying: "And we rely on the Statute of Limitations as well." Case p. 10 line 2.

Had the learned judge considered that there had been a possession of upwards of twenty years by George S. Marsh subsequent to the patent and prior

(1) 12 U.C.C.P. 607. (2) 15 Q.B.D. 491.

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to the conveyance by Greenshields to Mrs. Marsh of the 9th of May 1849, as there would have been had Marsh been in continuous possession from a date prior to the patent, we should, I feel sure, have found him fixing the commencement of that possession with certainty in his judgment, and also taking some notice of the defence under the Statute of Limitations to which he, however, makes no reference. I therefore conclude that the learned judge was not prepared to find that there was a possession beginning earlier than 1831. The appellant in his factum before this court insists on the same view of the evidence as that which I have indicated. Paragraph 18 is as follows: "Mr. Justice Maclennan in his judgment appears to consider that George S. Marsh went into possession in 1823 or 1824. It is submitted that there is no evidence of this, nor evidence that the entry of Marsh was an intrusion or made before the patent." The conclusion must, therefore, in my judgment be that Marsh did not take possession until after the patent was issued and that he is not proved to have acquired a title under the Statute of Limitations to the four acres he was originally in occupation of at the date of the conveyance to his wife. Had the evidence and finding warranted a contrary conclusion I should have found it difficult to say that the title he might have so acquired under the statute would have been divested by his affixing his signature and seal to a deed to which he was not a formal party.

This conclusion, whilst against the appellant so far as the Statute of Limitations is concerned, is, however, in his favour inasmuch at it displaces the foundation of fact upon which Mr. Justice Maclennan's judgment rests. Had the facts in evidence warranted a contrary conclusion I should have entirely agreed with that learned judge in his statement of the legal conse-

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quences. The law as laid down by him is, I think, clear, and his position is amply supported by the authorities he quotes. In order that a deed operating under the Statute of Uses should be void, either under the Statute of Maintenance or by force of that rule of the common law in affirmance of which the statute was passed, it was essential that the grantor should have been disseised. The crown could not have been disseised; such a thing as a disseisin of the crown is, and always has been, unknown in law. A person entering on the possession of the crown is a mere intruder having a possession which can no more be said to be a disseisin than can that of an overholding tenant. Then the possession if not originally tortious would not without any new entry have become so against the grantees of the crown, King's College, nor for a like reason against Greenshields the grantee of King's College. This proposition is established by the quotation from Bacon's Abridgement cited in Mr. Justice Maclennan's judgment. This however does not apply to the present case for the reason before given that there is no foundation in fact for it; and if there had been the same facts would have established the appellants' case under the Statute of Limitations, a defence which he insists on in the factum he has lodged in support of the present appeal.

The decision of the appeal must, therefore, depend on the legal effect of the evidence showing what occurred at the time of the conveyance by Greenshields to Mrs. Marsh. Marsh who had, however, been previously in possession of only four of the five acres comprised in that deed must clearly be taken to have assented to it; although not technically a party to the instrument he signed and sealed the deed. There could be no presumable object in this unless it was for the purpose of showing his assent to it. Moreover

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the evidence shows that he actually did assent to the conveyance which was made under an arrangement between Greenshields and himself and which it is a reasonable inference was made to his wife at his instance. Then he allowed Greenshields to covenant for a good title and he not only remained in possession under this deed by virtue of which he took an estate for his life in the lands, but in subsequent conveyances made by him he refers to it as a deed under which he derived title. This, in my opinion, is ample not only to create an estoppel in *pais* or an equitable estoppel, but also as regards this particular conveyance to take the case out of the law of maintenance. Had the conveyance been to Marsh himself for an estate in fee it would be absurd to say that it was void as against any person and I fail to see why it should be said to be void when with Marsh's assent it conferred upon him, not indeed a fee but an estate for life. This conveyance from Greenshields to the extent of the four acres comes, in my opinion, clearly within the fourth section of the Statute of Maintenance (1) which both the learned Chief Justices have invoked, and I entirely concur in their observations upon it. I feel quite safe in saying that neither the Statute of Maintenance nor the common law made it illegal to release a right of entry in favour of a person actually in possession or to assign it to a person assented to by him. A contrary doctrine would have been most unreasonable since the provision of the common law as well as that of the statute was designed entirely for the protection of the party so assenting. The statute always received a liberal construction restricting its operation to the obvious mischiefs against which it was enacted. *Anson* v. *Lee* (2) and *Cook* v.

(1) 32 H. 8 c. 9.

(2) 4 Sim. 364.

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Field (1), although cases differing in their facts very widely from the present, illustrate this principle. I also refer to Tapp's treatise on the law of Maintenance (2) as an authority to the same effect. The observations of Draper C. J. in *Bishop of Toronto* v. *Cantwell* (3) also go far in the same direction.

It is, however, argued that Greenshields had nothing to convey inasmuch as the conveyance of 1841 by the College to him was void. Upon this ground both the trial judge and Mr. Justice Burton base their judgments in favour of the present appellant. I cannot concur in this view. The deed of 1841 was not absolutely void but only as against Marsh and Devlin the parties in possession. Now, had Marsh and Devlin contemporaneously with the execution of that deed attorned as tenants to Greenshields, nobody could reasonably deny that the effect of their doing so would be to make that conveyance which they alone had a right to impugn perfectly valid and effectual. Then upon what reasonable principle should it make any difference that they did not assent by formally attorning by some contemporaneous act but did so after the conveyance was executed, and if they could have effectually done this a day after the deed was executed why should not the same consequence follow when their assent is proved to have been unequivocally given, not a day, but some eight years after the execution of the deed? I am of opinion, even in the absence of direct authority, that we ought not to give such an effect to a statute and rule of law now obsolete as would defeat an honest title, and that on purely technical grounds, by an application at variance with the spirit and the letter of the law itself.

(1) 15 Q. B. 460. (2) P. 44.
(3) 12 U. C. C. P. 607.

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Marsh, before the deed of May 1849, had not been in possession of more than four acres. The additional acre comprised in the conveyance to Mrs. Marsh had with 94 acres more been in the possession of Bernard Devlin. Devlin was examined as a witness in the cause; he swears that he was in possession of this one acre and that he came to an arrangement with Adam Henry Meyers the solicitor acting for Mr. Greenshields in pursuance of which the whole five acres including this one acre were assigned by Greenshields to Mrs. Marsh with Marsh's assent, the arrangement having in fact been made by Marsh himself, and that in further pursuance of the same agreement the remaining 94 acres were conveyed by Greenshields to Devlin himself.

With this evidence before us it is in my judgment impossible to say that those claiming under Marsh are not estopped from impugning the deed of 1841 and the title which Greenshields *primâ facie* took thereunder.

In conclusion I would add that I am not at all satisfied that the appellant has established that the possession of Marsh and Devlin amounted to disseisin. An adverse possession amounting to disseisin of the grantor would be indispensable to shew a deed void for maintenance and in a case such as the present the party attacking the deed on such a ground should be held to very strict proof. I do not, however, place my judgment on this ground.

I would further say that it must be remembered that we have not to deal with this case on strict common law principles but that equitable considerations are open on the record before us. This being so I have no doubt that the facts proved are such as to constitute a binding equitable estoppel.

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I cannot close my judgment without adding that the case was argued with great learning and ability by the learned counsel on both sides.

The appeal must be dismissed with costs.

FOURNIER AND TASCHEREAU JJ. concurred.

GWYNNE J.—Assuming it to have been competent for George S. Marsh in his lifetime, or for his heirs, to dispute as against his wife or her heirs the validity of the deed of the 9th May, 1849, procured by Marsh to be executed to and in favour of his wife by Greenshields, as to which I express no opinion, it must be admitted that the onus of clearly establishing the facts asserted by the appellants and relied upon by them as invalidating the deed rested upon the appellants, namely, the onus of establishing that at the time that Marsh was negotiating with Greenshields for the purchase, by and in the name of his wife, of the land by that deed expressed to be conveyed by Greenshields to Marsh's wife, and that, at the very time that Greenshields, by Marsh's procurement, executed that deed purporting to convey the lands therein mentioned to Marsh's wife and to her heirs forever, he, Greenshields, had no title, at least as to four-fifth parts of the land, which he could convey, for that he, Marsh, was then himself in actual adverse possession of such four-fifth parts, having acquired such possession by a previous disseizin of Greenshields or of his predecessors in title, and this the appellants, in my opinion, have utterly failed to establish.

From the facts of Marsh negotiating with Greenshields for the purchase by and in the name of his, Marsh's, wife, of the whole of the land purported to be conveyed to her by the deed, and of his procuring Greenshields to execute the deed to his, Marsh's, wife,

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the reasonable inference to be drawn is that whatever possession Marsh may have had of any part of the land so purported to be conveyed was for and on behalf of his wife, and was by Greenshields' permission and consent and not at all by a title adverse to the title of Greenshields.

I concur, therefere, in the judgment of the Chief Justice of Ontario and of Mr. Justice Maclennan in the Court of Appeal for Ontario, and am of opinion that this appeal should be dismissed with costs.

SEDGEWICK J. concurred.

Appeal dismissed with costs.

Solicitors for appellants: *Webb, Hooey & Mills.*

Solicitors for respondents: *Roaf & Roaf.*

WILLIAM VIRGO.....APPELLANT ; 1893

AND Nov. 2, 3.

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THE MUNICIPAL CORPORATION OF THE CITY OF TORONTO..... } RESPONDENTS. *Feb. 20

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Municipal corporation—By-laws—Power to license, regulate and govern trades—Prohibition of trading in certain streets—Ontario Municipal Act R. S. O. (1887) *c.* 184—*Repugnancy.*

The power given to municipal councils by sec. 495 (3) of the Ontario Municipal Act to pass by-laws for licensing, regulating and governing hawkers, etc., in their respective trades does not authorize the Toronto City Council to prohibit the carrying on of these trades in certain streets. Fournier and Taschereau JJ. dissenting.

A by-law of the City Council provided that no license should be required from any peddler of fish, farm and garden produce, fruit and coal oil, or other small articles that could be carried in the hand or in a small basket.

Held, affirming the decision of the Court of Appeal, Gwynne and Sedgewick JJ. dissenting, that a subsequent by-law fixing the amount of a license fee for fish hawkers and peddlers was not void for repugnancy.

APPEAL from a decision of the Court of Appeal fo Ontario (1), refusing to quash secs. 12 (2*a*) and 43 (2*a* of by-law no. 2934 of the City Council of Toronto.

The sections of the by-law and the grounds upon which the motion to quash was made sufficiently appear in the judgments of this court. Sec. 12 (2*a*) prohibited hawkers and petty chapmen from carrying on their business in certain specified streets in Toronto and was claimed to be in restraint of trade and not within the power of the council to pass under sec. 495 subsec. 3 of the Municipal Act. The other section

*PRESENT : Fournier, Taschereau, Gwynne, Sedgewick and King JJ

(1) 20 Ont. App. R. 435.

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attacked fixed the annual license fee of fish hawkers and peddlers who, it was claimed, were exempt from license by a former by-law, and was attacked on the ground of repugnancy. The motion to quash was made before Galt C.J. who held both sections valid and the Court of Appeal affirmed his decision.

DuVernet for the appellant. The Municipal Act only authorizes by-laws to license, regulate and govern. It must be construed strictly against the municipality. *Reg.* v. *Smith* (1); *In re Borthwick & Corporation of Ottawa* (2); *Reg.* v. *Dowling* (3).

Sec. 12 (2*a*) is in restraint of trade and therefore *ultra vires*. *Chaddock* v. *Day* (4); *Hughes* v. *Recorder's Court* (5).

And it is, in effect, prohibitory and void on that account. *In re Brodie & Corporation of Bowmanville* (6); *In re Barclay & Municipality of Darlington* (7); *Bannan* v. *City of Toronto* (8).

A trade lawful in itself cannot be prohibited on the ground of nuisance. *Davis* v. *Municipality of Clifton* (9); *Nash* v. *McCracken* (10); *Reg.* v. *Wood* (11); *Calder Navigation Co.* v. *Pilling* (12).

That the Council exceeded its powers, see also *Reg.* v. *Justices of Kings* (13); and that the by-law improperly discriminated in favour of shop-keepers *Reg.* v. *Pipe* (14); *Reg.* v. *Flory* (15).

Mowat for the respondents. Shop-keepers are favoured in law as against peddlers. Chitty on Commerial law (16).

(1) 4 O. R. 401.
(2) 9 O. R. 114.
(3) 5 All. (N.B.) 378.
(4) 75 Mich. 527.
(5) 75 Mich. 574.
(6) 38 U. C. Q. B. 580.
(7) 12 U. C. Q. B. 86.
(8) 22 O. R. 274.
(9) 8 U. C. C. P. 236.
(10) 33 U. C. Q. B. 181.
(11) 5 E. & B. 49.
(12) 14 M. & W. 76.
(13) 2 Pugs. (N.B.) 535.
(14) 1 O. R. 43.
(15) 17 O. R. 715.
(16) Vol. 2 p. 163.

Confining a business to certain parts of the city is a regulation and not restraint of trade. *Maxim Nordenfelt Co.*, v. *Nordenfelt* (1).

And see *Simson* v. *Moss* (2).

FOURNIER J.—I am of opinion that the judgment of the court below should be affirmed.

TASCHEREAU J.—I would dismiss this appeal. I think that Mr. Justice Maclennan's reasoning in the Court of Appeal amply demonstrates that the by-laws impeached are perfectly legal and *intra vires* of the corporation.

It would require a stronger case than the appellant has, in my opinion, made to bring me to reverse the unanimous judgment of two Ontario courts on the Ontario Municipal Acts.

GWYNNE J.—Upon the 13th day of January, 1890, the municipal council of the City of Toronto passed a by-law, designated as no. 2453, and intituled:

A by-law respecting the appointment of a general inspector of licenses, and the issue of licenses in certain cases.

It is only with the 12th and 43rd sections of that by-law, as amended by subsequent by-laws, that we are at present concerned. Upon the 23rd day of June, 1890, the same municipal council passed a by-law which, among other things, repealed subsec. 2 of sec. 43 of the by-law no. 2453, and substituted another subsection in lieu thereof. By another by-law passed on the 26th day of October, 1891, the said municipal council further amended sec. 12, and the sec. 43 as amended by the said by-law of the 23rd June, 1890.

The sections 12 and 43 of the by-law no. 2453 as so amended, are as follows:—

(1) (1893) 1 Ch. 630. (2) 2 B. & Ad. 543.

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The municipal council of the city of Toronto enacts as follows :

Sec. 12. Licenses shall be taken out by :

Subsec. 2. All hawkers, petty chapmen or other persons carrying on petty trades, or who go from place to place or to other men's houses on foot or with any animal bearing or drawing any goods, wares or merchandise for sale, or in or with any boat, vessel or other craft, or otherwise carry goods, wares or merchandise for sale ; except that no such license shall be required for hawking, peddling or selling from any vehicle or other conveyance goods, wares or merchandise to any retail dealer, or for hawking or peddling goods, wares or merchandise the growth, produce or manufacture of this province, not being liquors within the meaning of the law relating to taverns or tavern licenses, if the same are being hawked or peddled by the manufacturer or producer of such goods, wares or merchandise, or by his *bonâ fide* servants or employees having written authority in that behalf, and such servant or employee shall produce and exhibit his written authority when required so to do by any municipal or peace officer, nor from any peddler of fish, farm and garden produce, fruit and coal oil, or other small articles that can be carried in the hand or in a small basket, nor from any tinker, glazier or harness mender, or any person usually trading or mending kettles, tubs, household goods or umbrellas, or going about and carrying with him proper materials for such mending.

Subsec. 2a. No person named and specified in subsection 2 of this section, whether a licensee or not, shall, after the 1st day of July, 1892, prosecute his calling or trade in any of the following streets and portions of streets in the city of Toronto : 1. Yonge Street, from the bay to the Canadian Pacific Railway tracks ; 2. Queen Street, from Pape Avenue, in St. Matthew's Ward, to Jamieson Avenue, in St. Alban's Ward ; 3. King Street, from the river Don to Niagara Street ; 4. Spadina Avenue, from King Street to College Street ; 5. College Street, from Spadina Avenue to Bathurst Street ; 6. Parliament Street, from Queen Street to Westminster Street ; 7. Dundas Street, from Queen Street to St. Claren's Avenue ; 8. Wellington Street, from Church Street to York Street.

Sec. 43. There shall be levied and collected from the applicant for every license granted for any object or business in this by-law specified as requiring a license, a license fee, as follows :

Subsec. 2a. For a license to any one following the calling of a hawker, peddler or petty chapman, with a two-horse vehicle, $40 ; (2) with a one-horse vehicle, $30 ; (3) on a street corner or other place where permission is given therefor, other than in a house or shop, $15 ; (4) on foot, with a hand-barrow or wagon pushed or drawn, $7 ; (5) with a creel or large basket crate, $2.50 ; and the general inspector of licenses

shall furnish such licensee with a suitable badge, to be worn by said licensee in a conspicuous place while plying his trade.

Subsec. 2*a*. Provided that the annual fee for a fish hawker or peddler shall be, with a horse, mule or other animal and vehicle, $10; or (2), on foot, $2.50.

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Now it is to be observed that the above subsection 2*a* of said section 12 and subsection 2*a* of said section 43 were introduced into and made part of said by-law no. 2453 by the by-law passed upon the 26th of October 1891, while the subsection 2 of said section 43 was introduced into and made part of said by-law 2453 by the by-law passed on the 23rd day of June, 1890. It is objected to this by-law as thus amended that subsection 2*a* of said section 12 is wholly void and invalid for the following reasons: 1st. That it is wholly *ultra vires* of the corporation to pass as constituting an unauthorized and illegal restraint of the common law rights as well as of the statutable rights of persons engaged in carrying on legal, though they be petty, trades, occupations or business, and 2nd as being unreasonable in this that by the by-law as it now stands amended persons carrying on the respective trades for which by the section licenses are required to be taken out, while purported to be deprived by the subsection 2*a* of said section 12, of the right to carry on their trades in the greater part of the populous and profitable portion of the city for carrying on such trades are by the frame of the by-law as amended required to pay for licenses to carry on their trades in the smaller and least populous and least profitable portion of the city for carrying on their trades the respective fees which were in fact imposed for licenses to carry on their respective trades throughout the entire city.

Subsection 2*a* of the section 43 was also objected to as invalid, for the reason that it purports to require fish hawkers to pay license fees while the immediately preceding section 2 of said section 43 enacts and

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declares that hawkers or peddlers of fish shall not be required to take out any license.

Very many decided cases both ancient and modern, some more some less and some as it appears not at all bearing and throwing light upon the question before us, have been cited to us upon both sides. In estimating the value of these respective authorities as affecting the present case it is obviously of the first importance that we should carefully observe the terms in which the authority to pass the respective by-laws under consideration in the decided cases is expressed, in the act of Parliament, charter or other instrument by which the authority to pass the respective by-laws was conferred.

In *Freemantle* v. *the Company of Silk Throwsters* (1) a by-law had been passed by the company that none of that company should run above a certain number of spindles in one week. This was held to be a by-law not in restraint of trade but in restraint of monopoly—that none of the members of the company should engross the whole trade; and so was according to what was convenient and good, and the company having by its charter power to regulate its own trade the by-law was held to be good.

In *Player* v. *Jenkins* (2) it was held that a by-law made by the corporation of the city of London who by immemorial custom had the ordering of carmen and carters in the city that there should be only 420 allowed, and that if any worked unallowed they should pay 40s. to the chamberlain of the city was a good by-law. The reasoning upon which it was sustained was that the trade or business of carmen and carters was not like other trades for that a great number might cause disturbance and a nuisance in the streets and that therefore the number might be restricted, especially in

(1) 1 Lev. 229 [A.D. 1667]. (2) 2 Keb. 27 [A.D. 1666].

a city—for there any trade that might be a nuisance might be restrained.

Player v. *Vere* (1) was a case arising on a by-law passed by the city of London by way of repeal of and substitution for the by-law upon which the above case in 2 Keble proceeded. In this case the custom and the by-law were both specially pleaded at large as follows: The custom was that the mayor, aldermen, &c., from time out of mind, have had and have the right to order and dispose of carts, cars, car-rooms, carters and carmen and of all other persons whatsoever working any cars or carts within the city and liberties according to the custom thereof, which custom was confirmed by Parliament in the 7th year of Ric. II. The by-law then repealed the former by-law on the same subject, and reciting that the trade of the city being seriously considered, and to the end that all the streets and lanes of the city may not be pestered with carts or cars and that His Majesty's subjects may have free passage by coach or otherwise through the said streets and lanes, it was therefore enacted that no more than 420 carts should be allowed or permitted to work for hire within the city or the liberties thereof, and that each of them should be made known by having the city arms upon the shaft of every such cart in a piece of brass with the number upon it, and that 17s. 4d. per annum and no more should be received and paid for a car-room; and 20s. and no more or greater fine upon any admittance or alienation of a car-room, which 17s. 4d. per annum and 20s. aforesaid should be wholly applied towards the relief and maintenance of the poor orphans harboured and to be harboured in Christ's Hospital, and that if any person should presume to work any cars or carts within the said city and liberties for hire by himself or servants not being duly allowed as afore-

(1) T. Raym. 288 and 324 A.D. 1678.

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said, such person for every time of so offending should forfeit and pay the sum of 13s. 4d. to be recovered as provided in the by-law. This by-law was held to be void so far as it related to the fine and rent, but good as to the limitation of the number of cars to be allowed. Now it is to be observed that the by-law showed upon its face that it was passed for the maintenance of order and good government in the city and to prevent obstructions and nuisances occurring in the streets.

In *Wannel* v. *The City of London* (1) it appeared that by the custom of London, time out of mind, the several companies of Freemen of the City of London had power to pass by-laws to regulate their respective trades, and that a by-law had been made by the joiners company, one of the said companies, which reciting that several persons, not free of the joiners company, had exercised the trade of a joiner in an unskilful and fraudulent manner, which could not be redressed whilst such persons were not under the order and regulation of the company, and it was therefore enacted that no person should use the trade who is not free of the company, under the penalty of £10. This was held to be a good by-law, as being made in regulation of the trade by the persons most competent to judge of the necessities of the trade, and to prevent fraud and unskilfulness, of which none but a company carrying on the same trade can be judges.

In *Bosworth* v. *Hearne* (2) it was held that a by-law passed by the city of London, which by custom, time out of mind, had the regulation of carts in the city, was good, which enacted that no drayman or brewer's servant should be abroad in the streets with his dray or cart after 1 o'clock in the afternoon, between Michaelmas and Ladyday, and from thence after eleven in the forenoon, under the penalty of 20s., the court was of

(1) 1 Str. 675 A.D. 1726. (2) 2 Str. 1085.

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opinion that such a custom was good, and that as the regulation did not in itself appear to the court to be unreasonable the by-law was good.

In *The Chamberlain of London* v. *Godman* (1) it was held that a by-law of the city to oblige a person who had a right to be free of the city, to take up his freedom in some particular company, is in restraint of trade and bad, not being shown to be warranted by any special custom; that a general power to make by-laws for the common good of the citizens gave no power to make such a by-law. But in *Rex* v. *Harrison* (2) it was held, following *Wannel* v. *The City of London* (3), that a by-law that a butcher in London must be free of the butchers' company, was a good by-law. The court saying that the by-law only restored the constitution to what it originally must have been and ought to be, and that it was right and reasonable, and must have been the meaning of the custom that each company should have the inspection of their own trade. In *Pierce* v. *Bartrum* (4), a by-law of the city of Exeter was passed, under a charter granted to the city by Queen Elizabeth, and which enacted that no butcher or other person should, within the walls of the city, slaughter any beast upon pain to forfeit for every beast so slaughtered a fine prescribed by the by-law. It was contended that this by-law was void as being in restraint of a common law right of trade which, it was contended, nothing but a custom could control, and no custom was shown. The answer to this argument was that the by-law was one which merely restrained and prohibited an act being done, which, if done, would be a nuisance at common law, and by statute 4 H. 7 chap. 3, and so the by-law was held to be good as a reasonable regulation of trade. This case simply decides that a

(1) 1 Burr. 13.
(2) 3 Burr. 1323.
(3) 1 Str. 675.
(4) Cowp. 269.

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by-law which prohibits an act being done by any person in the conduct of his trade, which would plainly constitute a nuisance, cannot in law be said to be in restraint of trade, but rather a reasonable regulation of it. In *Chamberlain of the City of London* v. *Compton* (1) it was held that a by-law of the city of London, that no person not being free of the pewterers company should exercise the trade of a pewterer, was a by-law in restraint of trade, and in the absence of a special custom to support it was void.

The case of *The Gunmakers Society of London* v. *Fell* (2), arose upon a demurrer to the declaration, and it was held that a by-law passed by the gunmakers company that no member should sell the barrel of any handgun ready proved, to any person of the trade not a member, in London or within four miles thereof; and that no member should strike his stamp or mark on the barrel of any person not a member of the company under a penalty of 10s. for each offence, was holden to be in restraint of trade and void, it not appearing from anything set forth in the declaration that there was any adequate reason for these restraints or any consideration to the persons restrained. The charter of the company was set forth in the declaration. The Lord Chief Justice Willes there said :—

> The general rule is that all restraints of trade if nothing more appear are bad. This is the rule which was laid down in the famous case of *Mitchel* v. *Reynolds* (3). But to this general rule there are some exceptions, as first, that if the restraint be only particular in respect of the time or place, and there be a good consideration given to the person restrained, a contract or agreement upon such consideration so restraining a particular person may be good and valid in law notwithstanding the general rule ; and this was the very case of *Mitchel* v. *Reynolds* where such a bond was holden to be good. So likewise if the restraint appear to be of a manifest benefit to the public, such a restraint by a by-law or otherwise may be good ; for it is to be considered

(1) 7 D. & R. 597.
(2) 1 Willes 384.
(3) 1 P. Wm. 181.

rather as a regulation than a restraint; and it is for the advantage and not the detriment of trade that proper regulations should be made in it.

In *Maxim Nordenfelt Gun Co.* v. *Nordenfelt* (1), the Court of Appeal in England review all the cases of contracts in any way in restrant of trade from *Mitchel* v. *Reynolds* (2) down to the present time, and show the course of the decisions from time to time leading to the development of the doctrine as at present held in England. After a masterly review of the cases Lord Justice Lindley says (3):—

In *Rousillon* v. *Rousillon* (4), Lord Justice Fry in one of those admirable judgments for which he was so justly celebrated, came to the conclusion that the only test by which to determine the validity or invalidity of a covenant in restraint of trade given for valuable consideration was its reasonableness for the protection of the trade or business of the covenantee. This accords with the view of Lord Justice James in *Leather Cloth Co.* v. *Lorsont* (5), and is in my opinion the doctrine to which modern authorities have been gradually approximating. But I cannot regard it as finally settled nor indeed as quite correct. The doctrine ignores the law which forbids monopolies and prevents a person from unrestrictedly binding himself not to earn his living in the best way he can. Our predecessors expressed their views on this subject by drawing a distinction between partial and general restraint of trade and the distinction cannot be ignored. But what is more important than nomenclature or classification is the principle which underlies both.

And Lord Justice Bowen after a like review of the cases sums up the result to be as follows (6):

General restraints or in other words restraints wholly unlimited in area are not as a rule permitted by the law although the rule admits of exceptions. Partial restraints or in other words restraints which involve only a limit of places at which, of persons with whom, or of modes in which the trade is to be carried on are valid when made for a good consideration and where they do not extend further than is necessary for the reasonable protection of the covenantee.

Now the rule laid down governing the determination of cases in relation to contracts in restraint to trade can

(1) [1893] 1 Ch. 630.
(2) 1 P. Wm. 181.
(3) P. 649.
(4) 14 Ch. D. 351.
(5) L. R. 9 Eq. 345.
(6) P. 662.

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have application in the determination of a case like the present of a by-law passed by a municipal corporation incorporated by act of Parliament and imposing partial restraints upon the exercise of their trades by persons engaged therein, only upon the principle that what is necessary to support a contract in partial restraint of trade is equally necessary to support the by-law of a municipal corporation imposing partial restraints in the exercise of their trades by persons engaged therein, and that such a by-law is bad (as was held in respect of the by-law under consideration in the case of *The Gun Makers Co.* v. *Fell*), unless it be made to appear that there were adequate reasons for making the by-law and sufficient consideration to the persons restrained. Unless it be made so to appear it is impossible for the court, whose duty it is (equally as upon a question of reasonable and probable cause arising in an action on the case) to determine as a point of law whether the by-law is reasonable or not, efficiently to discharge its functions. But in the case of a by-law in restraint of trade passed by a municipal corporation there is this difference to be considered, namely, that whereas any individual has power to enter into any contract affecting his own interests and trade not contravening the rules of law applicable to such a contract no municipal, or other corporation incorporated by act of Parliament can have any power whatever to pass a by-law in restraint of trade partial or otherwise unless specially empowered so to do by suitable language in that behalf in an act of Parliament, and in construing an act of Parliament relied upon as conferring the power we must look to the purposes for which the corporation was created and gather the intent of the legislature as to conferring power to make a by-law of the character of the particular one under consideration from a consideration of

all clauses of the act affecting the subject and not of one isolated clause only, and in so doing we must enquire and consider whether the by-law under consideration does relate to and advance any and if any what purpose for which the corporation was created. Thus in the *Calder Navigation Co.* v. *Pilling* (1) a question arose as to the validity of a by-law passed by the Navigation Company which enacted that the navigation should be closed on every Sunday throughout the year and that no business should be transacted thereon during such time (works of necessity only excepted), nor should any person during such time navigate any boat, &c., nor should any boat, &c., pass along any part of the said navigation on any Sunday except for a reasonable distance for the purpose of mooring the same, and except on some extraordinary necessity or for the purpose of going to or returning from any place of divine worship under a penalty of £5.

Alderson B., pronouncing judgment, said:

The only question in this case is whether this by-law be good or not. For the purpose of determining that we must look to the powers to make by-laws given by the legislature to this company, in order to see whether this by-law is within the scope of their authority, or whether it does not relate to matters which ought to be left to the general law of the land by which the general conduct of the Queen's subjects is regulated. The power of making by-laws is conferred upon the company by a local act, by which it is enacted that the company shall have power and authority to make such new rules, by-laws and constitutions, for the good government of the said company and for the good and orderly using the said navigation, and all warehouses, wharfs, passages, locks and other things that shall be made for the same, and of and concerning all such vessels, goods and commodities as shall be navigated and conveyed thereon, and also for the well governing of the bargemen, watermen and boatmen who shall carry any goods, wares or merchandise upon any part of the said navigation. Now, looking at these words, it appears to me that all the powers which the legislature intended to give this company with respect to making laws for the government of this navigation, was solely for the orderly use of the

(1) 14 M. & W. 76.

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navigation, that is to say, to regulate in what manner and order th navigation should be used so as to secure to the public the greatest convenience in the use of it.

And Rolfe B., in his judgment, says (1):

The legislature says to the company, you may make by-laws for the good and orderly navigation of the canal, and for the government of the boatmen and bargemen connected with it, that is to say, in order that the navigation may be used with the utmost degree of convenience to every person. Now, the only point which occurred to me was this: whether on a state of facts, properly alleged, a by-law like this might not, under peculiar circumstances, be held good. Suppose, for instance, the company were to come to the conclusion that in order to secure a due supply of water in the canal it was necessary to have no navigation on it during one day out of seven, perhaps they would have power to close the canal for one day out of seven in order to make the navigation good during the other six, and in that case to say: if this must be done, we will take Sunday as the fittest day.

The by-law was held to be wholly *ultra vires* of the corporation, Chief Baron Pollock and Platt B. concurring.

Now it is here to be observed that for the purpose of construing the language used by the legislature as to conferring power upon the company to pass by-laws for the good government of the company and for the well governing of the bargemen, watermen and boatmen, and of and concerning the vessels, &c., that should be navigated thereon; and in order to arrive at the true intent of the legislature as to the powers conferred by such language the court had regard to the purpose for which the corporation was created, namely, for the good and orderly navigation of the canal.

Then there are three cases of by-laws of municipal corporations incorporated by the English municipal corporations acts viz. *Everett* v. *Grapes* (2), wherein a by-law passed by the town council of the borough of New Port in the Isle of Wight in conformity with all the formalities prescribed by 5 & 6 Wm. IV., ch 76, and

(1) P. 89.

(2) 3 L. T. N. S. 669.

duly allowed under the provisions of the statute in that behalf by Her Majesty in Council, was in the following terms:—

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Every person who shall keep or suffer to be kept any swine within the said borough from the 1st day of May to the 31st day of October inclusive, in any year, shall for every such offence forfeit and pay the sum of 5s. and the further sum of 2s. 6d. for every day the same shall continue.

The section of the act 5 & 6 Wm. IV., ch. 76 sec. 90, in virtue of which the by-law was passed, enacted that:

It shall be lawful for the council of any borough to make such by-laws as to them shall seem meet for the good government of the borough, and for the prevention and suppression of all such nuisances as are not already punishable in a summary manner by virtue of any Act in force throughout such borough and to appoint by such by-laws such fines as they shall deem necessary for the prevention and suppression of such offences.

Upon a conviction under that by-law it was set aside upon the ground that the by-law was *ultra vires* of the corporation to pass. The contention in support of the by-law was that it was not in restraint of but merely in regulation of trade, but the court held the by-law void as in restraint of trade, holding that all by-laws which restrict the common law right of trading always have the qualification annexed (to be good) that the trade is conducted so as to be a nuisance.

So in *Johnson* v. *Mayor of Croydon* (1), where by a by-law passed by the town council of the borough of Croydon under the powers conferred by 45 & 46 Vic., ch. 50, sec. 23, which is identical in its terms with sec. 90 of 5 & 6 Wm. IV., ch. 76, it was enacted that no person not being a member of Her Majesty's army or auxiliary forces acting under the commands of his commanding officers should sound, or play upon, any musical instrument in any of the streets of the borough on Sunday, and after a conviction had under this by-

(1) 16 Q. B. D. 708.

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law it was held to be void as unreasonable and *ultra vires*, as it made playing a musical instrument an offence whether it caused a nuisance, or annoyed any body, or not.

So likewise in *Munro* v. *Watson* (1), where a by-law was passed by the town council of the borough of Ryde, under the authority of sec. 90 of 5 & 6 Wm. IV., ch. 76, whereby it was enacted that every person who in any street should sound, or play upon, any musical or noisy, instrument, or should sing, recite or preach in any street without having previously obtained a license in writing from the mayor, and every person who having obtained such license should fail to observe or should act contrary to any of the conditions of such license should forfeit and pay a sum not exceeding twenty shillings, nor less than one shilling, it was held that this by-law was *ultra vires* of the town council to pass as it professed to suppress what unless done in such a manner as to constitute a nuisance was upon the principles of the common law perfectly lawful. These cases seem to establish the principle that the municipal corporations in England created by act of Parliament, although being invested with most ample powers to pass all by-laws necessary for the good government of the municipality, have no authority to pass a by-law in restraint of the performance of any act by the inhabitants which in itself is lawful at common law, unless it be so done as to create a nuisance, or to impose any restraint partial or otherwise upon the exercise of any trade, unless either the trade restrained be in itself a nuisance or that not being in itself a nuisance is made a nuisance by the manner in which it is carried on.

It only remains therefore to consider whether the Municipal Institutions Act of Ontario, ch. 184 of the

(1) 57 L. T. N.S. 366.

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Revised Statutes, gives authority to the council of the municipality of the city of Toronto to pass the subsections of the by-law now under consideration.

The 283rd section of the act invests the council with the most ample power to pass all such by-laws or regulations as the good of the inhabitants of the municipality requires. The 285th section enacts that in all cases where the councils are authorized by the act or by any other act to pass by-laws for licensing any trade, calling, &c., &c., or the persons carrying on or engaged in any such trade, calling, &c., they shall have power to pass by-laws for fixing the sum to be paid for such license and enforcing the payment thereof. By section 489, subsection 41, they are empowered to pass by-laws for preventing and abating public nuisances, and by section 495, which is the only section which has been appealed to by the respondents in support of the subsections of the by-law under consideration which are impugned, they are empowered to pass by-laws for the following purposes among others :—

Sec. 495, subsection 2. For licensing, regulating and governing auctioneers and other persons selling and putting up for sale goods, wares, merchandise or effects by public auction, and for fixing the sum to be paid for every such license, and the time it shall be in force.

Subsection 3. For licensing, regulating and governing hawkers or petty chapmen and other persons carrying on petty trades or who go from place to place or to other men's houses on foot or with any animal bearing or drawing any goods wares or merchandise for sale or in or with any boat, vessel or other craft, or otherwise, carrying goods, wares or merchandise for sale and for fixing the sum to be paid for a license for exercising such calling within the county, city, &c., and the time the license shall be in force. Provided always that no such license shall be required for hawking peddling or selling from any vehicle or other conveyance any goods wares or merchandise to any retail dealer, or for hawking or peddling any goods wares or merchandize, the growth produce or manufacture of this province not being liquors, &c., &c., if the same are being hawked or peddled by the manufacturer or producer of such goods wares or merchandise or by his *bonâ fide* servants or employees having written authority on that behalf; and

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provided also that nothing herein contained shall affect the powers of any council to pass by-laws under the provisions of section 496 of this act.

Now the only clause of this section 496 which can be said to come within this proviso are subsections 27 and 36 of the section 496 by which the council of every city, &c., &c., are empowered to pass by-laws:

Subsection 27. For regulating or preventing the encumbering, injuring or fouling by animals, vehicles, vessels or other means of any road, street, square, alley, lane, bridge or other communication.

Subsection 36. For regulating the conveyance of traffic in the public streets and the width of the tires and wheels of all vehicles used for the conveyance of articles of burden, goods, wares or merchandise and for prohibiting heavy traffic and the driving of cattle, sheep, pigs and other animals on certain public streets named in the by-law.

The plain, and indeed the only, meaning which can be given to the second proviso to the third subsection of section 495 of the act is that nothing contained in the immediately preceding proviso to the same subsection, recognizing and affirming and confirming the common law right of all persons to hawk, peddle and sell from any vehicle or other conveyance goods, wares and merchandise to any retail dealer within the limits of the city, and the right of all manufacturers and producers of goods manufactured and produced by them within the province, to hawk and peddle such goods within the city of Toronto, without any license therefor from the city, should be construed to interfere in any respect with the right of the city council to pass by-laws in respect of the matters contained in subsections 27 and 36 of section 496. All the persons named in the first proviso of section 495 are, if the subsection 2*a* of section 12 of the by-law under consideration be good, deprived of their right to carry on within the prohibited streets constituting a very large portion of the city of Toronto, their trades and callings, their right to carry on which in the entire city is recognized, affirmed and

confirmed to them by the proviso. To hold the by-law to be valid as affecting those persons would be to enable the council of the city, by a by-law, to override and nullify rights confirmed by the act and by the very section of the act which is appealed to by the corporation as its authority for making the enactment in the by-law under consideration. As to those persons therefore who are named in the first proviso to subsection 3 of section 495 as being entitled to carry on the business of hawkers, etc., without a license, the impugned subsection 2*a* of section 12 of the by-law is clearly *ultra vires* and invalid. But it is equally so, in my opinion, as affecting hawkers, peddlers and petty chapmen requiring licenses to pursue their calling :

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For, 1st. It is to be observed that the power to pass by-laws for licensing, regulating and governing hawkers, petty chapmen, etc., is given in precisely the same language as is used in the previous subsection, empowering the councils to pass by-laws "for licensing, regulating and governing auctioneers and other persons putting up goods for sale by auction." While all are subject to by-laws passed by the council of the municipality to prevent nuisances, all, that is to say, auctioneers, hawkers and petty chapmen as to any power in the municipal councils to impose any restraint upon them, partial or otherwise, in the exercise of their respective callings, are placed precisely on the same footing, so that if the enactment in subsection 2*a* of section 12 of the by-law under consideration were made in relation to auctioneers, and as so made should be unreasonable or *ultra vires* and invalid, it must be equally so as respects hawkers and petty chapmen, and I must say it seems to me impossible to conceive any reason whatever sufficient to support a by-law imposing such a restraint upon the business of auctioneers. 2nd. From several sections in the act it is apparent

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that the legislature recognized the great difference which (as said by Harrison C.J. in *Reg.* v. *Johnston*, (1)) exists between the regulation and the prohibition or prevention of a trade, and from the language of those sections it is apparent that the legislature by the authority conferred upon municipal councils to pass by-laws for licensing, regulating and governing persons engaged in carrying on the trades of auctioneers, hawkers, peddlers and petty chapmen, never intended to authorize by-laws imposing such restraint upon any of them, in the exercise of their respective trades, as is purported to be imposed by the impugned subsection 2*a* of section 12 of the by-law under consideration.

Thus subsection 3 of section 503 which authorizes municipal councils to pass by-laws for establishing markets expressly enacts that they may pass by-laws "for preventing or regulating the sale by retail on the public streets or vacant lots adjacent to the market of any meat, vegetables, grain, hay, fruit, beverages, small ware and other articles offered for sale" and by subsection 4 also for preventing vendors of small ware (that is to say petty chapmen), from practising their calling in the market place, or in the public streets and vacant lots adjacent to the market. Now if the impugned subsection 2*a* of section 12 of the by-law under consideration be good this special provision in section 503 for prevention of sales in certain cases and in particular streets adjacent to the markets would have been wholly unnecessary. Indeed the power of prevention here given being specially confined to streets in the neighbourhood of markets affords the strongest possible argument that the right asserted over the numerous streets mentioned in the impugned subsection 2*a* of section 12 is not conferred upon the plain principle that *expressio unius est exclusio alterius*. So likewise by sec-

(1) 38 U.C.Q.B. 551.

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tion 489 councils are authorized to pass by-laws by subsection 25, "for preventing or regulating" and licensing exhibitions of wax works, menageries, &c. &c., and by subsection 44 "for preventing or regulating" the erection or continuance of slaughter houses, gas works, tanneries, distilleries or other manufactories or trades which may prove to be nuisances, and by subsection 45 "for preventing or regulating" the keeping of cows, goats, pigs and other animals and defining limits within which the same may be kept, and by subsection 46 "for regulating or preventing" the ringing of bells blowing of horns, shouting and other unusual noises, or noises calculated to disturb the inhabitants. And so likewise by section 496 subsection 3 "for preventing or regulating" the firing of guns or other fire-arms and the firing or setting off of fire balls, squibs, crackers or fire works, and for preventing charivaries and other like disturbances of the peace, and by subsection 13 "for preventing or regulating" the use of fire or lights in stables, cabinet makers' shops, carpenters' shops and combustible places, and by subsection 14 "for preventing or regulating" the carrying on of manufactories or trades dangerous in causing or promoting fire. Now that the enactment under consideration in the said subsection 2*a* of section 12 is not an enactment for the prevention of any nuisance cannot admit of a doubt, for it prohibits absolutely all hawkers and petty chapmen from carrying on their trades in any of the streets named even though in the most orderly and unexceptionable manner possible. Neither can it admit of a doubt that it is an enactment which imposes restraint upon the exercise of the trade or calling of hawkers, petty chapmen, &c., nor are they the only persons prejudiced by such restraint, but the retail dealers also in the prohibited streets who have a right to look to hawkers and petty chapmen for such supplies as they think

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fit to buy from them, a right expressly secured to them by this ch. 184 section 495 itself, but householders also especially of the poorer class who more than the richer classes are accustomed to look to hawkers and petty chapmen to supply their wants and who might be much prejudiced by being prevented from so supplying themselves with vegetables, fruits and such like perishable articles and with other articles of prime necessity such as coal oil and the services of itinerant menders of kettles, tubs and other household goods, and for this prejudice to all these persons no reason whatever is suggested unless it be the reason given by the corporation under the item no. 5 of their printed reasons in support of their power to make the enactment in question, namely, that:—

> Permanent shopkeepers who pay taxes on real property, and who are supposed to have more stake in the community, are favoured in law as against peddlers, because they are of more use to trade and the community.

And in support of this, as a sufficient reason in support of the enactment, we are referred to Burns, Justice of the Peace (1), where no doubt it is said that:

> The trade carried on by persons keeping fixed establishments is, generally speaking, much more beneficial to the state than that of itinerant hawkers and peddlers, the character of the local trader is better known, and therefore there is greater security for the respectability of his dealings. He contributes also by the number of persons he employs and the taxes he pays, much more than the itinerant trader, to promote the wealth and increase the prosperity of the country. Hence has arisen the expediency of framing laws which may operate as a restraint upon itinerant traders, may diminish their numbers, and while they prevent any illegal practices, may, by obliging such persons to take out licenses and to submit to certain other regulations, be productive of revenue and profit.

Granting all this to be true, they are still entitled to the protection of the law in carrying on their humble trade equally as all other traders so long as they com-

(1) P. 952.

ply with the law. And the question simply is, as it was in *The Calder Navigation Company* v. *Pilling* (1), and in all other cases wherein a question as to the validity of a by-law has arisen, namely, whether the particular enactment which is questioned is within the authority conferred upon the municipal council of the city of Toronto by the chap. 184 of the Revised Statutes of Ontario, or whether the subject matter with which the enactment in question assumes to deal is not a matter which ought to be left, and which doth by law appertain, to the general law of the land by which the general conduct of the Queen's subjects is regulated, and the answer to this question, in my opinion, must be that the municipal council of the city of Toronto had no authority whatever to enact the matter contained in subsection 2*a* of section 12 of the by-law under consideration, and upon the principle involved in all the cases above cited, and upon a true construction of chap. 184 of the Revised Statutes of Ontario that subsection is unreasonable, *ultra vires* and invalid. The cases of *Barclay* v. *Darlington* (2); *Davis* v. *Municipality of Clifton* (3); *Regina* v. *Johnston* (4); and *Brodie* v. *Bowmanville* (5), are cases in the Upper Canada and Ontario courts which support the view I have taken. The observation of the late Chief Justice Wilson in *In re Kiely* (6), that the power to regulate livery stables confers the power to declare in what locality or localities they shall be allowed, is merely a *dictum* of that learned judge that the power to regulate will include a power to prohibit. Livery stables being kept in places where, or in a manner in which they would be nuisances, may be admitted, but the question whether the power to regulate would confer

(1) 14 M. & W. 76.
(2) 12 U.C.Q.B. 86.
(3) 8 U.C.C.P. 236.
(4) 38 U.C.Q.B. 551.
(5) 38 U.C.Q.B. 580.
(6) 13 O.R. 451.

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the power to prohibit any livery stable being kept in any of the streets named in the subsection of the by-law under consideration, and within which hawkers and petty chapmen are prohibited from pursuing their calling, is a question which I cannot think was present to the learned judge's mind when he gave expression to the *dictum* in question; such a question must be determined by reference to the same authorities as I have cited in connection with the language and intent of the legislature in passing the chap. 184 R.S.O., with which I have dealt.

Now as to subsection 2 (*a*) of sec. 43, the by-law as affects the point now under consideration in short substance reads as follows:—

Sec. 12. Licenses must be taken out by, all hawkers, petty chapmen, &c., except that no license shall be required 1st for hawking or selling from any vehicle, goods, wares or merchandize to any retail dealer.—Nor 2nd from any peddler of fish, farm and garden produce, tinker, cooper, &c., &c., &c. Then sec. 43 say :—There shall be levied and collected from the applicant for every license granted for any object or business in this by-law specified as requiring a license, a license fee as follows :—Subsection 2. For a license to any one following the calling of a hawker, peddler or petty chapman, with a two horse vehicle $40.00 (2) with a one horse vehicle $30.00 ; (3) on a street corner or other place where permission is given therefor other than in a house or shop $15.00 ; (4) on foot with a hand barrow or waggon pushed or drawn $7.50 ; (5) with a creel or large basket crate $2.50.

Subsection 2 (*a*). Provided that the annual fee for a fish hawker or peddler shall be, (1) with a horse, mule or other animal and vehicle $10, or (2) on foot $2.50.

Now the words "goods wares and merchandise" in the first exception which all hawkers, &c., &c., are at liberty to hawk and sell from vehicles to retail dealers without requiring a license, are sufficiently large to include fish. But these persons, it is admitted, by the corporation are not required to pay the fee of $10 prescribed by subsec. 2 (*a*) of sec. 43 to be paid by hawkers of fish with a horse and vehicle, because that the by-

law in its 43rd sec. enacts that license fees shall be paid only by the persons who are by the by-law required to take out licenses; and as the above persons named in the first exception in subsec. 2 of sec. 12, are not required by the by-law to take out licenses, the subsec. 2 (*a*) of sec. 43 cannot apply to them. But for the same reason and upon the same principle, as by the second exception in the same subsec. 2 of sec. 12, the by-law enacts that hawkers and peddlers of fish shall not be required to take out a license, the subsec. 2 (*a*), of sec. 43 cannot apply to them, and further, it is to be observed that by subsec. 2 of sec. 43, all persons, hawking, peddling, &c., with a two-horse vehicle are required to pay $40, and with a one horse vehicle $30, and on foot with a crate or basket $2.50. So that the persons respectively paying the said sums of $30 and $2.50 had by the provisions of subsec. 2 of sec. 43 a perfect right to sell fish without being obliged to pay any further fee. Now the contention is that subsec. 2 (*a*) of sec. 43, being subsequent in order to subsec. 2 of sec. 12 and to subsec. 2 of sec. 43, although in the same by-law, must be read not only as repealing the exception of peddlers of fish from subsec. 2 of sect 12, but further as enacting that the persons licensed as hawkers and petty chapmen under subsec. 2 of sec. 43, and paying the fees there provided, shall not be entitled to hawk and sell fish unless by paying the additional sum required by and specified in subsec. 2 (*a*) of the sec. 43. I find it difficult to concur in this mode of construing an instrument to which over the persons it affects the same force is given as to an act of Parliament, and which, therefore, should be passed with some care and accuracy of expression and certainty as to the persons to be affected by it especially in cases where restrictions and burthens are imposed upon the people in the exercise of their common law rights and the pursuit

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of their lawful trades and callings, and as the subsection in question purports to deprive persons of rights which they already possessed, it should be read strictly. I think, therefore, that this subsection cannot be read and construed as suggested, but that it should be pronounced to be *ultra vires* and void as purporting to impose a burden upon peddlers of fish to pay a fee to entitle them to pursue, while they are by the by-law exempted from requiring a license for that purpose, and because if such license were required the fee prescribed by subsec. 2 of sec. 43 covers the right to hawk fish as well as all other articles. The appeal therefore must, in my opinion, be allowed with costs and an order be directed to be issued for quashing the two subsections, namely, subsec. 2 (*a*) of sec. 12 and subsec 2 (*a*) of sec. 43, of the by-law under consideration, viz. the by-law of the city of Toronto, no. 2453 as amended.

SEDGEWICK J. concurred.

KING J.—The question in this appeal is as to the validity of certain by-laws of the city of Toronto relating to peddlers, petty chapmen, and other like persons. The Municipality Act of Ontario section 495 (3) empowers the council of any county, city and town separated from the county for municipal purposes to make by-laws:—

For licensing, regulating and governing hawkers or petty chapmen and other persons carrying on petty trades or who go from place to place or to other men's houses on foot or with any animal bearing or drawing any goods, wares or merchandise for sale, or in or with any boat, vessel or other craft or otherwise carrying goods, wares or merchandise for sale, and for fixing the sum to be paid for a license for exercising such calling within the county, city or town and the time the license shall be in force. * * * Provided always that no such licenses shall be required for hawking, peddling or selling from any vehicle or other conveyance any goods, wares or merchandise to any retail dealer, or for hawking or peddling any goods, wares or merchandise, the growth

produce or manufacture of this province (not being liquors within the meaning of the law relating to taverns or taverns licenses) if the same are being hawked or peddled by the manufacturer or producer of such goods, wares or merchandise, or by his *bonâ fide* servants or employees, having written authority in that behalf.

By a by-law no. 2453, passed by the municipal council of the corporation of the city of Toronto on 13th January, 1890, it was ordained that licenses should be taken out by "all hawkers, petty chapmen or other persons carrying on petty trades" (following the language of the act) excepting however those whom the act excepted, and further excepting:—

Peddlers of fish, farm and garden produce, fruit and coal oil, or other small articles that can be carried in the hand or in a small basket; also tinkers, coopers, glaziers, harness menders and persons usually trading in or mending kettles, tubs, household goods or umbrellas, and persons going about and carrying with them proper materials for such mending.

On 26th October, 1891, a by-law no. 2934 was passed in amendment of the above by the addition of the following:—

No person named and specified in subsection 2 of this section—i. e. in the subsection already cited—(whether a licensee or not) shall after the 1st day of July, 1892, prosecute his calling or trade in any of the following streets and portions of streets in the city of Toronto.

Then follows an enumeration of streets and parts of streets which, it is said on argument, comprise the leading business streets of Toronto, and covers an extent of about ten miles.

An application to quash this latter by-law was dismissed by the learned Chief Justice of the Common Pleas and his decision was sustained by the Court of Appeal.

The business of hawkers, petty chapmen and other persons carrying on petty trades, who go from place to place, and to other men's houses carrying goods for sale, is a business that is carried on and prosecuted upon and in the streets.

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The legislature recognized it as a legitimate business, and contemplated that it might be carried on in accordance with what might be considered the natural right to carry on any lawful trade or business, but provided that it might be subjected to being licensed, regulated and governed by the municipal council through by-laws. But, by a proviso, the legislature declared that the business, or certain forms of it, might be carried on in a certain way without being hampered by license fees, or by the obligation to take out a license, with all that is implied in this. Thus any hawker, peddler, etc., is not to be required to procure a license for hawking, peddling, etc., from any vehicle or other conveyance any goods, wares or merchandise to any retail dealer, or for hawking or peddling any goods, wares or merchandise, the growth, produce or manufacture of the province, if the same is being hawked or peddled by the manufacturer or producer of such goods, etc., or by his *bonâ fide* servant or employee. It seems to me that this privilege of selling to any retail dealer without license is rendered in large degree nugatory (and entirely so, so far as regards retail dealers whose places of business are on the prohibited streets) if the city council can prohibit the hawker, etc., from selling at all to such retail dealers. Can it be reasonably concluded that the legislature intended that the council might restrain all selling to retail dealers in large sections of the city, when it in terms declined to subject them to the comparatively small restriction involved in the obtaining and paying for a license in respect of such class of sales? The necessary effect of the by-law is to substantially impair rights and privileges recognized by the statute.

So as to the right or privilege to sell free from license to any one goods, etc., the produce or manufacture of the seller, provided they are produced or manufactured

in Ontario. Is it consistent with this that all sale of such articles to any one in the large prohibited district of this by-law, or in any district or street whatever which the council are not empowered by this or some other clause of the Municipal Act to close to such or like traffic, shall be prohibited entirely? The prohibition is not limited to certain times for the promotion of an assumed or real public convenience in the use of the streets, or to regulate traffic therein, nor to certain articles referred to in section 497 subsec. 9, but is general as to the goods, and absolute in its terms, and covers the whole period of each day and of every day in the year. This is very different from regulations as to time or mode. It is said to be merely a regulation as to place, but the business which the legislature has said shall be kept free from the necessity of license is a business which is carried on by going from place to place and to other men's houses, and to exclude ten miles of populated city streets from the field of these people's operations, must seriously interfere both with their right freely to sell to retail dealers, and with the right freely to sell to any one goods, their own produce or manufacture, in the only way in which they can so sell.

Under sec. 493 subsec. 1 authorizing the council "to license and regulate plumbers," can it possibly be that these may be restrained, as by way of regulation, from exercising their calling in and over a particular section of the city?

In *Slattery* v. *Naylor* (1) it was held that in certain cases mere words of regulation may authorize prohibition and the taking away of private property, but this follows upon the consideration that otherwise the matter cannot, in common understanding, be efficiently regulated. It was a case where a municipal act em-

(1) 13 App. Cas. 446.

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powered the council to make by-laws for regulating the interment of the dead, and the by-law prohibited interment altogether in cemeteries situated within a certain distance of any dwelling, place of worship, etc., the effect of which was to destroy, without compensation, the private property of owners of burial places therein.

Lord Hobhouse says (1):

> It is difficult to see how the council can make efficient by-laws for such objects as preventing fires, preventing and regulating places of amusement, regulating the killing of cattle and sale of butchers' meat, preventing bathing, providing for the general health, not to mention others, unless they have substantial powers of restraining people, both in their freedom of action and in their enjoyment of property. The interment of the dead is just one of those affairs in which it would be likely to occur that no regulation would meet the case, except one which wholly prevented the desired or accustomed use of the property.

The case also contains observations upon the setting aside of by-laws on the ground of their unreasonableness.

The regulating and governing of the business of hawkers does not, one would think, require that they be prohibited from carrying on their business in certain streets, which by the legislature are not authorized to be closed streets to such business and traffic, and which it is not suggested that the act anywhere gives the council authority to treat differently from the streets in general of the city, so far at least as this or like business is concerned. It was said that the business is objectionable by reason of the street cries used in carrying it on. Then the by-law should have been directed against this.

In addition to objections suggested by the words of the act I think that the by-law is in restraint of trade; in terms it is so. It says that the persons shall not carry on their trade in the streets named. It

(1) P. 449.

is true that all carrying on of the trade is not prohibited, but all carrying on of the trade in large areas is prohibited. It is a partial restraint of trade. As a general principle all by-laws in restraint of trade, general or partial, must be reasonable and beneficial to the public or they cannot be supported. *Gun-makers Co.* v. *Fell* (1); *Bosworth* v. *Hearne* (2). The securing of any public benefit which the council are authorized to promote is strikingly absent from anything that appears likely to follow upon the enforcement of this by-law. In fact, what strikes one as not pleasant in this case is that the rights of these small people over a large part of their accustomed fields of labour are seriously affected, and that so far the respondents have condescended to give no consideration of public benefit for it. It was put as if the council were not to be called on to give reasons.

There is another point. It was suggested that the by-law might be sustained under the powers relating to markets. But while the council are by section 503 subsecs. 3 and 4 authorized to pass by-laws "for preventing or regulating the sale by retail in the public streets or vacant lots adjacent thereto of any meat, vegetables, grain, hay, fruit, beverages, small ware and other articles offered for sale and for regulating the place and manner of selling and weighing grain, meat, vegetables, fish, hay, straw, fodder, wood, lumber, shingles, farm produce of every description, small wares and all other articles exposed for sale and the fees to be paid therefor; and also for preventing criers and vendors of small ware from practising their calling in the market place, public streets and vacant lots adjacent thereto," the restriction as to hawkers, etc., is limited to the market place, and public streets and vacant lots adjacent thereto. This not only does not authorize the by-

(1) Willes 389. (2) Str. 1085.

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law in question with its prohibition against selling on many other streets, but seems to show that it is *ultrâ vires*, for when the legislature would, as in this case, prevent hawkers selling on certain streets it does so in terms.

As to the other by-law complained of, no. 2934 (2*a*) in amendment of section 43 of no. 2453, as amended by no. 2717, I agree with the observations of Mr. Justice Maclennan, and think that although these by-laws may not be easy to construe it is a matter of construction, and that the by-law referred to in this objection should be allowed to stand. The result, in my opinion, is that the judgment appealed from should be affirmed as to by-law no. 2453 sec. 12 (2*a*) but reversed as to by-law no. 2453 sec. 43 (2*a*).

Appeal allowed as to by-law no. 2453 *section* 12 (2*a*) *and affirmed as to section* 43 (2*a*).

Solicitors for appellant: *Du Vernet & Jones.*

Solicitor for respondents: *C. R. W. Biggar.*

THOMAS HOLLIDAY (PLAINTIFF).....APPELLANT; 1893

AND *Nov. 3.

JACKSON & HALLETT, AND OTHERS (DEFENDANTS) ..... } RESPONDENTS. 1894 *Feb. 20.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Surety—Discharge of—Reservation of rights against—Promissory note—Discharge of maker.

Where the holder of a promissory note had agreed to accept a third party as his debtor in lieu of the maker.

Held, affirming the judgment of the Court of Appeal, that as according to the evidence there was a complete novation of the maker's debt secured by the note and a release of the maker in respect thereof the indorsers on the note were also released.

APPEAL from a decision of the Court of Appeal for Ontario (1) reversing the judgment of the Chancery Division (2) against the defendants Hallett & Jackson as indorsers of a promissory note.

The facts of the case, which are fully stated in the above-mentioned reports, may be summarized as follows :—

The plaintiff, Holliday, and the defendants, Jackson & Hallett, were respectively creditors of Hogan. The plaintiff held a note made by Hogan which Hallett & Jackson had indorsed as security for payment. Subsequently, Hogan having failed to pay his said creditors as agreed his business was sold to a third party, and both creditors accepted such third party as debtor in place of Hogan, and plaintiff agreed to give him time to pay off Hogan's debt. It was under these circumstances that the action was brought on the note against Hogan as maker, and Jackson & Hallett as indorsers.

*PRESENT :—Fournier, Taschereau, Gwynne, Sedgewick and King JJ.

(1) 20 Ont. App. R. 298, sub nom. *Holliday* v. *Hogan*. (2) 22 O.R. 235.

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On the trial the action as against Hogan was dismissed, but judgment was given as against the other defendants. The Chancery Division affirmed the judgment of the trial judge. Jackson & Hallett then appealed to the Court of Appeal where the judgment against them was reversed. Plaintiff then appealed to this court.

Johnson Q.C., for the appellant, referred to *Wyke* v. *Rogers* (1) ; *Ludwig* v. *Iglehart* (2).

Moss Q.C. for the respondents.

FOURNIER J.—I am in favour of dismissing the appeal.

TASCHEREAU J.—I am of opinion that the plaintiff's action was rightly dismissed by the Court of Appeal. The reasoning of Mr. Justice Osler and of Mr. Justice Maclennan, shows, in my opinion, that no other conclusion is possible. I would dismiss the appeal.

GWYNNE J.—I entirely concur in the judgment of the learned judges of the Court of Appeal for Ontario.

The evidence clearly established and the learned trial judge found that the plaintiff agreed to accept and did accept Singular as his debtor in lieu of Hogan as well in respect of the debt secured by the promissory note upon which Jackson and Hallett were indorsers as of a further sum secured by a chattel mortgage executed by Hogan to the plaintiff upon chattels in the Victoria Hotel which chattels and his interest in the hotel Hogan sold to Singular leaving $1,247 of the purchase money agreed upon on such sale in Singular's hands for the express purpose of his paying the plaintiff the two debts due by Hogan on

(1) 1 DeG. M. & G. 408. (2) 43 Md. 39.

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the promissory note and the chattel mortgage. This purchase so made by Singular from Hogan having been communicated to the plaintiff he accepted Singular as his debtor in lieu of Hogan and at Singular's request agreed to give him time for payment of the above sums for one or two years or as long as he, Singular, wished, he paying 5 per cent for such accommodation, to which Singular agreed. In fact the evidence clearly shows that the substitution of Singular in the place of Hogan as the keeper of the hotel, which the plaintiff, he being a brewer, supplied with beer and ale, was a step most acceptable to the plaintiff; accordingly the learned judge held that Hogan was discharged from all liability upon the note, from which judgment there has been no appeal taken; the plaintiff, in fact, admits it to be correct; but Hogan's discharge being due to the fact that the plaintiff had accepted Singular as his debtor in lieu of Hogan in respect of the said sum of $1,247, which included the note sued upon, that transaction constituted a complete novation of Hogan's debt secured by the note and an absolute release of Hogan in respect of that debt; and the sureties, the indorsers also, became discharged, the debt for which they had become sureties by their indorsement of the note being extinguished—*Commercial Bank of Tasmania* v. *Jones* (1). The appeal must therefore be dismissed with costs.

SEDGEWICK and KING JJ. concurred.

Appeal dismissed with costs.

Solicitor for appellant: *Kenneth McLean.*

Solicitor for respondents: *T. P. Coffee.*

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(1). [1893] A.C. 313.

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*Feb. 20.

THE QUEEN, ON THE INFORMATION OF THE ATTORNEY-GENERAL FOR THE DOMINION OF CANADA..... .... } APPELLANT;

AND

LUDGER O. DEMERS AND MIMA DEMERS..... } RESPONDENTS.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Title to lands in railway belt in British Columbia—Unsurveyed lands held under pre-emption record prior to statutory conveyance to Dominion Government—Federal and provincial rights—British Columbia Lands Acts of 1873 *and* 1879—47 *Vic., ch.* 6 (*D*).

On 10th Sept., 1883, D. *et al.* obtained a certificate of pre-emption under the British Columbia Land Act, 1875, and Land Amendment Act, 1879, of 640 acres of unsurveyed lands within the 20 mile belt south of the C. P. R., reserved on the 29th Nov., 1883, under an agreement between the Governments of the Dominion and of the province of British Columbia, and which was ratified by 47 Vic., c. 14 (B.C.). On 29th Aug., 1885, this certificate was cancelled, and on the same day a like certificate was issued to respondents, and on the 31st July, 1889, letters-patent under the great seal of British Columbia were issued to respondents. By the agreement ratified by 47 Vic., c. 6 (D), it was also agreed that three and a half million additional acres in Peace River District should be conveyed to the Dominion Government in satisfaction of the right of the Dominion under the terms of union to have made good to it, from public lands contiguous to the railway belt, the quantity of land that might at the date of the conveyance be held under pre-emption right or by crown grant.

On an information by the Attorney General for Canada to recover possession of the 640 acres :

Held, affirming the judgment of the Exchequer Court, that the land in question was exempt from the statutory conveyance to the Dominion Government, and that upon the pre-emption right granted to D. *et al.* being subsequently abandoned or cancelled, the land became the property of the crown in right of the province, and not in right of the Dominion.

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

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APPEAL from the judgment of the Exchequer Court (1), rendered on March 13, 1893, in favour of the defendants, upon an information of intrusion filed by the Attorney General of the Dominion of Canada, to recover possession of a lot of land within the Railway Belt in the province of British Columbia.

The statutes, agreements and facts bearing upon the case are as follows:—

By the 11th section of the terms of union, under which Britith Columbia was admitted into confederation, the Province agreed to convey to the Dominion, in aid of a transcontinental railway, a belt of land not exceeding 20 miles on either side of the railway; and any deficiency caused by lands situate within the belt being held crown grant or under pre-emption right was to be made up from contiguous public lands (2).

By 43 Vic. cap. 11 (B.C.) passed 8th May, 1880, the Province granted to the Dominion a belt along the line of railway as it was then proposed to be located through Yellowhead Pass.

By 46 Vic. cap. 14 (B.C.) passed 12th May, 1883, an agreement between the Dominion and Province was ratified, and in accordance with it, and by reason of a contemplated change of route, a grant was made of a 20 mile belt on either side of the railway, wherever finally located. A difficulty in respect to ascertaining the exact qnantity of lands "held under pre-emption right or crown grant" was arranged by taking them roughly at 3,500,000 acres, and public lands to that extent in the Peace River district of British Columbia were granted to and accepted by the Dominion "in satisfaction of all claims for additional lands under the terms of union.

(1) 3 Ex. C. R. 293.

(2) Statutes of Canada, 1872, p. xcvii.

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On September 10th, 1883, the lands now in dispute were pre-empted by Messrs. Dunbar, Wilson and Pillmore.

On November 5th, 1883, the Dominion Government agent notified the Provincial Government of the final adoption of practically the present line of railway, and requested the placing of a reserve on the lands within 20 miles on either side of such lines.

On November 29th, 1883, a notiee, reserving such belt, was published in the B. C. *Gazette.*

By 47 Vic. cap. 14 (B.C.), passed 19th December, 1883, the "First Settlement Act" was repealed, and the Province, among other things, granted to the Dominion the lands along the line of railway, "whenever it may be finally located, to a width of 20 miles on either side of the said line, as provided in the Order in Council, section 11, admitting the Province of British Columbia into Confederation." The same arrangement was made as in the "First Settlement Act," respecting lands in the belt theretofore alienated.

By 45 Vic., cap. 6 (D), the Dominion Parliament, on the 19th April, 1884, ratified the above settlement.

On 16th January, 1885, the line or the portion thereof which affected these lands was finally located and the lands which passed by the "Second Settlement Act," would be capable of being ascertained.

On August 29th, 1885, Dunbar and associates abandoned their pre-emption in favour of the respondents, who on the same date received a pre-emption record from the Provincial Government land agent.

On July 31st, 1889, a grant under the great seal of the province was issued to respondents.

Hogg Q.C. for appellant contended :—

(1.) That the Dominion, upon the abandonment or cancellation of a pre-emption of land within the railway belt, is entitled to the lands, although the same

were held under pre-emption right at the time of the statutory conveyance of the belt by the province.

(2.) That Dunbar and his associates did not hold these lands under pre-emption right within the meaning of the terms of union, and cited and referred to *Queen* v. *Farwell* (1); 11th paragraph terms of union, 1871 (2).

Dalton McCarthy Q.C. for the respondent. The lands which were held under pre-emption right at the time of the statutory conveyance, were as much excepted from its operation as if they had been described by metes and bounds. The same argument, which would establish the right of the Dominion to these lands upon the abandonment of the pre-emption, would also give to the Dominion the right to the ultimate reversion of lands within the belt, which were at the same time "held by crown grant," and this is not tenable. *Mercer* v. *The Attorney General of Ontario* (3).

Moreover, the province has given for every acre held under pre-emption right at the time of the statutory conveyance a corresponding acre in the Peace River country, and the Dominion has no more interest in the subsequent dealings with such land than the province has in the disposal of the equivalent parcel in the Peace River district.

These lands were not included in the reserve of the 29th November, 1883, for the authority for making such reserve was section 60 of the Land Act, 1875 (1875, cap. 5), which authorizes the reserve of "any lands not lawfully held by record, pre-emption, purchase, lease or crown grant, for the purpose of conveying the same to the Dominion Government in trust, * * for railway purposes, as mentioned in article 11 of the terms of union."

(1) 14 Can. S.C.R. 392. (2) 47 Vic. ch. 14, sec. 7 (B.C.)
(3) 8 App. Cas. 767.

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The second contention of appellants, viz., that the Dunbar pre-emption was not a valid method of holding lands under pre-emption right, within the meaning of the terms of union, seems to be founded on a change in the terminology of the land laws. It is attempted to construe the words "held under pre-emption right," in the light of the amended land law existing in 1885, instead of in the light of "The Land Act, 1870," which alone was in existence when the terms of union were drawn up. At that time almost all the province was unsurveyed, it was sold by public auction with an upset price—Land Act, 1870, sec. 44; Revised Laws, 1871, cap. 144.

By the "Land Act, 1875" (1875, cap. 5), this policy was changed, and both surveyed and unsurveyed lands were open to pre-emption, and the only material difference in the provisions was the necessary regulations provided for survey. For distinction's sake the proceedings relating to acquiring unsurveyed land were called "recording," and surveyed lands "pre-empting."

The settler had the privilege in the case of either class of land, upon performance of the statutory conditions, to acquire the title to his lot and this is the essence of pre-emption.

The following were cited and relied on :—

Anderson's Law Dictionary (1); *Dillingham* v. *Fisher* (2); *Hosmer* v. *Wallace* (3); *Sioux City Land Co.* v. *Griffey* (4); *Hastings and Dakota Railroad Co.* v. *Whitney* (5); *Kansas Pacific Railroad Co.* v. *Dunmeyer* (6).

THE CHIEF JUSTICE.—I am of opinion that this appeal should be dismissed with costs for the reasons given in the judgment of Mr. Justice Gwynne.

(1) P. 800, title "Pre-emption" and "Pre-emption Claimant."
(2) 5 Wis. 475.
(3) 97 U.S.R. 575.
(4) 143 U.S.R. 32.
(5) 132 U.S. R. 357.
(6) 113 U.S. R. 629.

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FOURNIER and TASCHEREAU JJ.—Were also of the same opinion.

GWYNNE J.—This appeal must be dismissed with costs. It cannot I think be doubted that the lands covered by the pre-emption certificate issued by the British Columbia Government to Dunbar, Wilson and Pillmore on the 10th Sept., 1883, did not form part of the lands within what is called the Railway Belt in British Columbia, which were granted by the Government and Legislature of British Columbia in virtue of the agreement between the Governments of British Columbia and of the Dominion of Canada affirmed and approved by the British Columbia statute 47 Vic. ch. 14, passed on the 19th December, 1883, and by the Dominion statute, 47 Vic. ch. 6, passed on the 19th April, 1884, but on the contrary that the land in question, consisting of 640 acres for which such pre-emption certificate had issued, constituted part of the lands within the said Railway Belt for which, because they were not included or intended to be included in the lands within the said belt so granted to the Dominion Government, they formed part of the lands for which the lands in the Peace River District were by the same acts granted and accepted by way of compensation. The land in question therefore never in law or fact passed or was intended to pass to the Dominion Government, and consequently, there is no place for the contention that upon the original pre-emption certificate being abandoned the land reverted to Her Majesty in right of the Dominion Government. The original pre-emption ticket remained beyond all question in full force until the 29th August, 1885, when what is relied upon as its abandonment took place as follows, and as would seem, although no evidence upon the point appears to have been asked for or given, for the

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purpose of substituting, with the consent of the British Columbia Government, the appellants in the place of Dunbar and the others named in the original pre-emption certificate with their consent. On the 29th August, 1885, Dunbar, Wilson and Pillmore appeared to have attended at the Government Land Commissioners Office and expressed their willingness to abandon and abandoned their certificate, the respondents at the same time attended at the same place and applied for and received a certificate of pre-emption record issued by the Government to them in the place and stead of the certificate so abandoned by Dunbar and his associates, which was filed away in the Government office and indorsed "abandoned."

Upon the 28th September, 1892, the Government of British Columbia having been duly satisfied as required by law that the respondents had made improvements upon the land exceeding $2.50 per acre, amounting in the whole to $1,860, issued letters patent under the great seal of the province of British Columbia granting the land to them.

The verbal distinction, if any there be, between the terms "pre-empting" and "recording" the rights of actual settlers apparently indifferently used in the British Columbia statutes, has no bearing whatever in my opinion upon the question under consideration. The claim made on behalf of the Dominion Government to the land in question appears to me to be utterly devoid of foundation.

KING J.—Concurred.

Appeal dismissed with costs.

Solicitors for appellant: *O'Connor & Hogg.*

Solicitor for respondents: *A. G. Smith.*

HENRY HECHLER (DEFENDANT) ..... APPELLANT; 1893

AND *Nov. 21, 27.

GÉORGE E. FORSYTH (PLAINTIFF).....RESPONDENT. 1894

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA. *Feb. 20.

Debtor and creditor—Goods sold—Person to whom credit was given—Assignment in trust—Power of attorney by trustee—Authority of attorney to use principal's name—Evidence.

A., doing business under the name of J. A. & Sons, assigned all his property and effects to H. for benefit of creditors. H., by power of attorney, authorized A. to collect all moneys due his estate, etc., and to carry on the business if expedient. A. continued the business as before and in the course of it purchased goods from F. to whom on some occasions he gave notes signed "J. A. & Sons, H. trustee per A." All the goods so purchased from F. were charged in his books to J. A. & Sons, and the dealings between them after the assignment continued for five years. Finally, A. being unable to pay what was due to F. the latter brought an action against H. on notes signed as above and for the price of goods so sold to A.

Held, reversing the decision of the Supreme Court of Nova Scotia, Taschereau J. dissenting, that the evidence at the trial of the action clearly showed that the credit for the goods sold was given to A. and not to H.; that A. did not carry on the business after the assignment at the instance or as the agent of H. nor for the benefit of his estate; that A. was not authorized to sign H.'s name to notes as he did; and that H. was not liable either as the person to whom credit was given or as an undisclosed principal.

Held further, that if H. was guilty of a breach of trust in allowing A. full control over the estate that would not make him liable to F. in this action.

APPEAL from a decision of the Supreme Court of Nova Scotia affirming the judgment at the trial in favour of the plaintiff.

One James Allen carried on business in Halifax under the firm name of John Allen & Sons and being

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unable to meet his engagements assigned all his estate and effects to his brother-in-law, the defendant Hechler, in trust for the benefit of his creditors. Hechler after the assignment gave to Allen a power of attorney authorizing him, among other things, "to sign, draw, make and indorse my name as such trustee as aforesaid to any cheques or orders for the payment of money, bill or bills of exchange, or note or notes of hand, in which I am or shall be interested or concerned as such trustee as aforesaid and which shall be requisite." The trust deed provided that the trustee might employ Allen to carry on the trade if thought expedient.

Allen continued after the assignment to carry on the business as before and in doing so continued to purchase goods from the plaintiff, giving him in some instances promissory notes signed "John Allen & Sons, Hechler trustee, per James Allen." This went on for five years when, Allen having again become embarrassed and unable to meet his engagements, the plaintiff brought an action against Hechler on notes signed as above and for the price of goods sold to Allen.

The facts of the case are more fully stated in the judgment of the court delivered by Mr. Justice Sedgewick, who also sets out the material part of the evidence at the trial.

An action had been brought in the county court by one Anderson who had also sold goods to Allen after the assignment against Allen and Hechler, in which the Supreme Court of Nova Scotia, on appeal from the judgment in the county court, had held Hechler liable (1). On the trial of the present action judgment was given against Hechler, the trial judge holding that the case was governed by the decision in the county court action.

(1) 25 N. S. Rep. 22.

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Borden Q.C., for the appellant referred to *Smethurst* v. *Mitchell* (1); *Scarf* v. *Jardine* (2); Evans on Agency (3).

Harrington Q.C., for the respondent cited *Watteau* v. *Fenwick* (4), as stating the law as to an undisclosed principal.

The judgment of the majority of the court was delivered by:

SEDGEWICK J.—On the 2nd of January, 1886, the firm of John Allen & Sons, composed of one James Allen only, being in financial difficulties made an assignment of its estate to the appellant Henry Hechler upon the trusts usual in such cases. It was by the assignment declared that the trustee Hechler might employ Allen or any other person in carrying out the trusts, and in carrying on the trade if thought expedient, and to pay Allen if thought expedient out of the trust moneys any sum not exceeding $100 per month. On the following day Hechler, by power of attorney, appointed Allen his attorney, giving him authority "to sign, draw, make and indorse his name as such trustee as aforesaid, to any cheque or cheques, or orders for the payment of money, bill or bills of exchange, or note or notes of hand, in which he was or should be interested and which should be requisite." These two instruments were filed with the registrar of deeds in the city of Halifax where the business was carried on. It would appear that upon the execution of the assignment and power of attorney, Hechler, the trustee, left the whole conduct of affairs to James Allen, assignor, and that for several years afterwards, in fact until he was threatened with legal proceedings, he never in any way examined into the condition of the

(1) 1 E. & E. 622.
(2) 7 App. Cas. 345.
(3) 2 ed. pp. 179-182.
(4) [1893] 1 Q. B. 346.

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estate, or ascertained to what extent Allen, as his attorney, had administered the estate. In fact I infer from the evidence that previous to the assignment in question the firm of John Allen & Sons, being insolvent, were being sued, and the assignment was made with a view of preventing the institution of further legal proceedings, and that Hechler (who was Allen's brother-in-law) permitted his name to be used as trustee, trusting to Allen's honesty in his faithfully administering the trust, and practically giving himself no concern about the matter. Up to the time of the commencement of this suit the estate had never been wound up nor, so far as appears, had any creditor interested in the trust found fault in any way with Hechler's administration of it.

At the time of the assignment the plaintiff, George E. Forsyth, a wholesale supply merchant in Halifax, was a creditor of Allen in the sum of $100. After the assignment it would seem that Allen continued carrying on business of the same character in the same place and under the same firm name as previously. When the assignment was made, according to the testimony of the plaintiff's chief clerk, Allen promised to pay him the $100 in full and the account was "carried over" from the date of the assignment in 1886 and charged in the usual way to the Allen firm. The plaintiff continued until September, 1891, more than five years, to sell goods to the firm of John Allen & Sons in the ordinary way, these goods for the most part being delivered upon orders signed by the Allen firm and charged in the plaintiff's account books to that firm without reference of any kind to the trustee Hechler. According to the evidence of the plaintiff's book-keeper the plaintiff never read or saw the power of attorney above referred to and could not tell when first he knew of its existence. Until about the commencement of these proceedings the defendant Hechler

never received any account from the plaintiff nor did he ever receive any intimation from him that he was considered as liable in connection with any of Allen's transactions subsequent to the date of the assignment. The original debt of $100 was paid by Allen as agreed shortly after the assignment, so that the transactions in question in this suit are all transactions subsequent to the date of the assignment. It would appear that sometime thereafter Allen began giving notes to the plaintiff, not in connection with any specific purchase of goods but generally in connection with his indebtedness. These notes were signed as follows:—"John Allen & Sons, Henry Hechler, trustee, per James Allen;" and it is upon one of these notes so signed, and for the price of goods sold and delivered, that this action is brought.

Two questions only, I think, arise upon this appeal First, to whom was credit given, Allen or Hechler? Secondly, did Allen in the dealings in question act as the agent of Hechler or did he act on his own account? In reference to the first question I am of opinion that the plaintiff gave credit to Allen only. There is not a scintilla of evidence to show the contrary, the evidence in my view conclusively demonstrating that Forsyth contracted with Allen alone. The plaintiff himself did not give any evidence at the trial, nor is his absence in any way accounted for. It is, I suppose, upon the testimony of James Billman, his chief clerk, that he relies in order to make out a case against Hechler; yet he testifies that "the account before the trust was charged against John Allen & Sons; about $100 then due. It was carried over. Allen promised to pay in full and it was just carried on; the account was continued with the same heading, John Allen & Sons, after the trust deed." I can gather no idea from the phrases "carried over" and "carried on" except that of con-

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tinuing the same kind of business between the same parties. There is not even a suggestion by Billman that Hechler was in any way responsible for purchases subsequent to the trust deed. It is true that in one case Billman thinks he sent an account to Hechler, but Hechler testifies that he never received it and I think it extremely doubtful if he did. It must have been present to the minds of both Forsyth and Allen when the promise to pay in full was made that Allen was to continue to carry on business. He had divested himself of all his property. It was understood that subsequent to the assignment there was to be a continuance of their old dealings, and as a matter of fact these old dealings did continue in precisely the same old way for more than five years when it appears Allen again got into difficulties, and then, for the first time, Hechler was sought to be made liable for Allen's account. In addition to these facts there is the undisputed evidence of Allen himself, and of his chief clerk, that Hechler had no connection whatever with any dealings in question after the assignment. So much in regard to the first question.

It might be, however, that even although the plaintiff gave credit to Allen alone yet, if as a matter of fact Allen was acting throughout as the agent of Hechler in carrying on the business for the benefit of the trust estate, Hechler would, under such circumstances, be liable as an undisclosed principal for the claim in question. In my view, however, the evidence does not point to any such conclusion. It is true that under the assignment the trustee had power, at his own discretion, to employ Allen or any other person in carrying on the trade if thought expedient, and to pay Allen a salary for that purpose. The onus of showing, first, that it was thought expedient to carry on the trade for the benefit of the trust, and secondly, that Allen was

employed by Hechler for the purpose of carrying on that trade, is on the plaintiff. He has, of course, proved that Allen did carry on that business, but has signally failed in proving that he carried it on either at the instance and as the agent of Hechler or for the benefit of his estate. The sworn testimony is undisputably the other way. That testimony it is sought to overcome by inferences of the most doubtful and ambiguous character. It must be borne in mind that Allen's status, his right to trade, to buy and sell, his capacity to contract on his own account and for his own benefit, remained precisely the same after as before the assignment. His was not the position of an undischarged bankrupt or insolvent. Had that been his position there might have been some ground for the inference that he was carrying the business on as an agent and for the benefit of his estate, but I myself am at a loss to understand how that inference can be drawn from the facts in the present case. Hechler himself swears that he never authorized Allen to purchase goods; that he never received anything out of the estate or any profits from the business; that although he knew he was doing business of some kind (as I suppose every person in business in Halifax knew as well), he did not know what business he was doing; that he seldom went there, even although he was his brother-in-law, and that he never looked at the books until 1891, after proceedings seeking to make him liable for Allen's subsequent debts were instituted against him. All this evidence is corroborated by the testimony of Allen and Russell, his book-keeper, and there is not any evidence whatever pointing in a contrary direction except the giving of notes signed by Allen in Hechler's name. It would seem that some time after the assignment—it does not appear how long after, it may have been years—Allen began to give notes to Forsyth, signed as

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above mentioned. These notes, as I have stated, were signed in the manner indicated above by Allen himself without the knowledge or special authority of Hechler. In order to make Hechler liable upon them it was necessary to show agency or authority. The only authority, apart from inference, was the power of attorney put in evidence; that power of attorney authorized Allen to sign Hechler's name, as trustee of his estate, to any notes of hand in which Hechler was interested or concerned as trustee. If, as a matter of fact, the business was not being carried on by Hechler, then he was neither interested nor concerned as trustee in these notes, and Allen was acting in bad faith, to say the least of it, in signing them. The evidence, as I have shown, is all the other way. Forsyth never made any inquiries in regard to Allen's authority, wanting, I suppose, to use the notes, as it would appear from the evidence he did for the purposes of discount. The question of liability on these notes depends altogether upon the question: Was the business being carried on by Allen, on Hechler's account, for the benefit of his estate? If so then Hechler was liable, if otherwise he was not liable. I have unhesitatingly come to the conclusion that the business was Allen's alone; Hechler's liability upon the notes, therefore, has not been established.

It would appear that in the case of *Anderson* v. *Allen* before the Supreme Court of Nova Scotia, on appeal from the County Court, the court held, under circumstances similar to those in the present case, that Hechler was liable. I understand that it was solely in consequence of that ruling that Mr. Justice Graham, the trial judge, here decided the case in favour of the plaintiff. I regret that I have not had the benefit of a perusal of the judgment of the appeal court in that

case, no public report of it having as yet reached me (1).

I entirely concur in the opinion of Mr. Justice Townshend in this case. I wish to add, that the question here is not whether any breach of trust has been committed by Hechler ; he may in that event be called upon to account and make good the consequences of his confidence in Allen (his brother-in-law.) By no process of reasoning known to me can I conclude that for such failure of duty he is to be made responsible for all debts which Allen may happen to have contracted after he took upon himself the trust in question.

In my view the appeal should be allowed with costs and judgment should be entered for the defendant Hechler with all his costs in the cause, including the costs of the appeal to the Supreme Court of Nova Scotia.

TASCHEREAU J.—This appeal involves nothing but a question of fact namely, to whom was credit given ? I do not think that the appellant has made the clear case necessary to justify our interfering with the finding of the trial judge, approved of as it has been by the court in *banco*. I would dismiss the appeal.

Appeal allowed with costs.

Solicitor for appellant: *Fred. T. Tremaine.*

Solicitor for respondent : *John M. Chisholm.*

(1) Since reported in 25 N. S. Rep. 22.

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THE GRAND TRUNK RAILWAY COMPANY OF CANADA (DEFENDANTS) ..... APPELLANTS;

AND

JOHN A. BEAVER (PLAINTIFF) .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Railway Co.—Passenger—Purchase of ticket by—Production of ticket to conductor—Refusal to produce—Ejectment from train—Liability of company—General Railway Act, 51 *Vic. c.* 29 (*D*), *secs.* 247 *and* 248.

By sec. 248 of the General Railway Act (51 V. c. 29), any passenger on a railway train who refuses to pay his fare may be put off the train.

Held, reversing the decision of the Court of Appeal, Fournier J. dissenting, that the contract between the person buying a railway ticket and the company on whose line it is intended to be used implies that such ticket shall be produced and delivered up to the conductor of the train on which such person travels, and if he is put off a train for refusing or being unable so to produce and deliver it up the company is not liable to an action for such ejectment.

APPEAL from a decision of the Court of Appeal for Ontario (1) affirming the judgment of the Queen's Bench Division (2) in favour of the plaintiff.

The only question to be decided by this appeal, is whether or not a passenger on a railway train who has purchased a ticket, but has lost or mislaid it, can be lawfully put off the train under the provisions of the Railway Acts of Canada and the act of incorporation of the Grand Trunk Railway Co. for refusing to produce and deliver up such ticket to the conductor. The Court of Appeal affirmed the decision of the Divisional

*PRESENT:—Fournier, Taschereau, Gwynne, Sedgewick and King JJ.

(1) 20 Ont. App. R. 476. (2) 22 O.R. 667.

Court which maintained the passenger's right of action for being ejected.

The facts of the case and the statutes are set out in the judgment of Mr. Justice Gwynne.

McCarthy Q.C. and *Nesbitt* for the appellants. In construing an act of Parliament its scope and the purposes for which it was passed are to be considered; *In re Anglesea Colliery Co.* (1); and if these defendants are liable sec. 248 of the Railway Act could not operate.

The American decisions are strongly against the plaintiff. *Chicago and Alton Railroad Co.* v. *Willard* (2); *Hibbard* v. *New York and Erie Railroad Co.* (3); *Crawford* v. *Cincinnati, etc., Railroad Co.* (4). And see *Duke* v. *The Great Western Railway Co.* (5).

DuVernet for the respondent. The defendants contracted to carry the plaintiff to Caledonia and have failed to fulfil their contract. See *Butler* v. *The Manchester, etc., Railway Co.* (6), on which the Court of Appeal relied; *Henderson* v. *Stevenson* (7); *Maples* v. *New York, etc., Railroad Co.* (8); *The Queen* v. *Caister* (9).

As to the liability of the defendants for the conductor's acts see Ferguson on Rights and Duties of Railways (10).

McCarthy Q.C. in reply. In *Butler* v. *Manchester, etc., Railway Co.* (6) the only penalty for not producing a ticket was payment of fare from the nearest station, and the conductor ejected the passenger. That case is distinguishable from this where the statute expressly authorizes ejectment.

(1) 1 Ch. App. 559.
(2) 31 Ill. App. R. 435.
(3) 15 N.Y. 455.
(4) 26 Ohio 580.
(5) 14 U.C.Q.B. 369.
(6) 21 Q.B.D. 207.
(7) L.R. 2 Sc. App. 470.
(8) 38 Conn. 557.
(9) 30 U.C.Q.B. 247.
(10) P. 201.

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Taschereau J.

FOURNIER J.—I am of opinion that this appeal should be dismissed.

TASCHEREAU J.—I would allow this appeal for the reasons given by Osler J. in his dissenting opinion. The following United States cases support that view of the case:—

Chicago & Alton Railroad Company v. *Willard* (1). The Illinois statute provides "that if any passenger on any railroad, car or train shall refuse upon reasonable demand to pay his fare, or shall etc. (relating to disorderly conduct) it shall be lawful for the conductor of the train to remove or cause to be removed such passenger from the train." In this case, the facts were almost identical with those in the present.

In *Hibbard* v. *New York and Erie Railroad Co.* (2) it was held that a passenger who had once exhibited his ticket and refused to do so again when requested by the conductor might be put off the train.

In *Crawford* v. *The Cincinnati Hamilton and Drayton Railroad Co.* (3) it was held that the purchaser of a non-transferable commutation ticket who had lost it, and refused on account of such loss to pay his fare upon the train, could not maintain an action of tort against the company to recover damages for being ejected by the conductor in compliance with a rule requiring him to do so in case of non-production of a ticket and refusal to pay fare.

To the same effect is *Shelton* v. *The Lake Shore and Michigan Southern Railway Co.* (4).

Also *Louisville and Nashville Railroad Co.* v. *Fleming* (5). The court in its judgment quotes from and adopts the language used in *Frederick* v. *Marquette, etc., Railroad Co.* (6):

(1) 31 Ill. App. R. 435.
(2) 15 N.Y. 455.
(3) 26 Ohio 580.
(4) 29 Ohio 214.
(5) 18 Am. & Eng. Cases 347.
(6) 37 Mich. 342.

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Taschereau J.

There is but one rule which can safely be tolerated with any decent regard to the rights of railroad companies and passengers generally. As between the conductor and passenger, and the rights of the latter to travel, the ticket produced must be conclusive evidence, and he must produce it when called upon as the evidence of his right to the seat he claims.

In *Jerome* v. *Smith* (1) Wheeler J., in delivering the judgment of the court, says at page 234:

Having lost his ticket he was called upon by the proper conductor to pay his fare. He had not any ticket or cheque to pay it with, and refused to pay it in money, consequently there was a refusal to pay it at all and the conductor rightfully expelled him from the train.

In *Haley* v. *Chicago and North-western Railway Co.* (2), where an intoxicated man was forcibly ejected from a train upon failing to show a ticket or to pay fare, and was killed, it was held that he was rightly ejected.

GWYNNE J.—This case has proceeded in the courts below upon the authority of *Butler* v. *Manchester & Sheffield Railway Co.* (3), which case, as has been ably pointed out by Mr. Justice Osler in his judgment in the Court of Appeal for Ontario, has no application in the circumstances of the present case. Judgments of the courts in England upon cases arising there upon statutes wholly different in terms from the statutes of the Dominion of Canada affecting the same subject matter cannot have any binding effect upon the courts in this country in cases arising upon the statutes in force here. In *Butler* v. *The Manchester & Sheffield Railway Co.* (3) there was no statute authorizing the conductor of a railway train to put a passenger off the train either because of non-payment of his fare to the conductor or for non-production of a ticket.

The company were empowered by statute to make by-laws for regulating their passenger traffic. They

(1) 48 Vt. 230.
(2) 21 Iowa 15.
(3) 21 Q.B. D. 207.

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did make such by-laws among which they enacted as follows :—

No passenger will be allowed to enter any carriage used on the railway unless furnished by the company with a ticket specifying the class of carriage and the stations for conveyance between which the ticket is issued.

Every passenger shall show and deliver up his ticket to any duly authorized servant of the company when required to do so for any purpose, and any passenger travelling without a ticket or failing or refusing to deliver up his ticket as aforesaid shall be required to pay the fare from the station whence the train originally started to the end of his journey.

And it was held that this by-law did not authorize the conductor to put a passenger off a train who did not produce a ticket authorizing him to travel on the train and who excused himself by the allegation that he had purchased a ticket but had lost it, for the by-law had imposed in such a state of facts an obligation only upon the passenger to pay the fare from the place whence the train had originally started to the place of his destination, and therefore that putting the passenger off the train was an actionable wrong. Now in the present case it is true that the Grand Trunk Railway Company, ever since their incorporation in 1852, have had power to make by-laws regulating the traffic on their railway; and they have done so, but there is among them no by-law in relation to the particular subject under discussion nor, as the company contend, is there any necessity for such a by-law inasmuch as their case is, as they contend, provided for by statute. As far back as 1851 the General Railway Clauses Act, 14 & 15 Vic. ch. 51 which is incorporated with the Grand Trunk Railway incorporation act, 16 Vic. ch. 37, in its 21st sec. subsec. 1, which is incorporated into the Consolidated Railway Act, 51 Vic. ch. 29, as sec. 247 of that act, enacted as follows :—

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Every servant of the undertaking employed in a passenger train or at stations for passengers shall wear upon his hat or cap a badge which shall indicate his office, and he shall not without such badge be entitled to demand or receive from any passenger any fare or ticket or to exercise any of the powers of his office, nor meddle or interfere with any passenger or his baggage or property.

And in the sixth subsection of the same sec. 21, which is incorporated as sec. 248 of the Railway Act 51 Vic. ch. 29, it was enacted that:—

Passengers refusing to pay their fare may by the conductor of the train and the servants of the company be, with their baggage, put out of the cars using no unnecessary force at any usual stopping place or near any dwelling house as the conductor shall elect, first stopping the train.

The statute law which the defendants invoke in their defence was enacted as far back as 1851 and has ever since continued in force without any alteration in its terms and must be construed now, appearing as it does *verbatim et literatim* in the Railway Act of 1888 sections 247 and 248, precisely as it would have been construed immediately after the first passing of the act in 1851, that is to say, having regard to the circumstances and condition of the country and the ordinary practice of railway companies in their first institution in the province and which has continued to the present day in relation to the collection of the fares of passengers travelling on railways—the practice being for passengers to pay their fares to the conductors on the trains either in money or by handing to him a ticket purchased by the passenger before entering the train. In modern times the purchasing tickets before entering the train is more general than it formerly was but it is still quite optional with passengers to purchase a ticket for the purpose of being delivered to the conductor on the train as and for the passenger's fare, or to pay the fare in money to the conductor. It is in relation to this state of things so existing at the time of

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the passing of the act that we must construe the provisions of the law invoked by the defendants. That law, for the security of the passenger, enacts that no person on a passenger train shall be entitled to receive or demand from any passenger any fare, or ticket, unless he shall wear a badge indicating his office. This section plainly implies a dealing by the legislature with a practice well known to exist of the companies, through some servant of theirs, collecting upon the trains when in course of travelling on the railway the fares of passengers either in money or in tickets, if any there should be, authorizing the holder to travel on the train upon which he should produce it. Then for the protection of the companies the statute enacts that it should be lawful for the conductor of a train of cars to put off the train a passenger refusing to pay his fare. It is obvious that this refusal spoken of in the statute is a refusal to pay the fare to the conductor the person recognized by the statute as the person authorized to collect the fares of all passengers travelling upon the train of which he is conductor and who for such refusal is empowered to put the passenger off the train. Now a passenger may pay his fare to the conductor in money or in a ticket or *bon* issued by the company as "good" for the fare if used of the date for which it is issued; but to avoid being in the position of a person refusing to pay his fare to the conductor the passenger must upon demand by the conductor deliver to him either money or such a *bon* in satisfaction of his fare for being conveyed upon that train. The conductor of any passenger train is, in a plain, common sense understanding of the terms of the statute, the person responsible for the collection of the fares of all passengers upon his train and the person to be satisfied of such payment either in money or by the production of a ticket allowing the person producing it to travel on the train of which he

is the conductor. The judgment appealed from is to the effect that this is not so, but that when a railway company issues a ticket to a purchaser thereof for a passage on a particular train such ticket constitutes a contract between the purchaser and the company that the company will carry the purchaser upon such train, and that they must do so whether he produces the ticket to the conductor or not; and that in case even of his refusal to produce to the conductor or to pay his fare in money to him he cannot under the terms of the statute be put off the train but must be carried to whatever place upon the railway to which the train by which he is travelling goes that he may select as the point of his destination. In short that the conductor is a wrong doer, and the company responsible for his wrong, if he should put a passenger off his train who excuses himself for not paying the conductor his fare in money by the simple allegation that he had purchased a ticket which authorized him to travel upon the train on which he was but that he had forgotten to bring it with him—or that he had lost it—or that he had destroyed it—or that he had it in his pocket but would not produce it; such a construction would render the statute absolutely inoperative.

But let us consider what is the true nature of the contract involved in the ticket which the plaintiff had purchased, and which he had not with him, or if he had did not produce, when on the train from which he was put off.

It was upon its face declared to be:

Good only for a continuous trip from Detroit to Caledonia until October 14, 1892.

Now, construing the contract evidenced by that ticket in the language of Lord Esher in *Butler* v. *The Manchester and Sheffield Railway Co.* (1) as implying only such terms as were clearly and obviously in the contem-

(1) 21 Q. B. D. 207.

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plation of the parties, can it be doubted for a moment that both parties had in contemplation what had been the practice and user ever since the introduction of railways into Canada, without ever a doubt being entertained upon the point, namely, that the ticket was purchased by the purchaser and was issued by the company for the sole purpose of being produced to the conductor of the train upon which the purchaser should travel upon the faith of it, to be taken up by such conductor as and for the fare of the purchaser for his being carried upon such train, and upon the thorough understanding and intent that, unless so produced, it was utterly valueless and good for nothing? It was only when so produced within the period mentioned on the ticket that it was to be, or could be, good for the continuous trip also mentioned on the ticket. The contract simply was to convey the purchaser upon one continuous trip from Detroit to Caledonia (up to the 14th October, 1892) upon any train of the company travelling between those two places upon which the purchaser should travel, and when called upon for his fare should produce and deliver up the ticket to the conductor of the train as and for such fare.

No other construction of the contract is admissible, and this being the plain, sensible construction of the contract the plaintiff, upon the facts in evidence, was, when called upon for his fare by the conductor, in the same position precisely as if he had never purchased the ticket, and not having paid his fare to the conductor was, in the terms of the provision of the statute in that behalf, liable to be put off the train by him.

In 1857, in *Duke* v. *The Great Western Railway Co.* (1), a precisely similar question arose upon the pleadings under an act relating to the Great Western Railway 16 Vic. chap. 99, the twelfth section of which (the

(1) 14 U.C.Q.B. 369.

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Great Western Railway not being subject to the provisions of the general Railway Act of 1851, was similar to the above provisions extracted from 14 & 15 Vic. chap 51. The late Chief Justice Sir John B. Robinson, delivering judgment in that case, makes use of language precisely applicable to the present case. He says there:

> Mrs. Duke had paid for a ticket, and got it. Yet we must know what every one else knows, that still, after such payment, each passenger has to account for his passage to the conductor, in effect to pay him, for the company does not know to what person by name tickets are issued, nor does the officer that issues them at the station know. He only exchanges tickets for money without any reference to the person paying, and the system can only be carried out so as to prevent fraud by its being considered that the reckoning between the individual and the company takes place when the conductor goes round and receives payment from every person he sees there, taking money from those who have no ticket, and receiving tickets as money from those who have procured them by paying at the station.

This practical common sense understanding of the statute, as here expressed, has never been questioned, that I am aware of, until the decision in the present case now under consideration in appeal. It was doubtless in view of the facts and circumstances above treated by the learned chief justice, as being in the knowledge of every one, that the sections extracted from 14 & 15 Vic. chap. 51 were enacted, and were re-enacted in 22 Vic. chap. 66, secs. 95 and 106; and again in the Railway Act of 1868, 31 Vic., chap. 68, sec. 20, subsecs. 1 and 12; and again in the Railway Act of 1879, 42 Vic. chap. 9, sec. 25, subsecs. 1 and 12; and again, in 1886, in chap. 109 of the Revised Statutes of Canada, sec. 25, subsecs. 1 and 12; and again, lastly, in 1888, in 51 Vic. ch. 29 sections 247 and 248. In the courts of the United States where the practice as to the mode of issuing and collecting tickets in payment of fares is identical with that existing in Canada the law is laid

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down in the same manner. In one of them, *Frederick* v. *The Marquette Railroad Co.* (1), the court pronouncing judgment say :—

It is within the common knowledge and experience of all travellers that the uniform and perhaps the universal practice is for all railroad companies to issue tickets to passengers with the places designated thereon from whence and to which the passenger is to be carried—and that these tickets are presented to the conductor or person in charge of the train and that he unhesitatingly accepts such tickets.

And again :—

There of course will be cases where a passenger who has lost his ticket, or where through mistake a wrong ticket has been issued to him, will be obliged to pay his fare a second time.

And again :—

There is but one rule which can safely be tolerated with any decent regard to the rights of railroad companies and passengers generally. As between the conductor and passenger and the right of the latter to travel the ticket produced must be conclusive evidence and he must produce it when called upon as the evidence of his right to the seat he claims.

In the acts of the state of New York 1850, ch. 140 section 35, is a provision in language so identical with that of subsection 6 of section 21 of 14 & 15 Vic. ch. 51 that the latter seems to have been taken from the former. And in *Willets* v. *The Buffalo and Rochester Railroad Co.* (2), the Supreme Court of the state of New York, with reference to that statute, say :—

It is however argued that as the fare has been paid to Buffalo the act of the conductor cannot be justified (for putting off the train before reaching Buffalo a passenger who neither produced a ticket or paid the fare in money). Our attention has been directed to a provision of the general railroad act of 1850 which makes it lawful for a conductor if a passenger refuses to pay his fare to put him and his baggage off the cars.

And again :—

Can it be maintained that the company and its servants are bound to know whether the particular individual has paid his fare? This under the present mode of travelling would be impossible.

(1) 37 Mich. 343. (2) 14 Barb. 590.

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In another case *Townsend* v. *The New York Central Railroad Co.* (1), it was held by the Court of Appeal for the state of New York that the conductor of a train is not bound to take the word of a passenger that he had purchased a ticket showing his right to a passage on that train. Indeed it stands to reason and common sense that nothing but the production of a ticket to the conductor on the train upon which a passenger is travelling will fulfil the purpose for which the ticket was issued, namely, to be delivered up to the conductor of the train which the passenger enters to be carried upon the faith of his ticket which when so produced operates as a payment to the conductor of the passenger's fare for his being carried on that train.

The only question in the present case is whether the facts in evidence bring the case within the purview of the statute which has equal, if not greater, binding effect than a by-law, rule or regulation of the company in like terms would have, and for the reasons given I am of opinion, both upon principle and authority, that they do, and that therefore the appeal should be allowed with costs and the judgment of Mr. Justice Rose restored.

SEDGEWICK and KING JJ. concurred.

Appeal allowed with costs.

Solicitor for appellants: *John Bell.*

Solicitor for respondent: *V. Mackenzie.*

(1) 56 N.Y. 295.

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S. R. CLARK (DEFENDANT)..... .....APPELLANT;

AND

ELIZA HAGAR (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Conveyance—Illegal or immoral consideration—Intention of grantor—Character of grantee—Pleading.

Under the judicature Act of Ontario an action for foreclosure is not to be regarded as including a right to recover possession of the mortgage premises as in ejectment, and the rule that in such action the plaintiff may obtain an order for delivery of possession does not apply to a case in which the mortgage sought to be foreclosed is held void and plaintiff claims title as original owner and vendor.

Under said Judicature Act, as formerly, the plea to an action on a contract that it was entered into for an immoral or illegal consideration must set out the particular facts relied upon as establishing such consideration.

Quære: Can the purchaser of the equity of redemption set up such defence as against a mortgagee seeking to foreclose or is the defence confined to the immediate parties to the contract?

A contract for transfer of property with intent by the transferor, and for the purpose, that it shall be applied by the transferee to the accomplishment of an illegal or immoral purpose is void and cannot be enforced; but mere knowledge of the transferor of the intention of the transferee so to apply it will not avoid the contract unless, from the particular nature of the property, and the character and occupation of the transferee, a just inference can be drawn that the transferor must also have so intended. Judgment of the Court of Appeal affirmed, Taschereau J. dissenting.

APPEAL from a decision of the Court of Appeal for Ontario affirming the judgment of the Divisional Court in favour of the plaintiff.

The material facts of this case are fully set out in the judgment of the court and may be summarized as follows :—

*PRESENT :—Fournier, Taschereau, Gwynne, Sedgewick and King JJ.

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The plaintiff, Hagar, had sold a house to one Jennie O'Neill who was, to the knowledge of the plaintiff, a prostitute. A mortgage was given for part of the purchase money and plaintiff brought an action against said O'Neill and the defendant Clarke to whom the equity of redemption had been conveyed to foreclose it. At the trial defendants did not appear and judgment for possession of the land was given against them. Clarke then applied for and obtained a new trial on affidavits showing that part of the purchase money on the sale to O'Neill was for the good will of the house as a house of ill-fame and he claimed, therefore, that the mortgage was void to the extent of such immoral consideration. The present appeal was from a decision of the Court of Appeal holding the mortgage valid.

Clarke, appellant in person. The courts will not aid the enforcement of an immoral or illegal contract. *Harris* v. *Fontaine* (1); *Furlong* v. *Russell* (2); *Smith* v. *Benton* (3); *Peoples Bank* v. *Johnson* (4).

As to the right to plead illegality not appearing on the face of an instrument see *Collins* v. *Blantern* (5); *Bonisteel* v. *Saylor* (6); *Jones* v. *Merionethshire Building Soc.* (7).

The appellant referred also to *Windhill Local Board* v. *Vint* (8); *Sprott* v. *United States* (9); *Hanauer* v. *Doane* (10).

Armour Q.C. for the respondent. The acts constituting illegality should be set out in the defence. *In re Vallance* (11): *Gray* v. *Mathias* (12); *Hall* v. *Palmer* (13); *Waugh* v. *Morris* (14).

(1) 13 L. C. Jur. 336.
(2) 24 N.B. Rep. 478.
(3) 20 O. R. 344.
(4) 20 Can. S. C. R. 541.
(5) 1 Sm. L. C. 9 ed. 398.
(6) 17 Ont. App. R. 505.
(7) [1891] 2 Ch. 587; [1892] 1 Ch. 173.
(8) 45 Ch. D. 351.
(9) 20 Wall. 459.
(10) 12 Wall. 342.
(11) 26 Ch. D. 353.
(12) 5 Ves. 286.
(13) 3 Hare 532.
(14) L. R. 8 Q. B. 202.

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On the merits the learned counsel referred to *Taylor* v. *Bowers* (1); *Roberts* v. *Roberts* (2); *Pawson* v. *Brown* (3).

The judgment of the majority of the court was delivered by:

GWYNNE J.—This is an action for foreclosure of a mortgage instituted by the mortgagee against the mortgagor and the appellant, to whom the mortgagor sold and conveyed the premises, subject, however, expressly to the mortgage and to payment of the moneys thereby secured. The plaintiff, having at the trial waived all relief against the mortgagor, we may, under the circumstances, treat the appellant, who is solely seized of the equity of redemption, as the sole defendant. In his statement of defence he alleged that the consideration for the execution of the mortgage was illegal and immoral, and that therefore the mortgage was void and of none effect. To this the plaintiff replied, denying what was so alleged, and saying that if it should be found that the consideration was illegal the mortgagor was a party thereto, and that neither she nor the appellant, her grantee of the premises, could set up such a defence to plaintiff's claim. The case came down for trial in October, 1890, when the defendant applied for a postponement of the trial, upon grounds which did not appear to the learned trial judge to be sufficient. Thereupon the case proceeded, and no defence being offered judgment for foreclosure of the mortgage, as prayed by the plaintiff's statement of claim, was rendered for the plaintiff. Subsequently a motion for a new trial was made to the Chancery Division of the High Court of Justice, founded upon affidavits of the mortgagor and the appellant, to the

(1) 1 Q. B. D. 291.
(2) 2 B. & Ald. 367.
(3) 13 Ch. D. 202.

effect in substance that the mortgage was executed to secure payment of part of the purchase money of a dwelling house purchased from the mortgagee by the mortgagor, who was, as the mortgagee well knew, a prostitute, and that $2,000 of the purchase money for the house was in the contract of purchase and sale estimated as the value of the house as a house of prostitution, for the good-will, as it is called, of the house as a house used for purposes of prostitution. Upon these affidavits the court made an order that upon payment by the defendant to the plaintiff, on or before the 27th of February then next, of the full amount found due for debt, interest and costs by the judgment for foreclosure rendered in the action, less the interest not then yet accrued, and less the sum of $2,000 of principal money and the interest thereon, together with the costs of the motion to set aside the judgment, the judgment should be set aside, and the court thereby further adjudged that upon the said 27th of February there would be due to the plaintiff for balance of principal money $1,625, and for balance of interest $140.17, and for taxed costs up to judgment $206.02, and for subsequent costs $115.39, amounting together to $2,086.58, and the court did further order that upon payment of that sum to the plaintiff, on or before the said 27th day of February, the plaintiff should execute and deliver to the defendant a release of the mortgage, save as to the amount of $2,000, for principal and interest thereon from the 5th December, 1889, and the court did further order that upon such payment being made then a new trial should be had, and that in default of such payment the motion to set aside the judgment for foreclosure should be dismissed. Upon this order being made the now appellant paid the said sum of $2,086.58 in pursuance of the order, and the case came down again for trial in April, 1891, before Street

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J., when the mortgage was put in, and its execution being admitted the plaintiff's case closed, whereupon counsel for the defence opened the defence as follows, as stated in the appeal case as presented to us:—

> The contention (he said) is that this mortgage was given as part of the purchase money of the house No. 32 Albert St., Toronto. As a defence to this action the defendants set up that the house was bought to the knowledge of the plaintiff by the mortgagor for the purpose of carrying on a house of ill-fame—that part of the consideration was the good-will of the place as a house of ill-fame and therefore being an illegal consideration the plaintiff cannot recover. The amount paid is the full value of the place at the time it was bought and we say the amount in dispute now, $2,000, was for the good-will of the place.

This latter is the special point for the purpose of establishing which the new trial was granted to the defendant, and after hearing all the evidence offered in support of this contention the learned trial judge set aside the evidence of the mortgagor as not worthy of belief when wholly unsupported by other evidence as he found it to be, and the learned judge found as a matter of fact that the market value of the house at the time of the sale was at least $5,000 at which sum it could readily have been sold to other persons, and that the character of the house formed no element in the consideration paid for it and that nothing took place to induce the belief that the purpose of the sale was other than that of turning $5,000 worth of land into that sum of money, and accordingly he rendered judgment for foreclosure in favour of the plaintiff. Against this judgment the appellant appealed, and the judgment having been maintained in the Ontario Courts the case comes before us upon appeal from the judgment of the Court of Appeal for Ontario.

Before entering into the case of the appellant, who argued his appeal in person, it will be convenient here to notice certain objections taken by the learned counsel for the plaintiff which if well founded go

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to the root of the right of the appellant to be heard at all upon his appeal. His contention is that since the Administration of Justice Act of 1873, whereby the courts of law and equity were made auxiliary to each other, an action instituted as the present was against the mortgagor and the appellant as purchaser of the mortgaged premises subject to the mortgage had a threefold aspect, and was to be regarded as three separate actions, namely, besides being an action for foreclosure of the mortgage that it was at the same time an action against the mortgagor upon the covenant in the mortgage to pay the mortgage money and as against the appellant an action in the nature of ejectment for recovery simply of possession of the land mortgaged; but neither in the act of 1873 nor in the Ontario Judicature Act, nor in the rules passed by the judges under the authority of that act can I find anything in support of the contention. But on the contrary, rule 341 of the Supreme Court of Judicature puts the question beyond all doubt if any could exist. By that rule, which has the force of an act of the legislature, it is enacted that: No cause of action shall unless by a leave of a court or a judge be joined with an action for the recovery of land except a claim in respect of mesne profits or arrears of rent or double value in respect of the premises claimed or any part thereof and damages for breach of any contract under which the same or any part thereof is held, or for any wrong or injury to the property claimed. And although it is by subsec. (*a*), of that rule declared that the rule should not prevent a plaintiff in an action for foreclosure or redemption from asking for and obtaining judgment or an order against the defendant for delivery of possession of the mortgaged premises to the plaintiff, either forthwith, or on or after a final order for foreclosure or redemption, yet it is there expressly

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provided that such an action should not be deemed to be an action for the recovery of land within the meaning of the rule. Since the Judicature Act all the courts, no doubt, administer legal and equitable principles in all suits properly framed for the purpose, but the act countenances no such confusion of remedies and principles as the form of action in triplicate suggested would introduce. There are some observations of Lord Justice Cotton in *Clements* v. *Matthews*, (1) and *Joseph* v. *Lyons* (2) pertinent upon this point. In those cases it was decided that neither detinue nor an action for conversion would lie for the recovery of chattels acquired by a mortgagor after the execution of a chattel mortgage which professed in express terms to pass to the mortgagee after acquired chattels although, as decided in *Holroyd* v. *Marshall* (3), equity does give relief in such a case upon a suit properly framed. In the former of the above cases the Lord Justice said :—

> It is true that every court now administers and deals with the rights of parties having regard to law and equity but the legal position and the equitable position are still different and distinct.

And in the latter he says :—

> It was not intended that legal and equitable interests should be identical but that the court should administer both legal and equitable principles.

Such principles being those applicable to the case as framed.

The purpose for which the contention was made was in order to open to the plaintiff this further contention made by her learned counsel, viz. :—that although the plaintiff should fail in obtaining judgment for foreclosure of the mortgage upon the ground that the mortgage was void by reason of illegality in the consideration for which it was executed, still that she might and

(1) 11 Q. B. D. 814. (2) 15 Q. B. D. 286.
(3) 10 H. L. Cas. 191.

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should have in the action so failing a judgment to recover, as in ejectment, possession of the land comprised in the mortgage so adjudged to be void. This contention is rested upon the judgment in *Doe d. Roberts* v. *Roberts* (1), but obtains no support whatever from that judgment which as relied upon in the argument seems to me to have been misunderstood. That action was instituted in pursuance of an order of the Court of Equity Exchequer in *Roberts* v. *Roberts* (2). The bill there was filed by the devisee of one George Roberts for the purpose of setting aside a deed executed by the testator to the defendant and for a re-conveyance of the premises thereby demised. The deed was alleged in the bill to have been executed to the defendant for the consideration expressed therein of natural love and affection, but that it was in truth executed upon the express promise and assurance of the defendant that the deed when executed should be merely nominal and that as to any beneficial interest in the property the defendant would be a mere trustee of the testator. The bill then alleged that on the execution of the deed the testator delivered it to the defendant and though it had ever since been in his possession yet the testator retained all the title deeds and other writings relating to the property in his own possession, and that neither the defendant nor any other person had ever made use of the deed, nor was the defendant ever in occupation of any part of the property, nor did he in any way derive any advantage from the conveyance, the testator having continued in possession until the time of his death. The defendant in his answer alleged that being for many years much addicted to field sports and not being qualified to kill game he had been threatened with prosecutions, and that he therefore applied to the testator, who was his

(1) 2 B. & Ald. 367. (2) Daniel Eq. Ex. 143.

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brother of the half blood, to qualify him which the testator agreed to do, and for that purpose executed the deed mentioned in the bill. The defendant denied however that the deed was executed for the sole purpose of affording him a qualification to kill game, but alleged that the testator in executing the same had it also in view to secure the property to the defendant after testator's decease. He admitted that no use had ever been made of the deed and that the property had always continued in the possession of the testator. From the evidence it clearly appeared that the intention of the testator in executing the deed was solely to give the defendant a qualification to kill game. The Lord Chief Baron during the argument said:—

If the deed be void the plaintiffs want no re-conveyance. They might defend themselves in ejectment and I can render them no assistance.

At the close of the argument he said:—

I do not think that I can interfere in this case without first referring it to a court of law. My present opinion is that it is not void at law.

Then pronouncing judgment on a subsequent day he said:—

It appears that the conveyance was made for the purpose of giving the defendant a qualification to kill game, and I feel myself at a loss to know in what manner I am to grant relief. I don't think the plaintiffs are entitled to a re-conveyance—the deed was executed maturely—the grantor knew the effect of it. There was no fraud between the brothers, with respect to them the whole transaction was perfectly fair. But it appears by the evidence that the object of the deed was to give to the defendant the appearance of a qualification and that it was executed for no other purpose. That was a fraud on the law and I cannot conceive what right that gives the plaintiffs to come to a court of equity to call for a re-conveyance. It is said nothing was done under the deed, but I cannot see the distinction.

And again:—

It appears to me that it is not in the power of equity to call back a deed so given. It has been urged that the deed is void at law and I will not shut out that question. If it be void the plaintiffs have a

complete defence at law and I have no objection to retain the bill for a year for the purpose of giving them an opportunity to try that question.

Accordingly a decree was made whereby the defendant in the equity suit was ordered to proceed to the trial of an action of ejectment which had been stayed by injunction in the equity suit until the hearing and this is the action of ejectment which is reported in 2. B. & Ald. 367. The only object of that trial and the sole question in it was whether or not the deed was void at law. The court entertained no doubt upon the point, and it is difficult to conceive that there could be any. The statute which required all persons killing game to have a certain qualification in real property did not declare any deed executed for the purpose of giving a qualification to kill game to be void; nor even that a deed giving an interest in real property sufficient to give the qualification should be void if executed in pursuance of an agreement that as between the parties to the deed it should be regarded as intended only to give the appearance of qualification for the purpose of protecting the grantee from prosecutions; but that for any other purpose, or as to any beneficial interest in the premises purported to be conveyed by the deed to the grantee, the deed should be deemed to be of no force or effect. As between the parties themselves to the deed it was perfectly good. It was competent to give a good qualification. The only fraud relied upon was one wholly collateral to the deed, namely, that although the deed was competent to give the qualification, yet there was a secret agreement between the parties that it never should be used except to prove the qualification and that it should not be regarded by the grantee as passing to him any beneficial interest, save only to prove his qualification to kill game. Holroyd J. held the case to be similar to that

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of *Hawes* v. *Loader* (1), wherein it was held that as between the parties to a deed it could not be avoided by showing that it was executed for the purpose of defeating creditors, such deeds being only by the statute made void as against creditors. Abbott C.J. proceeded wholly upon the case of *Montefiori* v. *Montefiori* (2), which he held to be expressly in point. Now that case was that a person who had given his brother a promissory note for a large sum of money for the purpose of promoting the brother's marriage by representing him to be a man of means, could not after the marriage maintain a bill to have the note given up, nor could he defend an action on the note by showing it was given without consideration. Lord Mansfield C. J. rested his judgment upon the following principle; he says:—

> The law is that where upon proposals of marriage third persons represent anything material in a light different from the truth even though it be by collusion with the husband they shall be bound to make good the thing in the manner in which they represented it. It shall be as represented to be.

Therefore, in *Doe Roberts* v. *Roberts* (3) the grantor having by the deed represented the grantee to be the owner of the property which constituted his qualification to kill game, "it shall be as represented to be," and the grantor is estopped from proving an agreement to the contrary effect, which if given effect to would be at variance with the deed. The grantee shall hold the property and the grantor shall not be permitted to say that it was agreed that the deed should not pass to the grantee the beneficial estate which it purported to pass. The principle upon which *Montefiori* v. *Montefiori* (2) proceeded and which Abbott C. J., made the foundation of his judgment in *Doe Roberts* v. *Roberts* (3), is thus stated by Lord Chancellor Thurlow, in *Neville* v. *Wilkinson* (4).

(1) Cro. Jac. 270; Yelv. 196.
(2) 1 W. Bl. 363.
(3) 2 B. & Ald. 367.
(4) 1 Br. Ch. Cas., 543.

The Court, he says, proceeded upon the single ground that where one brother has given to another a note for £1,730, to enable him to make a contract of marriage, he could not revoke it. It amounted to a contract to perform what he had done.

And *Doe Roberts* v. *Roberts* (1) is thus referred to by Sir J. Plumer, Master of the Rolls in *Cecil* v. *Butcher* (2).

If the deed is complete whether it is a qualification to sit in Parliament or to kill game as in *Roberts* v. *Roberts*, (3) the party cannot be heard to allege his own fraudulent purpose, it being a fraud upon the law to attempt to give another a qualification without making him owner of the estate. He is estopped from confining the operation of the deed by averring that he had such a purpose.

That is, that the grantee, while having the property conveyed for the purpose of having a qualification, should not be the owner of the estate. The principle of *Doe Roberts* v. *Roberts* (1) as here explained is that a grantor is estopped from setting up a secret oral agreement to defeat the operation of the express terms of his own deed. In *Bessey* v. *Windham* (4) where it was decided that an assignment of goods in fraud of creditors is valid as between the parties to the deed, Lord Denman C. J., delivering judgment, proceeded upon the authority alone of *Doe Roberts* v. *Roberts* (1), while in the latter case, as already shown, Holroyd J., proceeded upon the authority of *Hawes* v. *Loader*, (5) wherein the same point was decided as in *Bessey* v. *Windham* (4). These cases, therefore, may well be held to be based upon the same principle, and that the principle of estoppel. So in *Phillpotts* v. *Phillpotts*, (6) which was the case of an action of covenant upon an annuity deed, wherein it was held that the defendants' executors were estopped from pleading that the deed was made fraudulently and collusively between the testator and the plaintiff, for the purpose of multiplying voices, in order to increase the electorate of certain

(1) 2 B. & Ald. 367.
(2) 2 J. & W. 565.
(3) Daniel Eq. Ex. 143.
(4) 6 Q. B. 166.
(5) Cro. Jac. 270 ; Yelv. 196.
(6) 10 C. B. 85.

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counties at the parliamentary elections therein, and subject to a secret trust and condition that no estate or interest should pass beneficially to the plaintiff by the deed. Jervis C. J. says :—

It is to my mind exceedingly difficult to discover any distinction between this case and that of *Doe Roberts* v. *Roberts* (1). It may be that a deed may be bad so far as concerns the law of Parliament and yet as between the parties it may not be competent for either to set up its invalidity ; the very point was discussed where though the jury expressly found that the parties never intended anything to pass by the deed the Court of Queen's Bench held the deed to be operative to convey an interest in the goods upon the principle laid down in *Doe Roberts* v. *Roberts* (1).

And upon the same principle he maintained that the deed in *Phillpotts* v. *Phillpotts* (2) might be supported. Williams and Talfourd JJ. concurred that *Doe Roberts* v. *Roberts* (1) was conclusive upon the point that the defendants, executors of the grantor, were estopped from setting up the secret understanding that the deed should not operate beneficially to the grantee. The same doctrine was affirmed in *Bowes* v. *Foster* (3), where *Doe Roberts* v. *Roberts* (1) was put upon this ground that the transfer was made for the purpose of giving to the transferree a qualification to kill game, and the property therefore passed by the deed, and having passed it was not competent for the defendants claiming under the grantor to allege that the conveyance was made merely to give the semblance of a qualification but in reality upon a secret trust beneficially for the grantor, and that in such a case the transferree in violating the secret agreement was guilty only of a breach of honour and not of a legal obligation. The case of *Doe Roberts* v. *Roberts* (1) is plainly referable to the principle that to an action founded upon a deed which as between grantor and grantee passed the property the grantor and those claiming under him are estopped from setting

(1) 2 B & Ald. 367.
(2) 10 C. B. 85.
(3) 2 H. & N. 779.

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up that the deed was executed upon a secret agreement that it should not operate to give to the grantee the beneficial interest purported by the deed to be given. The principle applied was the same as that applied *inter partes* in the case of a deed of conveyance of property in fraud of creditors; it therefore can have no application where the defence if established is that the instrument upon which an action is founded was void *ab initio* as made in violation of the principles of the common law.

Then it was contended upon the authority of *Simpson* v. *Bloss* (1), and other cases which have proceeded upon the authority of that case as *Cannan* v. *Bryce* (2), *McKinnell* v. *Robinson* (3), and other cases of that class, that the test whether a demand connected with an illegal transaction is capable of being enforced at law is whether the plaintiff requires any aid from the illegal transaction to establish his case; and the contention is, that as the plaintiff is not required in the present action to prove the consideration for the mortgage sought to be foreclosed, but upon proof of the mortgage establishes her case, she cannot be said to require any aid from the illegal transaction to establish it.

In *Simpson* v. *Bloss* (1) the action was in *indebitatus assumpsit* founded upon mutual promises, where the plaintiff had to prove, in support of his case, the consideration for defendant's promise sued upon. *Cannan* v. *Bryce* (2) was in like manner an action in *indebitatus assumpsit* founded upon mutual promises. At the trial a verdict was rendered for the plaintiff, subject to the opinion of the court upon a case stated wherein all the circumstances of the transaction were set out, by which it appeared that the defendant's promise to repay money lent was made upon an illegal consideration,

(1) 7 Taun. 246.
(2) 3 B. & Ald. 179.
(3) 3 M. & W. 434.

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without relying upon which the plaintiff could not recover, and so it was held that he could not recover. *McKinnell* v. *Robertson* (1) was also an action in *indebitatus assumpsit* for money lent, and on account stated; the defendant pleaded to the whole declaration that the money was lent for the purpose of the defendant illegally playing and gaming therewith at the illegal game of hazard. To this plea the plaintiff demurred upon the ground that the plea did not cover the count upon an account stated, but the plea was held to be good and judgment was given accordingly. But in *Taylor* v. *Chester* (2) the action was in detinue for half a £50 Bank of England note. Defendant pleaded that the half note was deposited as a pledge in security for a sum of money due from the plaintiff to the defendant, and which was still due and unpaid. To this plea the plaintiff was obliged to reply that the alleged debt in the plea mentioned in justification of detention of the half-note was incurred for wine and suppers supplied by the defendant in a brothel and disorderly house kept by the defendant, for the purpose of being consumed there, etc., etc. There Millar J., delivering the judgment of the court, says:—

> The true test for determining whether or not the plaintiff and defendant were *in pari delicto*, is by considering whether the plaintiff could make out his case otherwise than through the medium of the illegal transaction to which he was himself a party.

And he proceeds:

> Had no pleading raised the question of illegality a valid pledge would have been created and a special property conferred upon the defendant in the half-note, and the plaintiff could only have recovered by showing payment or tender of the amount due. In order to get rid of the defence arising from the plea which set up an existing pledge of the half-note the plaintiff had recourse to the special replication, in which he was obliged to set forth the immoral and illegal character of the contract upon which the half-note had been deposited. It was there-

(1) 3 M. & W. 434. (2) L.R. 4 Q.B. 309.

fore impossible for him to recover except through the medium, and by the aid, of the illegal transaction to which he was himself a party.

And so it was held that he could not recover being himself *in pari delicto*.

What is meant in this case, and in all cases as to the application of the test is, that in every case, whether in *indebitatus assumpsit* or in an action upon a bond, note or other instrument, it appears either by admission on the pleadings, or in the evidence given upon the issues joined upon the pleadings in the case, that the action is connected with an illegal transaction to which the plaintiff was a party, the question arises whether he can or cannot succeed in his action without relying upon the illegal transaction. If he cannot, the action fails; if he can, it prevails. But it never has been held, nor so far as I have been able to find hitherto contended, that in an action upon a note or other instrument in security for money requiring *primâ facie* no evidence of consideration the plaintiff is entitled to recover upon the mere production of the instrument, notwithstanding that the defence is that the instrument sued upon was executed for an illegal consideration in respect of a transaction to which the defendant was himself a party. Such a proposition could not be maintained without reversing a legion of cases from *Guichard* v. *Roberts* (1), down to *Windhill Board of Health* v. *Vint* (2), which establish that illegality in the consideration of an instrument, whether under seal or not, to enforce which an action is brought, not only may be pleaded, but if it does not appear upon the plaintiff's own pleading must be pleaded.

There remains now the question which was argued by the appellant with much ability, namely, whether he has pleaded and proved sufficient to establish

(1) 1 Wm. Black. 445. (2) 45 Ch. D. 351.

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his contention that the mortgage was void *ab initio* by reason of illegality in the consideration for which it was given.

In considering this question a point arises which in view of the very peculiar circumstances of this case cannot be overlooked. The defence is one of which it may be said that it is without a parallel in the reported cases. The appellant purchased from the mortgagor the property mortgaged at what he himself considered to be its fair market value such value being nearly $2,000 in excess of the amount for which the plaintiff had sold the property, and he paid to the mortgagor only the difference between the amount remaining upon the security of the mortgage and the amount so fixed by himself as the value of the property to him purchasing it as he admits he did upon speculation and in the expectation that by reason of the erection of a large public building for a city hall and other purposes of the city of Toronto in the immediate neighbourhood it would become much more valuable as other property which he had purchased in the neighbourhood and had sold at a large advance had proved to be a good speculation. He took from the mortgagor a conveyance of the property subject expressly to the mortgage and to the payment of the sum of $3,700 and interest which in the deeds under which the appellant claims title is stated to be due under the mortgage and by that deed he covenanted with the mortgagor his grantor that he would pay off and discharge the mortgage. By this deed the appellant acquired no legal estate in the mortgaged premises but an equity of redemption therein only, that is to say, the right, by paying the moneys secured by the mortgage, to acquire the legal estate. Upon an action being instituted by the mortgagee to foreclose this mortgage he sets up by way of defence and for the purpose of evading payment of

the money secured by the mortgage that the consideration for the execution of the mortgage was illegal and immoral and that the mortgage therefore is void and of no effect. Now the deed executed by the mortgagee conveying the property in fee simple to the mortgagor constituted the consideration for the execution of the mortgage. If then the consideration for the execution of the mortgage was illegal and immoral and the mortgage therefore void, the deed and the estate thereby conveyed which constituted that consideration must be null and void; yet the appellant's argument before us was to the effect that his succeeding in establishing the mortgage to be void for the reason suggested would be to vest in him the land which he had purchased expressly subject to the mortgage discharged from the mortgage. The case therefore may truly he said to be one *sui generis* and without parallel in the reported cases. In *Holman* v. *Johnson* (1) Lord Mansfield lays down the principle upon which the court proceeds in respect of contracts that are immoral and illegal. As between the parties to the illegal contract, he says:

> The objection that a contract is immoral and illegal as between plaintiff and defendant sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed, but it is founded on general principles of public policy which the defendant has the advantage of, contrary to the real justice as between him and the plaintiff, by accident, if I may so say; the principle of public policy is *ex dolo malo non oritur actio.*

Now, here it is to be observed: 1st. That the language is applied as between the immediate parties to the illegal or immoral contract, who, in the case of such a contract, are *in pari delicto*, and the test as to the plaintiff's right of recovery where such a defence is set up by the other party to the contract is whether the

(1) Cowp. 341.

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plaintiff is or is not *in pari delicto* with the defendant. It does, I must say, seem to me to be an unwarranted extension of the rule so laid down by Lord Mansfield, not supported by any decided case, to apply it to the case of a mortgagee seeking to foreclose a mortgage given to secure purchase money of land sold by the mortgagee, against a *bonâ fide* purchaser for valuable consideration from the original vendee, whose deed of conveyance from such vendee subjects the premises and the estate therein transferred to such purchaser, in express terms, to payment of the mortgage and the moneys secured thereby. And it is to be observed, 2nd. That in order to procure the court to abstain from enforcing a contract upon its face perfectly good and for valuable consideration the objection must be taken by the defendant. Now, although when properly taken as required by the recognized course of proceedings in the particular action, and established by legal evidence, the court does not act in the interest of, or for the sake of, the defendant making the objection, but upon principles of public policy, by which the defendant may obtain an advantage over the plaintiff, contrary to the real justice of the case, and so by accident, as it were, yet before he can obtain such even accidental advantage against the real justice of the case he must take the objection by a plea specially stating the particular facts relied upon as constituting the immorality or illegality, so that the court may see upon the record that the facts pleaded, if proved, do constitute illegality in the contract or instrument sued upon; and also in order that the evidence offered in support of the plea may be confined to the particular facts so pleaded. No public policy would justify a court in withholding its aid to enforce a deed executed upon its face for good and valuable consideration, except upon its being shown by the facts specially pleaded and proved in the action

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wherein the deed is sought to be enforced, that it is void as illegal or immoral. Prior to the passing of the Judicature Act the invariable rule was that the facts relied upon as constituting the illegality relied upon as a defence to an action upon a contract must be specially pleaded. In *Colborne* v. *Stockdale* (1) it was held that a plea of illegality in a bond, that it was given for money won at play, ought to state at what game, that it was like a usurious or simoniacal contract where the agreement must be shown, for that it was matter of law and that the court should have the means of judging whether the facts stated constituted illegality; and in *Mazzinghi* v. *Stephenson* (2), it was held that a plaintiff was entitled to recover upon such a bond where the defendant failed to prove that the money for which the bond was given was won at the particular game stated in the plea, viz., "faro." To the like effect as to the necessity of particularity in the statement of the facts relied upon as constituting illegality are *Hill* v. *Montagu* (3); *Potts* v. *Sparrow* (4); *Martin* v. *Smith* (5); *Fenwick* v. *Laycock* (6); *Cooke* v. *Stratford* (7); *Allport* v. *Nutt* (8); and *Grizewood* v. *Blane* (9). In this latter case the court unanimously held that the facts relied upon as making the contract illegal must be specially pleaded; that illegality must not be stated by simple, inexplicit allegation, but that the plea should contain an allegation of facts which would enable the court to say whether or not they constituted illegality, and for that purpose that the facts should be expanded on the record.

Now the Judicature Act has made no difference in this respect for by rule 399 of the General Rules passed

(1) 1 Str. 493.
(2) 1 Camp. 291.
(3) 2 M. & S. 377.
(4) 6 C. & P. 749.
(5) 4 Bing N. C. 436.
(6) 1 Q.B. 414.
(7) 13 M. & W. 379.
(8) 1 C.B. 974.
(9) 11 C.B. 526.

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under the authority of the act it is enacted that pleadings shall contain a concise statement of the material facts upon which the party pleading relies. Under a similar rule in England it was decided, in *Hanmer* v. *Flight* (1), that the facts from which the court is to judge the result must be stated. So a statement of claim which merely alleged that a good *donatio causa mortis* had been made to the plaintiff without stating the facts relied upon as constituting the donation was held bad (2). The form of setting up the defence as invariably used in practice under the Judicature Act appears from the statement of defence in *Windhill Board of Health* v. *Vint* (3).

The plea of the appellant which merely alleged that the consideration for the execution of the mortgage in the statement of claim mentioned was illegal and immoral was a bad plea as presenting no facts relied upon as constituting illegality or immorality. It is true that the plaintiff did not take any objection to the plea for this defect; but when after a regular judgment of foreclosure in favour of the plaintiff in the action the appellant applied to the court for a special indulgence to be granted to him, namely, that the regular judgment should be set aside and a new trial given to him to enable him to prove that $2,000 of the purchase money for the house sold by the plaintiff to the mortgagor, and for securing which the mortgage was given, was for what has been called the good-will of the house, or a value attached to it as a house of ill-fame, and that the residue of the purchase money or $2,000 was the agreed value of the premises irrespective of such so called good-will; and when he accepted the new trial upon condition of paying the balance of the

(1) 35 L. T. N. S. 127.

(2) *Towsend* v. *Parton* 45 L. T. N.S. 755.

(3) 45 Ch. D. 351.

money remaining due upon the security of the mortgage and availed himself of the special indulgence so granted to him, and went down to try the truth of the allegation as to the $2,000—part of the purchase money—and wholly failed to establish the matter alleged in respect thereof, no principle of law or public policy requires the court to entertain a further objection made *ore tenus*, not set out on the record, namely, that in the evidence offered to establish the contention to try which alone the appellant was granted the indulgence of setting aside a regular judgment, and in which he failed, it sufficiently appeared that the person to whom the house was sold by the plaintiff, and by purchase from whom the appellant claims, was to the knowledge of the plaintiff a prostitute, and that the plaintiff knew or had reason to know or believe that the purchaser of the house intended when the house should be conveyed to her to continue to lead therein her dissolute and immoral life. Whether these facts, assuming them to be established, would or would not make void the mortgage given to secure part of the purchase money *bonâ fide* agreed upon as being the fair marketable value of the house, I can see no principle of law or public policy requiring the court to relax the rules of law governing the mode of presenting a defence of that kind to an action upon a mortgage given for such purchase money for the purpose of permitting the appellant, after judgment against him upon the point upon which alone the court granted the new trial, to raise such new contention. In my opinion, however, the cases relied upon by the appellant do not support this new contention assuming it to be open to him.

In *Lloyd* v. *Johnson* (1), where the action was for work and labour bestowed by the plaintiff in washing clothes for a prostitute, which were used by her for

(1) 1 B. & P. 340.

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the purpose of appearing in public places in pursuit of her immoral calling, the plaintiff having knowledge of her being a prostitute, and of the purpose to which the articles washed were applied, it was held that such knowledge did not disentitle the plaintiff to recover for his work and labour.

In *Lightfoot* v. *Tenant* (1) the plea to an action on a money bond alleged that the bond was given for the price of goods sold by the plaintiff to the defendant for a purpose the facts of which were specially stated, and which were contrary to the provisions of an act of Parliament, and the plea being proved it was held that the plaintiff could not recover.

In *Paxton* v. *Popham* (2), to an action on a bond, a plea that the bond was given to cover the price of goods illegally (stating the facts constituting the illegality) contracted to be sold and shipped in contravention of an act of Parliament, was held upon demurrer to be a good plea in bar of the action.

In *Bowry* v. *Bennet* (3), in an action for the value of clothes furnished to the defendant, the defence was that the defendant was, as was well known to the plaintiff, a woman of the town and that the clothes were furnished to her for the purpose of enabling her to carry on her business of prostitution. Lord Ellenborough held that the plaintiff must not only be shown to have had notice of the defendant's way of life but that he had expected to be paid from the profits of defendant's prostitution, and that he had sold the clothes to enable her to carry it on, and the plaintiff recovered.

In *Hodgson* v. *Temple* (4) Lord Mansfield held that the mere selling goods knowing that the buyer would make an illegal use of them is not sufficient to deprive the vendor of the right of just payment.

(1) 1 B. & P. 551.
(2) 9 East 408.
(3) 1 Camp. 348.
(4) 5 Taun. 181.

In *Langton* v. *Hughes* (1) the case was of drugs sold with the knowledge that they were bought for the purposes of being used in a manner prohibited by act of Parliament, and it was held that as the act also expressly prohibited the causing or procuring the drugs to be so used, the sale with knowledge that the goods were bought for the purpose of being so used was a causing or procuring them to be so used within the prohibition in the act, and that therefore the plaintiff could not recover the price of goods so sold.

In *Cannan* v. *Bryce* (2) the plea was that the money sued for was lent for the express purpose of enabling the defendant to pay certain losses incurred in illegal stock jobbing transactions; and it was held that the plaintiff could not recover money lent for the express purpose of accomplishing an illegal object.

In *McKinnell* v. *Robinson* (3), *to* an action of *indebitatus assumpsit* for money lent, the plea was that the money was lent for the purpose of defendant illegally playing and gaming therewith at hazard. On demurrer the plea was held a good plea in bar, upon the principle, "not for the first time" (as said by Lord Abinger on delivering judgment) "laid down but fully settled in the case of *Cannan* v. *Bryce* (2) namely that the repayment of a sum of money lent for the express purpose of accomplishing an illegal object and of enabling the borrowers to do a prohibited act cannot be enforced.

In *Jennings* v. *Throgmorton* (4) the action was in assumpsit for the use and occupation of rooms let to defendant as weekly tenant. After the tenant entered the plaintiff became aware that she lived by prostitution. Abbott C. J. charged the jury that if the plaintiff after he became aware of the defendant's mode of living suffered her to occupy the premises for the express pur-

(1) 1 M. & S. 593.
(2) 3 B. & Ald. 179.
(3) 3 M. & W. 434.
(4) Ry. & M. 251.

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pose of continuing a life of prostitution, and that the demand sued for accrued afterwards, he could not recover.

In *Gas Light Co.* v. *Turner* (1) in an action upon the covenant in a lease for payment of rent the plea was that the premises were demised for express purpose of violating an act of Parliament in the manner specially stated in the plea—upon demurrer the plea was held to be good, Tindal C. J. saying:—

> The allegation that the tenements and premises were demised to the defendant for the express purpose, &c., &c., necessarily implies and even in a more especial manner declares that the express purpose was the purpose of the party who made the demise viz., the plaintiff.

And with reference to an argument urged on behalf of the plaintiff that if the defendant should succeed on the plea the consequence would follow that he could hold the premises for the whole term granted by the lease free from rent he answered:—

> If an ejectment were brought by the lessors to recover possession on the ground that the lease was void it would be difficult for the lessee to maintain his right to hold under the lease after having pleaded in the present action that the indenture was void and obtained the judgment of the court in his favour on that plea.

In *Ritchie* v. *Smith* (2) the action was in assumpsit for the use and occupation by the defendant of certain premises under a written agreement; plea that the agreement, setting it out at length, was made for the express purpose of enabling one of the defendants, party to the agreement, to contravene the provisions of a statute passed for the protection of public morals, showing the manner of contravention. The facts alleged in the plea being proved it was held that the plaintiff could not recover, Williams J. saying:—

> This is an agreement by which the plaintiff co-operated with other persons for the avowed purpose of contravening and evading the pro-

(1) 5 Bing. N.C. 666. (2) 6 C.B. 462.

visions of an act having for its object the protection and advancement of public safety and morals.

In *Smith* v. *White* (1) the question arose in relation to a lease of premises which had been used as a brothel. Kindersley V. C., proceeded upon the cases of *Jennings* v. *Throgmorton* (2) and *Bowry* v. *Bennet* (3), in which latter case, however, he is erroneously reported to have said that the plaintiff was held to be not entitled to recover. In his judgment, however, he rests upon the same principle which enabled the plaintiff to succeed in *Bowry* v. *Bennet* (3) and the defendant in *Jennings* v. *Throgmorton* (2). He there says —

It cannot be doubted that in the present case the plaintiff knew that the means of paying the high rent which was to be paid for the premises would be derived from the profits of the immoral trade carried on in the house, and although he had no lien on these profits he expected to be paid out of them, and knew that unless the tenant carried on such trade he would not be able to pay the rent.

In *Feret* v. *Hill* (4), with reference to a lease of premises acquired by a lessee with the intention of using the premises as a brothel, it is said that no intention existing in the lessee's mind could make the lease void.

In *Pearce* v. *Brooks* (5), in an action for the use of a brougham had under an agreement between plaintiff and defendant for the purpose, the plea was that the agreement was made for the supply of a brougham to be used by her as a prostitute, which she was known to the plaintiff to be, and to assist her, as the plaintiff also well knew, in carrying on her immoral vocation. The question was as to whether the evidence supported the plea. At the trial Bramwell B., put the case to the jury thus :—

That in some sense everything which was supplied to a prostitute is supplied to her to enable her to carry on her trade, as, for instance, shoes sold to a street walker, and that the things supplied must not be

(1) L.R. 1 Eq. 626.
(2) Ry. & M. 251.
(3) 1 Camp. 348.
(4) 15 C.B. 207.
(5) L.R. 1 Ex. 213.

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merely such as would be necessary or useful for ordinary purposes, and also be applied to an immoral purpose, but that they must be such as would, under the circumstances, not be required except with that view.

And he submitted certain questions to the jury which they answered by finding that the brougham was used by the defendant as part of her display to attract men, and that the plaintiff knew it was supplied to be used for that purpose. Upon this finding a verdict was entered for the defendant, with leave for the plaintiff to enter a verdict for him for 15 guineas. Upon the argument of a motion to that effect it was held that the finding of the jury supported the allegation in the plea that the brougham was supplied to the defendant to be used by her as a prostitute, and to assist her in carrying on her immoral vocation. During the argument Bramwell B., after stating what his charge had been, as above, added:

> The jury, by the mode in which they answered the question, showed that they appreciated the distinction, and on reflection I think they were entitled to draw the inference which they did. They were entitled to bring their knowledge of the world to bear on the facts proved. The inference that a prostitute (who swore that she could not read writing) required an ornamental brougham for the purpose of her calling, was as natural a one as that a medical man would want a brougham for the purpose of visiting his patients, and the knowledge of the defendant's condition being brought home to the plaintiffs, the jury were entitled to ascribe to them also the knowledge of her purpose, which, being established, was sufficient to support the allegation in the plea, to the effect that the brougham was supplied by the plaintiffs to the defendant to be used by her as a prostitute, and to assist her in carrying on her immoral vocation.

So regarding the case Pollock C. B. says (1):—

> If evidence is given which is sufficient to satisfy the jury of the fact of the immoral purpose and of the plaintiff's knowledge of it and that the article was required and furnished to facilitate that object, it is sufficient.

And Martin B. says:—

(1) P. 218.

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The real question is whether sufficient has been found by the jury to make a legal defence to the action under the third plea.

Then stating the substance of that plea he adds :—

If therefore there is evidence that the brougham was to the knowledge of the plaintiffs hired for the purpose of such display as would assist the defendant in her immoral occupation the substance of the plea is proved and the contract was illegal.

And he added :—

As to *Cannan* v. *Bryce* (1) I have a strong impression that it has been questioned to this extent that if money is lent the lender merely handing it over into the absolute control of the borrower, although he may have reason to suppose that it will not be employed illegally he will not be disentitled from recovering. But no doubt if it were part of the contract that the money should be so supplied the contract would be illegal.

This language implies that the learned Baron considered that the evidence that the plaintiff knew that the defendant was a prostitute and that she hired the brougham to be used by her in attracting men and in assisting her to carry on her immoral vocation, for which purpose alone in her condition in life she could have been supposed to require such an article, was equivalent to a contract for the letting by the plaintiff of the brougham to her for that purpose. And so Pollock C.B., agreeing with what had fallen from Martin B. as to the case of *Cannan* v. *Bryce*, (1) says (2) :—

If a person lends money but with a doubt in his mind whether it is actually to be applied to an illegal purpose it will be a question for the jury whether he meant it to be so applied, but if it were advanced in such a way that it could not possibly be a bribe to an illegal purpose and afterwards it was turned to that use neither *Cannan* v. *Bryce* (1) nor any other case decides that this act would be illegal.

Then Pigott B. said :—

I think that the jury were entitled to call in aid their knowledge of the usages of the day to interpret the facts proved before them. If a woman who is known to be a prostitute wants an ornamental brougham there can be very little doubt for what purpose she requires it. It can-

(1) 3 B. & Ald. 179. (2) P. 221.

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not be necessary that the plaintiff should look to the proceeds of the immoral act for payment, the law would indeed be blind if it supported a contract where the parties were silent as to the mode of payment, and refused to support a similar contract in the rare case where the parties were imprudent enough to express it. The plaintiff knew the woman's mode of life and where the means of payment would come from.

These observations were applied to an allegation in the plea, that the agreement for letting the brougham was made by the plaintiffs in the expectation that the defendant would pay the plaintiffs the moneys to be paid by the agreement out of her receipts, of which expectation being entertained by the plaintiffs there was no express evidence, but as it would seem, sufficient evidence in the opinion of the learned Baron from which that inference if it had been necessary might have been drawn. The judgment in this case does not extend the principle involved in *Cannan* v. *Bryce* (1), *The Gas Light Co.* v. *Turner* (2), or any other of the cases above cited. It merely lays down the rule that for the purpose of proving an allegation in a plea that an article for the price or use of which an action is brought was supplied by the plaintiff to the defendant to be used by her in the pursuit of an illegal and immoral purpose, and to assist her in accomplishing such illegal and immoral purpose, the jury should take into consideration the nature of the article supplied and the condition in life of the person to whom it was supplied, and the question whether the article supplied was such as under the circumstances in evidence might be required for some necessary purpose other than the illegal purpose, or on the contrary could only be required for such illegal purpose, and that in order to enable them to draw a proper inference from the facts in evidence they were entitled to apply their knowledge of the world as bearing upon those facts, and, it having been proved that

(1) 3 B. & Ald. 179. (2) 5 Bing. N. C. 666.

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the plaintiffs knew the defendant to whom they had let an ornamental brougham to be a prostitute, were, in the exercise of their knowledge of the world, justified in finding that the plaintiffs who supplied the brougham to the defendant knew that it was supplied by them to be used by her as part of her display as a prostitute and to attract men. The judgment of the court in the case is that such finding proved the plea, and so in effect was equivalent to an express finding that the brougham was let as alleged in the plea to be so used, that is to say for the purpose of being so used by the defendant, and so the case came within *Cannan* v. *Bryce* (1), *Gas Light Co.* v. *Turner* (2), and other similar cases.

In *Fisher* v. *Bridges* (3) in the Exchequer Chamber it was pleaded and proved that the bond upon which the action was brought was given to secure payment of the consideration money for lands sold and conveyed by the plaintiff to the defendant for the express purpose of being sold, and upon an express agreement entered into between the plaintiff and the defendant that the lands so conveyed should be sold, by the defendant by lottery in contravention of two acts of Parliament by which not only were all lotteries prohibited, but all sales of houses, lands, &c., by lottery were declared to be absolutely void.

Now the principles involved in, and to be collected from, all of the above cases are as it appears to me—

1st. That a plea setting up as a defence to an action upon a contract entered into or an instrument under seal or in writing without seal executed by the defendant, that the contract or instrument upon which the action is founded was executed for an illegal or immoral purpose or consideration must state the particular facts relied upon as establishing the illegality or immorality, and must not merely make the inexplicit allegation

(1) 3 B. & Ald. 179. (2) 5 Bing. N. C. 666.
(3) 2 E. & B. 118; 3 E. & B. 642.

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that the contract was entered into or the instrument executed upon or for an illegal or immoral purpose or consideration.

2nd. That all contracts entered into between a plaintiff and defendant and all instruments executed for the purpose of passing property from the former to the latter, with the intent and for the purpose, operating in the mind of the transferor, that the property transferred shall be applied by the transferree in the accomplishment of a purpose which is in contravention of the principles of the common law or the provisions of a statute, are void and incapable of being enforced by either of the parties against the other upon the illegality being made to appear in due form of law in an action upon the contract or instrument, and that an instrument executed by the transferee for the purpose of securing to the transferor payment of the consideration money for the property so transferred is in like manner void and incapable of being enforced by the transferor against the transferree upon the illegality being made to appear in like manner.

3rd. Knowledge in the mind of the transferor that the transferee intended to apply the property when transferred to him to an illegal purpose will not avoid a contract between the parties or an instrument which transfers the property from the one to the other unless, having regard to the particular nature of the property transferred, and to the condition in life and occupation of the person to whom it is transferred, a just inference can be drawn from the facts in evidence that the property was so transferred with the intent and for the purpose, operating in the mind of the transferor, that the property when transferred should be applied by the transferee to the illegal purpose alleged in the plea.

Applying these principles to the present case I am of opinion, for all of the reasons above stated, that the

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appellant has wholly failed in establishing that the deed executed by the plaintiff to the appellant's grantor, and which constitutes the consideration for the execution of the mortgage sued upon and the root of the appellant's title to the premises mortgaged, is void. If the contention of the appellant should prevail I cannot see that it would be possible for any of these unfortunate creatures who lead a life similar to that led by the appellant's grantor to enter into any contract with any person knowing her character for the purchase in fee of a house to shelter her or for the purchase of any of the necessaries of life; and the golden rule laid down in *Pearce* v. *Brooks* (1) upon which case the appellant so much relied would be utterly ignored and set at naught, namely—that it is necessary in cases like the present to distinguish between such things as, while being necessary or useful for the ordinary purposes of life, may also be applied to an immoral purpose, and those which are such as under the circumstances in evidence would appear not to be required except for an immoral purpose. No such principle has yet been laid down, or is sanctioned, by any of the decided cases, and there is not in my opinion any principle of law or of public morals or of christian morality which could sanction the affirmation of such a principle.

The appeal must be dismissed with costs.

TASCHEREAU J.—The appellant has, in my opinion, made a strong, a very strong case. Mr. Justice Meredith's remarks in the Divisional Court, also, it seems to me, support the appellant's legal propositions. I dissent.

Apppeal dismissed with costs.

Appellant in person: *R. S. Clark.*

Solicitors for respondent: *Mowat & Smyth.*

(1) L. R. 1. Ex. 213.

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*Oct. 10.
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*Feb. 20

THE HARBOUR COMMISSIONERS OF MONTREAL (PLAINTIFFS). } APPELLANTS;

AND

THE GUARANTEE COMPANY OF NORTH AMERICA (DEFENDANTS) } RESPONDENTS.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA (APPEAL SIDE).

Insurance—Guarantee—Notice to insurer of defalcation—Diligence.

A guarantee policy insuring the honesty of W., an employee, was granted upon the express conditions, (1) that the answers contained in the application contained a true statement of the manner in which the business was conducted and accounts kept, and that they would be so kept, and (2) that the employers should, immediately upon its becoming known to them, give notice to the guarantors that the employee had become guilty of any criminal offence entailing or likely to entail loss to the employers and for which a claim was liable to be made under the policy. There was a defalcation in W.'s. accounts, and the evidence showed that no proper supervision had been exercised over W.'s books, and the guarantors were not notified until a week after employers had full knowledge of the defalcation and W. had left the country.

Held, affirming the judgment of the court below, that as the employers had not exercised the stipulated supervision over W., and had not given immediate notice of the defalcation, they were not entitled to recover under the policy.

APPEAL from a judgment of the Court of Queen's Bench for Lower Canada (appeal side) (1), reversing the judgment of the Superior Court and dismissing appellants' action with costs.

This was an action upon two contracts of guarantee as to the fidelity of Mr. H. D. Whitney, formerly secretary-treasurer of the Harbour Board of Montreal,

*PRESENT :—Sir Henry Strong C. J., and Fournier, Taschereau, Sedgewick and King JJ.

(1) Q. R. 2 Q B. 6.

who absconded in June, 1887, being a defaulter in an amount exceeding that covered by the two contracts of guarantee.

The plea set up in effect the following grounds:—

That in 1877 the then chairman of the Harbour Commissioners made an employer's proposal, which was to form the basis of the contract of guarantee, and thereby answered certain questions which were declared to be true, and the supervision named therein was to be duly observed by the plaintiffs, and that the appellants, relying upon the truth of all the answers and representations, entered into the contract.

The following are the questions and answers, as set out:

In what capacity do you require this security from him, and from when do you wish this security to date?

When and how often will his accounts be balanced and closed?

Will the cash and securities appearing to your credit at each balancing time be examined and verified, and if so, by whom?

Plaintiffs answered in words following:—

He acts as assistant-secretary; first November; books balanced every month and closed at the 31st December each year; cash, etc., examined by auditors.

What is the greatest amount of money or negotiable or convertible securities which will at one time be in his custody? Please state how long such amounts will remain under his control, and whether all such moneys and securities are deposited in the bank daily, or how and by whose authority will they be drawn out?

Answer.—Custom is to deposit in bank frequently every few days; drawn out by cheque signed by chairman, and by order of Finance Committee.

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The plea also alleged:—

That it was a condition of the policy that it should only remain in force so long as the contract by the said declaration created should be strictly performed and observed by the employer.

That it was also stipulated that the policy was granted upon the express condition that the answers contained in the declaration contained a true statement of the manner in which the business was conducted, and accounts kept; and that the business should be so continued to be conducted, and accounts so kept, and proper supervision exercised and that the policy should not extend to cover any loss by reason of neglect or omission but only of the fraud and dishonesty of the employee. And the respondents averred that the answers and representations were false.

That another condition of the policy was that every description of aid and assistance (not pecuniary) for the purpose of bringing an offender to justice should be given by the employer, and the employer should immediately, upon its becoming known to him that the employee had been guilty of a criminal offence, give notice, so as to give the directors an opportunity of instituting legal proceedings.

That the appellants neglected to give immediate notice of the criminal offences charged against Whitney, and refused to aid the respondents in bringing Whitney to justice and failed to notify them as required by the provisions of the policy.

That they thereby forfeited all claims under the policy of guarantee.

The evidence in the case is reviewed in the report of the case in the court below and in the judgments hereinafter given.

Abbott Q.C. for appellants, contended that in a contract of suretyship the appellants statements, even if

incorporated in the contract, are not warranties. The appellants were not bound to carry them out on pain of absolute forfeiture of their rights. They are statements of a course of conduct intended to be pursued, and that only. Unless they could show fraud or collusion, even the non-observance of the course of conduct independently of the observance of this course of conduct, does not vitiate the contract—*North British* v. *Lloyd* (1). Cites also *Towle* v. *National Guardian Assurance Co.* (2); *American Surety Co.* v. *Thurber* (3); *La Banque Nationale* v. *L'Esperance* (4); *Benham* v. *United Guarantee and Life Assurance Co.* (5).

Geoffrion Q.C. and *Cross* for respondents, contended that the notice was given after defalcation was known and not until the respondents thought it was too late to arrest Whitney, and that Whitney's books had not been balanced, as the agreement distinctly expressed, and that they had violated the essential conditions of the guarantee bond.—*Commercial Building Society* v. *The London Guarantee and Accident Co.* (6); *Molsons Bank* v. *Guarantee Co. of North America* (7); Pouget's Dictionnaire des Assurances (8).

THE CHIEF JUSTICE.—I am of opinion that this appeal should be dismissed with costs.

FOURNIER J.—Le 1er novembre 1877, les appelants ont fait avec l'intimée un contrat, par lequel celle-ci se rendait responsable en leur faveur de la fidélité de D. Whitney, dans l'exécution de ses devoirs comme leur assistant secrétaire, en considération d'une certaine prime annuelle. Un second contrat de même

(1) 24 L.J. (Ex.) 14.
(2) 30 L.J. (Ch.) 900.
(3) 56 N.Y. (S.C.) 338.
(4) 4 Legal News 147.
(5) 7 Ex. 744.
(6) M. L.R. 7 Q.B. 307.
(7) M. L.R. 4 S.C. 376.
(8) T. 1, pp. 220-22.

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nature est intervenu entre les mêmes parties le 1er novembre 1882.

Pendant qu'il était au service des appelants, et dans l'exécution de ses devoirs, comme assistant secrétaire-trésorier et comme secrétaire-trésorier depuis son entrée en office jusqu'au 30 juin 1887, le dit Whitney est devenu défalcataire et a laissé le pays avec un déficit dans sa caisse de $8,000.

Les appelants ont alors donné avis à la compagnie du déficit et ont porté contre l'intimée une action réclamant $5,000, le montant des deux polices de garantie.

Avec l'action, les deux polices et une lettre de Alexander Robertson, président des demandeurs appelants, furent produites. Cette lettre adressée à Edward Rawlings, le gérant de la compagnie intimée, en date du 29 septembre 1887, contenait un état de la défalcation commise par Whitney.

L'existence de la défalcation est hors de doute. La défense se base uniquement sur les conditions du contrat. Il s'agit de savoir si ces conditions sont suffisantes pour autoriser la compagnie à repousser une demande fondée pour perte réelle occasionnée par l'infidélité de Whitney, c'est-à-dire d'une perte contre laquelle les appelants se sont pourvus par les conditions du contrat de garantie.

La défense allègue qu'en 1877, le président de la commission du havre fit à la compagnie une proposition qui devait être la bâse d'un contrat de garantie et donna à certaines questions des réponses qu'il déclara vraies, et que la surveillance mentionnée dans ces questions serait régulièrement exercée par les appelants, que l'intimée se fiant sur la vérité de ces réponses et représentations consentit à donner les dites polices de garantie (1).

Par la seconde police du 1er novembre 1882, il était stipulé qu'une surveillance active serait exercée sur

(1) [For questions and answers in the application, see supra.]

l'employé, et sur l'exécution de toutes les règles et règlements et que s'il y avait quelque changement important dans les devoirs de l'employé, la compagnie intimée en serait avertie ; qu'elle le serait aussi dans le cas où l'employé commettrait d'autres infractions aux règlements ou qu'à la connaissance des appelants il s'engagerait dans des entreprises de spéculations ou d'une nature dangereuse.

Par une autre condition il était stipulé que si l'employé devenait défalcataire dans des circonstances pouvant donner lieu à une poursuite criminelle, les appelants prendraient immédiatement tous les procédés nécessaires pour faire arrêter l'employé pendant l'enquête sur sa conduite et en avertiraient la compagnie.

La défense allègue aussi que les appelants ont négligé d'exercer sur Whitney une surveillance diligente dans l'exercice de ses devoirs et n'ont pris aucune des précautions ordinaires pour se prémunir contre la défalcation de Whitney, laquelle n'est que le résultat de leur faute et négligence.

Que les dits appelants, longtemps avant la fuite de Whitney, et avant d'en avoir averti l'intimée, connaissaient ses malversations et ont toujours négligé d'en avertir l'intimée ; qu'ils ont aussi négligé de lui donner immédiatement avis de l'affaire criminelle portée contre lui et refusé d'aider l'intimée à l'amener à justice.

Ainsi qu'on le voit par les conditions ci-dessus rapportées, le contrat ne devait pas avoir d'effet, à moins que les appelants n'eussent exécuté les obligations qu'ils avaient assumées envers l'intimée et dont ils avaient garanti l'exécution.

La Cour Supérieure siégeant à Montréal a donné gain de cause aux appelants, mais ce jugement a été infirmé en cour d'appel sur le principe que la preuve a établi qu'ils n'avaient pas exécuté leurs obligations envers l'intimée.

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En effet, les livres de compte de Whitney, au lieu d'être balancés tous les mois comme l'avait dit le président Robertson dans ses réponses, ne l'étaient qu'une fois l'année, et pour les années 1884 et 1885, ils ne l'ont été qu'une seule fois pour ces deux années.

Le président des commissaires, M. Robertson, dit qu'il n'a jamais examiné la caisse de Whitney.

A. I never looked into his cash, I did not consider it my duty to look into his cash. It was not my special duty. I never counted his cash. It was a matter for the auditor to do.

Qu'il n'a jamais examiné les comptes de Whitney avant sa fuite; admet qu'il n'y a eu qu'une audition des comptes pour les années 1884 et 1885; qu'il n'a jamais vérifié les balances considérables portées au crédit, n'a jamais vérifié non plus l'argent en caisse, et n'avait aucune méthode de contrôler les entrées du livre de caisse, qu'il laissait tout cela à l'auditeur, qu'il ne lisait pas non plus les lettres reçues.

Un chèque de $14,000 du gouvernement pour le compte des phares et des bouées, en date du 11 juin 1886, a été reçu par M. Whitney ainsi qu'il l'a reconnu dans une lettre entrée au livre des lettres, en date du 19 juin. Ce montant a été détourné par Whitney, mais la découverte n'en a été faite que le 30 juin de l'année suivante, le jour de sa fuite.

Le président n'a jamais eu le livret de banque et ne l'a jamais comparé avec le livre de caisse. Personne n'était chargé de la surveillance des comptes de Whitney.

Il était tenu un livre pour l'enregistrement des obligations (bonds), mais ce livre n'a jamais été contrôlé par personne dans l'office.

M. Cameron, associé de M. Riddell, l'auditeur des appelants, qui a fait presque tout l'ouvrage de l'audition, dit: qu'aucun examen des comptes de Whitney n'a été fait depuis le commencement de 1884, jusqu'au commencement de 1885. Il dit aussi que le livre de

caisse n'était pas balancé tous les mois et probablement pas même tous les trois mois. En suivant une semblable méthode, ajoute Cameron, il n'était pas possible de constater une défalcation avant la fin de l'année.

Dès le mois de mai ou juin 1887, Whitney avait commis une défalcation, par la soustraction d'une obligation de $500 à $600 qu'il avait réalisée et détournée à son profit. Aussi à bonne heure que le 17 ou 22 juin, ce fait était connu des auditeurs Riddell et Cameron, ainsi que du président des commissaires.

Cameron dit aussi qu'aucune entrée n'avait été faite au grand-livre depuis six mois. Tous les témoins qui en parlent, disent que la caisse n'était pas comptée tous les mois et en réalité pas plus de deux fois dans l'année. Cameron dit que la défalcation eut été probablement connue plus tôt, si la caisse eût été balancée tous les mois, mais elle ne l'était que rarement, pas même tous les quatre mois.

D'après le témoignage de Riddell, la caisse n'a été balancée que tous les six mois pendant les trois dernières années, qu'il n'y a pas eu d'examens mensuels ni de vérification des fonds en caisse, qu'elle n'a été balancée que le 5 janvier 1887, et ne l'a plus été ensuite jusqu'au 30 juin, après la fuite de Whitney.

D'après Cameron, des balances considérables non collectées étaient rapportées d'année en année, et que ceci, ajouté à la négligence avec laquelle la caisse était tenue et l'absence de tout contrôle sur l'émission des débentures, avait été considéré si irrégulier que les auditeurs avaient jugé à propos dans l'automne de 1886 d'en prévenir Whitney et le président lui-même et de recommander l'adoption d'un nouveau système qui n'a jamais été adopté.

Dans le mois d'avril 1887, Cameron avait eu connaissance du détournement d'une somme de cinq à six cents piastres, produit d'une obligation que Whitney avait

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réalisé. Le 17 ou le 22 juin de la même année, Riddell et le président eurent connaissance du détournement de la somme de cinq ou six cents piastres produit d'une obligation des commissaires. Le 29 juin Riddell écrivit au président au sujet du détournement de l'obligation et le 29 lui écrivit encore pour lui dire que Witney était défalcataire pour un montant considérable. Le lendemain Whitney s'était enfui. Malgré toutes ces preuves de la défalcation de Whitney, aucun avis n'en fut donné à l'intimée. Au contraire, Riddell qui était convaincu depuis le 17 ou 22 juin de la défalcation de Whitney, discutant le sujet avec le président des commissaires fut étonné et même alarmé de voir celui-ci accorder huit jours de délai à Whitney pour remettre ses affaires en ordre. Il lui dit aussi que la compagnie intimée devait être notifiée, et que quelqu'un devrait passer la nuit avec Whitney. Ceci se passait peu après quatre heures p. m.; il revit le président ensuite vers cinq heures, mais il avait alors décidé de ne pas donner avis à la compagnie.

Non-seulement les appelants ont manqué à leur obligation d'avertir l'intimée, mais le lendemain après le départ de Whitney, le président hésita pendant si longtemps à donner son consentement pour son arrestation que Whitney eut le temps de s'enfuir. Rawlings, le gérant de l'intimée se rendit avec un détectif au bureau des appelants, pour demander le consentement de M. Robertson pour l'arrestation, mais celui-ci tarda si longtemps à le donner que l'on apprit que le train qu'avait pris Whitney était déjà arrivé à Prescott et que Whitney s'était échappé.

L'obligation de surveiller Whitney dans ses procédés ne s'appliquait pas seulement à la première police de garantie comme assistant secrétaire mais également à celle de secrétaire-trésorier. Dans cette seconde police il est fait référence par son numéro à la proposition des

appelants et déclaré qu'elle est émise sur les représentations contenues dans ce document et sur la déclaration que les réponses sont vraies et sur la promesse que la même surveillance sera exercée sur Whitney dans son nouvel office de secrétaire-trésorier que dans celui d'assistant secrétaire qu'il exerçait auparavant. Il ne peut pas y avoir de doute que la proposition des appelants s'applique aussi bien à la seconde qu'à la première police et que leur obligation quant à la surveillance est parfaitement établie.

La Cour du Banc de la Reine est tout-à-fait fondée sur la preuve lorsqu'elle déclare que les appelants n'ont pas exercé sur leur employé Whitney la surveillance à laquelle ils s'étaient engagés par les polices d'assurances émises par l'intimée ; qu'ils ne lui ont point accordé toute l'aide et l'assistance qu'ils étaient tenus de lui donner d'après les conditions des dites polices, qu'ils ne lui ont donné aucun avis des défalcations de Whitney dont ils avaient connaissance depuis longtemps et que leur manque de diligence à faire arrêter Whitney a été cause qu'il a pu échapper à la justice. Que ces violations des engagements des appelants sont suffisantes pour dégager l'intimée de toute responsabilité envers eux. En conséquence, je suis d'avis que l'appel doit être renvoyé, ainsi que l'action avec dépens.

TASCHEREAU J.—The appellants in this case claim from the respondents the amount of two policies of guarantee of the fidelity of one Whitney, their secretary-treasurer, who absconded in 1887, being a defaulter to an amount exceeding these two policies.

The two policies are not precisely in the same terms. However, the variances between them do not affect the conclusion I have reached, that this appeal should be dismissed.

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Taschereau J.

The respondent's defence to the action is that the appellants failed to fulfil the undertakings assumed by them under the policies; that they violated the essential conditions thereof; more particularly that Whitney's books were not balanced, nor his cash counted every day, as expressly covenanted; that no supervision whatever was exercised over Whitney; that no immediate notice of the defalcation was given, as agreed. The appeal court found these pleas proved, and in my opinion the evidence amply supports that finding. The impression left in my mind from the consideration of the witness's depositions is that the commissioners are proved to have been grossly negligent of their duties in the matter. They say in their factum that they are public trustees existing not for the purpose of making money but for public purposes. That is so, and I am inclined to think that if their business had been to make money they would have shown more care, and exercised more supervision over their cashier.

The appeal should be dismissed.

SEDGEWICK and KING JJ. concurred.

Appeal dismissed with costs.

Solicitors for appellants: *Abbotts, Meredith & Campbell.*

Solicitors for respondents: *Hall, Cross, Brown & Sharp.*

ARTHUR STANHOPE FARWELL (DEFENDANT)..... ..... } APPELLANT;

AND

THE QUEEN, ON THE INFORMATION OF THE ATTORNEY GENERAL FOR THE DOMINION OF CANADA (PLAINTIFF)..... } RESPONDENT.

1893
*Oct. 19.

1894
*Feb. 20.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Information of intrusion—Subsequent action—Res judicata—Beneficial interest in land—Jurisdiction of the Exchequer Court—British North America Act, section 101.

In proceedings on an information of intrusion exhibited by the Attorney General of Canada against the appellant, it had been adjudged that the appellant, who claimed title under a grant from the crown under the Great Seal of British Columbia, should deliver up possession of certain lands situate within the railway belt in that province. *The Queen* v. *Farwell* (14 Can. S. C. R. 392.)

The appellant having registered his grant and taken steps to procure an indefeasible title from the registrar of titles of British Columbia, thus preventing grantees of the crown from obtaining a registered title, another information was exhibited by the Attorney Generel to direct the appellant to execute to the crown in right of Canada a surrender or conveyance of the said lands.

Held. 1. That the judgement in intrusion was conclusive against the appellant as to the title. The *Queen* v. *Farwell* (14 Can. S. C. R. 392) and *Attorney General of British Columbia* v. *Attorney General of Canada*, (14 App. Cas. 295) commented on and distinguished.

2. That the proceedings on the information of intrusion did not preclude the crown from the further remedy claimed.

3. That the crown in right of the Dominion had a right to take proceedings to restrain an individual from making use of a provincial grant in a way to embarrass the Dominion in the exercise of its territorial rights.

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

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4. That the rights of the crown, territorial or prerogative, are to be passed under the Great Seal of the Dominion or Province (as the case may be) in which is vested the beneficial interest therein.

5. And that the Parliament of Canada had the right to enact that all actions and suits of a civil nature at common law or equity, in which the crown in right of the Dominion is plaintiff or petitioner, may be brought in the Exchequer Court. Taschereau J. *dubitante.*

APPEAL from a judgment of the Exchequer Court of Canada (1), ordering the appellant to execute to Her Majesty the Queen, in the right of Canada, a surrender or conveyance of certain lands in British Columbia and reserving to the crown the right to apply for an order restraining the defendant from further prosecuting his proceedings before the Registrar General of Titles.

This was an information at the suit of Her Majesty's Attorney General for the Dominion of Canada, to obtain an order of the court directing the defendant to execute a conveyance to Her Majesty, in right of the Dominion, of certain lands in the railway belt of British Columbia.

The facts and pleadings are fully stated in the judgment hereinafter given. See also the report of the case in the Exchequer Court (1).

McCarthy Q.C. for appellant contended, 1st, that the Parliament of Canada could not give concurrent original jurisdiction to the Exchequer Court in actions and suits of a civil nature at common law or equity.

2. That the Exchequer Court had no jurisdiction in the premises, inasmuch as the respondent is not entitled to the legal estate in the said lands by reason of the judgment of the Privy Council in the "Precious Metals Case." (2)

3. That the said court had no jurisdiction to entertain an action, the gist of which is the direct impeachment of a provincial crown grant.

(1) 3 Ex. C.R. 271. (2) 14 App. Cas. 295.

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4. That if the said court had jurisdiction the court erred in holding that the matter of the validity of the appellant's crown grant was *res judicata*, the respondent's right to possession being alone determined.

5. That if the question of the validity of the said crown grant is *res judicata* by reason of the former judgment of this court, no further relief in respect of the same should be awarded against the appellant, said judgment being erroneous.

6. That the appellant was protected by virtue of the provisions of the Land Registry Act which bound the Government of Canada.

7. That if the whole matter of the appellant's title by conveyance from Prevost was *res judicata*, and the court had jurisdiction, then the respondent was barred from bringing this action by reason of the former recovery. And in addition to the cases and authorities cited in the Exchequer Court (1), the learned counsel referred to British North America Act, section 101, and section 92, subsections 13 and 14; Clement's Canadian Constitution (2); Chitty on Prerogatives (3); Freeman on judgments (4); *Sawyer* v. *Woodbury* (5); *Barrs* v. *Jackson* (6); *Queen* v. *Hutchings* (7); *Abouloff* v. *Oppenheimer* (8); *Russell* v. *Place* (9); *Bell* v. *Merrifield* (1); Consolidated Acts, 1888, B. C. ch. 31, secs 18 and 35; *Flint* v. *Attorney General of Canada* (11); Everest & Strode on Estoppel (12).

Hogg Q.C. for the rsspondent, on the question of jurisdiction, cited and relied on 50 & 51 Vic. ch. 16, sec. 17, ss. (d); British North America Act, sec. 101.

(1) See 3 Ex. C. R. 271.
(2) P. 228 *et seq*, and 513 *et seq*.
(3) P. 389, sec. 2.
(4) Ed. 1892 sec. 2.
(5) 7 Gray (Mass.) 499.
(6) 1 Y. & C. Chy. Repts. 585.
(7) 6 Q. B. D. 304.
(8) 10 Q. B. D. 307.
(9) 94 U.S.R. 606.
(10) 109 N.Y. 202; 4 Am. St. Repts. 436.
(11) 16 Can. S. C. R. 707.
(12) P. 60.

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As to *res judicata* the decision of this court in the former action of *Farwell* v. *The Queen* concludes the appellants (1); also see Chitty on Prerogatives (2); *Dynes* v. *Bales* (3); *Harkin* v. *Rabidon* (4); *Truesdell* v. *Cook* (5); *Shaw* v. *Ledyard* (6); *Keefer* v. *Mackay* (7); Manning's Exchequer Pr. (8); Cons. Acts of B.C., 1888, ch. 67, secs. 13, 18, 20, 31, 54, 74 and 89; Story's Equity Jurisprudence (9); *Ont. Industrial Loan and Investment Company* v. *Lindsay* (10); *Charlton* v. *Watson* (11); *Re Bobier & Ont. Investment Association* (12); *Ftower* v. *Martin* (13); See also argument for plaintiff in 3 Ex. C. R. p. 279 *et seq.*

THE CHIEF JUSTICE.—I am of opinion that this appeal should be dismissed for the reasons given in the judgment of Mr. Justice King.

FOURNIER J.—I have also come to the same conclusion.

TASCHEREAU J.—I have doubts on the question of jurisdiction of the Exchequer Court on this information. On the merits, I concur in the dismissal of the appeal upon the grounds set forth in the judgment of the Exchequer Court.

GWYNNE J.—I am also of opinion that this appeal should be dismissed.

KING J.—By the judgment of the Exchequer Court the appellant (the defendant below) was ordered to

(1) 14 Can. S. C. R. 392.
(2) P. 334-381.
(3) 25 Gr. 593.
(4) 7 Gr. 243.
(5) 18 Gr. 532.
(6) 12 Gr. 382.
(7) 10 Ont. P. R. 345.
(8) 200 and 106, 122.
(9) Sec. 705.
(10) 3 O. R. 66.
(11) 4 O. R. 489.
(12) 16 O. R. 259.
(13) 2 Mylne and C. 459.

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execute to the Queen, in right of Canada, a surrender or conveyance of the unsold portions of certain lands in British Columbia.

These lands are within what is known as the railway belt, a tract of land transferred to the Dominion by Act of British Columbia, 47 Vic. ch. 14 (1883). In October, 1885, an information of intrusion was filed against Farwell in respect of the lands in question. He then set up as a defence that his possession was under a grant to him issued by the Queen under the great seal of British Columbia in January, 1885, and that prior thereto the lands were in the hands and possession of the Queen. To this the Attorney General of Canada replied that, at the date referred to, the lands were in the hands and possession of the Queen, in right of the Dominion, and not in right of the province. It was so held by the Supreme Court of Canada, (1) and the defendant was put out of possession on 6th January, 1892.

Prior to the filing of information of the intrusion, *i.e.*, in March, 1885, Farwell began to take steps to secure for himself a certificate of indefeasible title under the "Land Registry Act" of British Columbia, and upon the lapse of the statutable period of seven years, sought to perfect his title under the land laws of the province by applying to the registrar of titles for certificate of indefeasible title. The effect of this, if granted, would be to prevent any purchaser from the crown in right of Canada from obtaining registry of his title, and to put a blot upon the title of the crown; and accordingly, upon public notice by the Registrar General of defendant's application, objections to the issue of the certificate were made on behalf of the Attorney General of Canada, and subsequently it was agreed that the matter before the registrar should stand

(1) 14 Can. S. C. R. 392.

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over until the final determination of the present action that had been previously begun.

The appellant contends that he is not concluded by the former judgment, because it related to the possession only, and that no further effect should be given to the judgment in that case, because, as he contends, the judgment of the judicial committee in *Attorney General of British Columbia* v. *Attorney General of Canada* (1) has subverted or weakened the foundations of the judgment in *Queen* v. *Farwell* (2). As to the first point: Where the parties (themselves or privies) are the same, and the cause of action is the same, the estoppel extends to all matters which were, or might properly have been, brought into litigation. Where the parties (themselves or privies) are the same, but the cause of action is different, the estoppel is as to matters which, having been brought in issue, the finding upon them was material to the former decision. Here the rights of the province and the Dominion were before the court, not as a matter collateral or incidentally cognizable, but as material, upon the pleadings, in the determination of whether there had been an intrusion or not.

But, secondly, there is no inconsistency between *Queen* v. *Farwell* (2), and *Attorney General of British Columbia* v. *Attorney General of Canada* (1). The former case held that the act of British Columbia transferred to the Dominion the rights in the lands which had been formerly enjoyed by the province. The latter held that the act transferred to the Dominion those rights only, and did not transfer the *jura regalia*, including therein the precious metals then in question. These were held to be in the crown, subject to the control and disposal of the Government of British Columbia.

(1) 14 App. Cas. 295. (2) 14 Can. S.C.R. 392.

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Certain expressions in the latter judgment, at pp. 301 and 302 are relied upon by the learned counsel for appellant to show that the right of the Dominion is not as great as the respondent contends for. Mr. Justice Burbidge has, however, explained these passages satisfactorily.

Perhaps a reference to other passages in confirmation may not be superfluous.

In the *St. Catherines Milling Co.* v. *The Queen* (1), the same learned Lord who delivered the opinion of the judicial committee in the "precious metal case," speaking of the effect of the Imperial Civil List Act of 1840, in relation to the crown lands in Canada, says:—

> There was no transfer to the province of any legal estate in the crown lands, which continued to be vested in the Sovereign; but all moneys realized by sales or in any other manner became the property of the province. In other words, all beneficial interest in such lands within the provincial boundaries belonging to the Queen, and either producing or capable of producing revenue, passed to the province, the title still remaining in the Crown.

And then, speaking of the distribution of property under the British North America Act:—

> It must always be kept in view that, wherever public land with its incidents is described as 'the property of' or as 'belonging to' the Dominion or a province, these expressions merely import that the right to its beneficial use, or to its proceeds, has been appropriated to the Dominion or the province, as the case may be, and is subject to the control of the legislature, the land of itself being vested in the crown.

Then in the case under consideration, the "precious metal case," (2) the same principles are stated in their application to the territorial rights of the crown on the one hand, and to the prerogative rights of the crown in connection with such lands on the other. In the one case, as in the other, the title is in the Sovereign; but whilst, prior to the act of 1883, the entire beneficial interest, both as to the territorial and the prerogative

(1) 14 App. Cas. 46. (2) 14 App. Cas. 295.

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rights of the crown, was in the province, and subject to the control of the government and legislature of the province, the effect of that act was to sever the beneficial interests, and to assign or appropriate the beneficial interest in the crown's territorial rights to the Dominion, retaining to the province the beneficial interest in the *jura regalia* or prerogative rights of the crown in connection with such lands.

Thus, at page 302, it is said :—

> In British Columbia the right to public lands, and the right to precious metals in all provincial lands, whether public or private, still rest upon titles as distinct as if the crown had never parted with its beneficial interests ; and the crown assigned these beneficial interests to the Government of the province, in order that they might be appropriated to the same state purposes to which they would have been applicable if they had remained in the possession of the crown. Although the Provincial Government has now the disposal of all revenues derived from prerogative rights connected with land or minerals in British Columbia, those revenues differ in legal quality from the ordinary territorial revenues of the Crown. It therefore appears to their Lordships that a conveyance by the province of 'public lands,' which is, in substance, an assignment of its right to appropriate the territorial revenues arising from such lands, does not imply any transfer of its interest in revenues arising from the prerogative rights of the Crown.

Again at page 305 :—

> The expression 'lands' in the 11th article of Union admittedly carries with it the baser metals, *i.e.* 'mines' and 'minerals' in the sense of section 109 of the British North America Act. Mines and minerals, in that sense, are incidents of land. But *jura regalia* are not accessories of land ; and their Lordships are of opinion that the rights to which the Dominion Government became entitled under the 11th article did not, to any extent, derogate from the provincial right to 'royalties' connected with mines and minerals under section 109 of the British North America Act.

It is thus abundantly (and perhaps unnecessarily) shown that the beneficial interest in the crown's territorial rights, as distinguished from the *jura regalia*, are appropriated to and held by the Dominion as fully and

effectually, and by the same tenure, as the same had been previously appropriated to and held by the province. The title is in the Sovereign in right of the Dominion, in the same sense (as to territorial rights) as it was in the Sovereign in the right of British Columbia before the act of 1883. Mr. Justice Burbidge has effectually disposed of the suggestion that, upon a sale of the lands by the Dominion, the grant is to be passed under the great seal of British Columbia on application of the Dominion. The rights of the crown, territorial or prerogative, are to be passed under the great seal of the Dominion or province (as the case may be) in which is vested the beneficial interest therein, otherwise they cannot be said to be enjoyed by it, or under its control.

It is further contended that the Exchequer Court has no jurisdiction to entertain an action to impeach a provincial crown grant. But the effect of this action is to restrain an individual from making use of a provincial grant in a way to embarrass the Dominion in the exercise of territorial rights which a statute of the province had previously vested in the Dominion. Having taken his provincial grant with knowledge of the Dominion's rights, and having put a blot on the title of the Dominion in the registry of titles in British Columbia, he is required to remove the blot, and so give unrestrained effect to what the province had agreed to do.

It is then said that the crown should have sought this remedy in the action for intrusion. This is also dealt with effectually in the judgment appealed from, and, on principle, there is nothing requiring dissimilar rights to be enforced at the same time.

The remaining objection is that the Parliament of Canada had no power to give to the Exchequer Court original jurisdiction "in all actions and suits of a civil

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nature at common law or equity in which the crown is plaintiff or petitioner." It is contended that the power of Parliament, in the establishment of courts, is limited by the British North America Act to the establishing of a court of appeal or other courts for the better administration of the laws of Canada. But "the King has the undoubted privilege of suing in any court he pleases." Chitty on Prerogatives. (1)

And where the matter in suit in another court concerns the revenue, or touches the profit of the King, he has the right to remove the suit into the Exchequer.

See the illustrations given of this in *Cawthorne* v. *Campbell* (2). This privilege is said to be "without the least mixture of prerogative process; or whether it is a proper subject for prerogative process only to act upon or not, that is not an ingredient." (3)

It follows, in my mind, that the crown, by and with the advice and consent of the Houses of Parliament, must have the right (a right which it would need clear words to take away) to enact that all actions and suits of a civil nature at common law or equity, in which the crown in right of the Dominion is plaintiff or petitioner, may be brought in the Exchequer Court—the right to establish which with its other branches of jurisdiction is undisputed and indisputable.

Agreeing with the judgment of Mr. Justice Burbidge I think the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors for appellant: *McIntyre, Code & Orde.*

Solicitors for respondent: *O'Connor & Hogg.*

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(1) P. 244.

(2) 1 Anstruther, p. 205 in note.

(3) P. 218.

J. AVARD MORSE (DEFENDANT).....APPELLANT; 1893

AND *Nov. 29.

INGLIS PHINNEY (PLAINTIFF).....RESPONDENT. 1894

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA. *Feb. 20.

Chattel mortgage—Affidavit of bonâ fides—Compliance with statutory form—R.S.N.S. 5th ser., c. 92, s. 4.

By R.S.N.S., 5th ser., c. 92, s. 4, every chattel mortgage must be accompanied by an affidavit of *bona fides*, "as nearly as may be" in the form given in a schedule to the act. The form of the jurat to such affidavit in the schedule is: "Sworn to at in the county of , this day of A.D. . Before me a commissioner," etc.

Held, reversing the judgment of the Supreme Court of Nova Scotia, Gwynne J. dissenting, that where the jurat to an affidavit was "sworn to at Middleton this 6th day of July, A.D. 1891, etc., without naming the county, the mortgage was void, notwithstanding the affidavit was headed "in the county of Annapolis." *Archibald* v. *Hubley* (18 Can. S.C.R. 116) followed; *Smith* v. *McLean* (21 Can. S.C.R. 355) distinguished.

APPEAL from a decision of the Supreme Court of Nova Scotia reversing the judgment at the trial in favour of defendant.

The action in this case was against the sheriff of the County of Annapolis, N.S., to try the title to goods claimed by plaintiff under a chattel mortgage from the owner, Lewis Landers, and by defendant under execution issued on a judgment against Landers. The chattel mortgage to plaintiff was attacked on the ground that it did not comply with the provisions of R.S.N.S., 5th ser., ch. 92, sec. 4, which requires every such instrument to be accompanied by an affidavit, as nearly as may be, in the form prescribed by a schedule to the

* PRESENT:—Fournier, Taschereau, Gwynne, Sedgewick and King, JJ.

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act, of the good faith of the mortgagor in giving it, or else the mortgage shall be void. By the said form the jurat to the required affidavit is to be as follows: "Sworn to at in the county of this day of A.D. , before me a commissioner," etc. The affidavit of Landers accompanying the mortgage to the plaintiff, was headed, "Canada, province of Nova Scotia, County of Annapolis," and the jurat was, "sworn to at Middleton, this 6th day of July," etc., without containing the name of the county in which Middleton is situated. Defendant contended that this departure from the form vitiated the mortgage, while plaintiff urged that section 11 of said chapter 92, providing that slight deviations from prescribed forms, not affecting the substance nor calculated to mislead, shall not vitiate them, operated to cure this defect, and that as the affidavit showed on its face that it was sworn in Annapolis County, in which Middleton is situate, the case is within the decision in *Smith* v. *McLean* (1).

The trial judge held the chattel mortgage void on the authority of *Archibald* v. *Hubley* (2). His judgment was reversed by the full court from whose decision the defendant appealed.

Borden Q.C. for the appellant, referred to *Archibald* v. *Hubley* (2); *Parsons* v. *Brand* (3); *Thomas* v. *Kelly* (4); *Ford* v. *Kettle* (5); *Furber* v. *Cobb* (6); *Blankenstein* v. *Robertson* (7).

Harrington Q.C. for the respondent, cited *Cheney* v. *Courtois* (8); *Bird* v. *Davie* (9); *Ex parte Johnson* (10); *Emerson* v. *Bannerman* (11).

(1) 21 Can. S.C.R. 355.
(2) 18 Can. S.C.R. 116.
(3) 25 Q.B.D. 110.
(4) 13 App. Cas. 519.
(5) 9 Q.B.D. 139.
(6) 18 Q.B.D. 502.
(7) 24 Q.B.D. 543.
(8) 9 Jur. N.S. 1057.
(9) [1891] 1 Q.B. 29.
(10) 26 Ch. D. 338.
(11) 19 Can. S.C.R. 1.

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Taschereau J.

FOURNIER J.—I am of opinion that this appeal should be allowed.

TASCHEREAU J.—This is an action against the sheriff of Annapolis County, for the return of goods taken by him under a writ of execution against one Lewis Landers. The goods were in possession of Landers when taken by the sheriff, but are claimed by the plaintiff under a chattel mortgage from Landers to him. The defendant justified under the execution, and also pleaded that the chattel mortgage under which the plaintiff claims is invalid under chapter 92 of the Revised Statutes of Nova Scotia.

The action was tried before Chief Justice McDonald, without a jury. The learned Chief Justice gave judgment for the defendant. The plaintiff appealed from this judgment to the Supreme Court *in banco*. The appeal was heard by Weatherbe, Ritchie, Graham and Meagher JJ. A majority of the learned judges consisting of Weatherbe, Graham and Meagher JJ., were of opinion that the appeal should be allowed, Meagher J. *dubitante*. Ritchie J. was of opinion that the appeal should be dismissed. A rule was granted allowing the appeal. The defendant now appeals.

The Supreme Court of Nova Scotia allowed the appeal on the ground that the chattel mortgage under which the plaintiff claims is a valid instrument as against the defendant under chapter 92, Revised Statutes, Nova Scotia, fifth series.

Upon the true construction of chapter 92, R.S. N.S., fifth series, the chattel mortgage under which the plaintiff claims is, in my opinion, invalid as against the defendant for non-compliance with the statute. Section 2, of chapter 92, is imperative that the affidavit accompanying the chattel mortgage shall be as nearly as may be in the form prescribed by the statute.

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Archibald v. *Hubley* (1); *Emerson* v. *Bannerman* (2); *Parsons* v. *Brand* (3); *Thomas* v. *Kelly* (4); *Furber* v. *Cobb* (5); *Re Andrews* (6).

The form of affidavit prescribed by the statute requires the commissioner or person before whom the affidavit is sworn to certify that it was sworn "in the county of " leaving a blank for the county. The person before whom this affidavit was sworn has omitted this statement from his certificate. The jurat to this affidavit does not state, either expressly or by reference, the county in which the oath was administered, and the person administering the oath does not state for what county he is a justice of the peace.

This omission, it seems to me, brings the present case directly within the authority of *Archibald* v. *Hubley* (1) as held by Chief Justice Macdonald at the trial.

In that case the person swearing the affidavit omitted to certify that the affidavit was sworn before him, and in this case the person swearing the affidavit omitted to certify that it was sworn in the county where the oath was administered. If the form requires the one fact to be certified it also requires the other.

The decision in that case of *Archibald* v. *Hubley* (1) is not modified, and never was intended to be, by the decision in *Smith* v. *McLean* (7).

I would allow this appeal and restore the judgment which dismissed the action.

GWYNNE J. The judgment of this court in *Archibald* v. *Hubley* (8), does not hold or purport to hold that section 11 of ch. 1 of the Revised Statutes of Nova Scotia 5th series has no application to a case like the present.

(1) 18 Can. S. C. R. 116.
(2) 19 Can. S. C. R. 1.
(3) 25 Q. B. D. 110.
(4) 13 App. Cas. 519.
(5) 18 Q. B. D. 502.
(6) 2 Ont. App. R. 24.
(7) 21 Can. S. R. 355.

That section enacts that where forms are prescribed in statutes slight deviations therefrom, not affecting the substance or calculated to mislead shall not vitiate them. By the 4th and 5th sections of ch. 92 of the same series it was enacted that chattel mortgages and bills of sale therein respectively mentioned should be accompanied by an affidavit of the grantor of its *bona fides* to the effect in these sections respectively mentioned, and by section 11 it was enacted that the affidavits mentioned in the said 4th and 5th sections should be as nearly as may be in the form given in schedules A and B respectively. At the foot of the forms in these schedules is given the form of the jurat as follows:—

"Sworn to at in the county of
this day of A.D. 18
"Before me"

Now what the court decided in *Archibald* v. *Hubley* (1) was that the omission of the words "before me" in the jurat to the affidavit of the grantor of the bill of sale in that case wholly vitiated the affidavit; made it in fact no affidavit, although the commissioner who took it testified in court upon oath in an issue as to the title to the property purported to be conveyed by the bill of sale which accompanied the affidavit, that the affidavit was sworn to before him.

The result of that case then simply is that the omission of the words "before me" in the jurat of such an affidavit was not such a slight deviation from the prescribed form not affecting the substance as would come within the protection and saving influence of ch. 1, section 11. That is all that case can be said to have decided. The court did not attempt to lay down and indeed could not lay down any fixed rule applicable to the determination in all cases of the question what deviation would and what would not be within the protection of the section 11 of ch. 1.

(1) 18 Can. S.C.R. 116.

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Then in *Smith* v. *McLean* (1), a question arose upon the same statute ch. 92.

The form prescribed for an affidavit to be made by the grantor of the bill of sale commenced as follows:—"I A. B. of in the county of (occupation) make oath and say as follows, &c." In the affidavit under consideration the "occupation" of the person making the affidavit was omitted wholly; but the court held that that omission did not vitiate the affidavit as his occupation appeared on the face of the bill of sale to which the affidavit referred. That omission was plainly one which constituted such a slight deviation from the prescribed form as brought it within the protection of ch. 1 section 11.

The question in the present case is simply this: Does the deviation from the prescribed form in the present case constitute only such a slight deviation not affecting the substance or calculated to mislead, as to bring it within the protection of the statute—and so not vitiate the instrument; or is it, on the contrary, so substantial a variance or so calculated to mislead as not to come within the protection of the statute and to be fatal to the validity of the instrument? The variance is this. The affidavit is headed as made in

"Canada—Province of Nova Scotia,

"County of Annapolis."

The jurat was—"Sworn to at Middleton this 6th "day of July, A.D. 1891

"Before me

A. W. PHINNEY, *J.P.*

leaving out the name of the county in which Middleton is. But that the affidavit was sworn in the county of Annapolis appears from the heading to the affidavit, and that Middleton is situated in the county of Annapolis is not disputed.

(1) 21 Can. S.C.R. 355.

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Now without impugning in the slightest degree the judgment of this court in *Archibald* v. *Hubley* (1) I must say that this omission does appear to me to constitute just such a slight deviation from the prescribed form, not affecting the substance or calculated to mislead, as to come within the protection of ch. 1 section 11, and that we must therefore hold that the omission does not vitiate. It certainly appears to me to be as harmless a deviation from the prescribed form as was that in *Smith* v. *McLean* (2).

All cases of this description must be brought to the test of the statute ch. 1 section 11.

I am of opinion therefore that this appeal must be dismissed with costs.

SEDGEWICK J.—I concur in the judgment prepared by Mr. Justice King.

KING J.—The question raised by this appeal is as to the validity of a chattel mortgage given by one Landers to the respondent, the plaintiff below. Upon the trial the learned Chief Justice of Nova Scotia held that the instrument was invalid for want of compliance with the statute, ch. 92, Revised Statutes of Nova Scotia. The Supreme Court of Nova Scotia, per Weatherbe, Graham and Meagher JJ., (Ritchie J. dissenting) reversed the judgment and this appeal is from that decision.

The statute referred to requires that

Every bill of sale of personal chattels made either absolutely or conditionally, subject or not subject to any trust, shall be filed with the registrar.

It also provides (sec. 4) that:

Every bill of sale or chattel mortgage of personal property other than mortgages to secure future advances shall hereafter be accompanied by an affidavit of the party giving the same or his agent or attorney duly authorised in that behalf, that the amount set forth therein as being the consideration thereof is justly and honestly due and owing by the

(1) 18 Can. S. C. R. 116. (2) 21 Can. S.C.R. 355.

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grantor * * * ; otherwise such bill of sale or chattel mortgage shall be null and void as against the creditors of the grantor or mortgagor.

By sec. 11 it is provided that the affidavits mentioned in secs. 4 and 5 shall be as nearly as may be in the form in schedules A and B, respectively, and the following is the form of jurat in said schedules :—

"Sworn to at , in the county of , this day of , A. D., 18 , before me.

(Signed), A. B."

In the jurat to the affidavit accompanying and filed with this chattel mortgage there was no reference to the county. The jurat was as follows: "Sworn to at Middleton, this 6th day of July, A.D., 1891, before me, (Signed), A. W. P., J. P."

In *Archibald* v. *Hubley*, (1) (a case under the same statute), it was held that the omission of the day of the month and the words "before me" from the jurat rendered the bill of sale void. This was a decision of the late Chief Justice, and of Justices Fournier and Patterson, Justices Taschereau and Gwynne dissenting. At page 112 the late Chief Justice says :—

If these can be omitted why may not the place where sworn be likewise dispensed with and so the whole jurat be got rid of ?

Patterson J., (p. 135) says :—

By sec. 4 the mortgage or bill of sale is to be null and void as against creditors unless the prescribed affidavit of bona fides is made, and sec. 11 is imperative that it shall be as nearly as may be in the given form. This is undistinguisable from the English Act of 1882 which provides in sec. 9 that the bill of sale shall be void if not made in accordance with the form in the schedule to the act * * * Some of the decisions in Ontario which have been cited have gone as far as liberal construction of the facts would allow to uphold defective affidavits in cases of this kind, but no case has gone the length we are asked to go in this case and besides they have no provision in Ontario like that of the 11th sec. of the Nova Scotia Act."

If it were not for this decision, it might perhaps be open to point out a possible distinction between the

(1) 18 Can. S.C.R. 116.

English and the Nova Scotia act, in this, that, by the former, the formal characteristics, are expressly made matters of substance by the direct provision avoiding the bill of sale if not made in accordance with the form, while in the case of the act in question the penalty is laid for non-compliance with a provision requiring an affidavit setting forth certain matters of substance ; and then by a further provision (sec. 11) it is enacted that such affidavit shall be as nearly as may be in the forms in the schedules, which forms deal with both formal and substantial requirements.

But as already observed the decision in *Archibald* v. *Hubley*(1) makes no account of this verbal difference and treats the enactment in question as though it in terms enacted that the bill of sale, &c.. should be void if not made as nearly as may be in the form given in the schedule. In this state of things the form given in the schedule cannot be treated merely as a model (as is ordinarily the case when forms are prescribed) for the form becomes a matter of substance; the essence of the thing is in the form, and the provision is unaffected by the general statutory provision that " forms when prescribed shall admit variations not affecting the substance or calculated to mislead." It has not been held under the English Statute that slavish or literal adherence to the form is required, but it has been held that in a case where form is prescribed and departure from it penalized, divergence from the form in what is characteristic of it is fatal.

In *Ex parte Stamford*, (2) Bowen C. J., delivering the judgment of five judges of the Court of Appeal, says : —

> But a divergence only becomes substantial or material when it is calculated to give the bill of sale a legal consequence or effect either greater or smaller than that which would attach to it if drawn in the form which has been sanctioned.

(1) 18 Can. S.C.R. 116.

(2) 17 Q. B. D. 259, 270.

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And he adds :—

We must consider whether the instrument as drawn will in virtue either of addition or omission, have any legal effect which either goes beyond or falls short of that which would result from the statutory form.

In *Thomas* v. *Kelly*, (1) Lord Fitzgerald says :—

I would hesitate, my lords, to criticise a proposition coming from a tribunal so important and so weightily constituted (Lord Esher M. R., and Cotton, Lindley, Bowen and Lopes JJ., FryL. J. diss). I am not now called on to do so, nor shall I say more than that I am not now to be taken as adopting in all its terms that rule of construction, as affording an inclusive as well as exclusive test.

Lord Macnaghten (p. 519) says that :—

The section seems to me to deal with form and form only. So purely is it, I venture to think, a question of form, that I should be inclined to doubt whether a bill of sale would not be void which omitted the proviso referring to section 7, though I cannot see that the omission would alter the legal effect of the document in the slightest degree, or mislead anybody. It has been held, and I think rightly, that section 9 does not require a bill of sale to be a verbal and literal transcript of the statutory form. The words of the act are "in accordance with the form," not "in the form." But then comes the question : When is an instrument which purports to be a bill of sale not in accordance with the statutory form? Possibly when it departs from the statutory form in anything which is not merely a matter of verbal difference. Certainly I should say, when it departs from the statutory from in anything which is a characteristic of that form.

In his dissenting judgment in *Ex parte Stamford* (2), Fry J. says :—

The act of 1882 is a remarkable statute, imposing stringent fetters on the power of contracting in respect of loans on chattels * * * It is a statute which deals in an imperious manner, not with the substance only, but with the form of the instrument * * Again, the particular section now in question (the 9th) is an enactment of a remarkable, and so far as I know of late years, novel description, for it is aimed, not at the operation or substance of an instrument, but at its form, and in its demand for accordance with the scheduled form, it has no words of indulgence, such as, "or to the like purport or effect,' and in default of such accordance it makes the instrument void not as against third persons only, but as against the maker himself.

(1) 13 App. Cas. 517. (2) 17 Q.B.D. 274.

Parsons v. *Brand* (1), was a case where a bill of sale was held void because both the address and description of the attesting witness did not appear in the attestation clause in accordance with the direction to that effect contained in the form. The omission was not held to be one which altered the legal effect of the instrument, but *Thomas* v. *Kelly* (2), was considered as clearly holding that divergence from the form was not necessarily immaterial because it did not alter the effect of the instrument. Lord Justice Cotton also says that the word "form" does not refer only to what expresses the contract between the parties. He also pointed out that the test laid down in *Ex parte Stamford* (3), was one applicable only where the alleged divergence relates to the effect of the contract, and says that that case "must not be taken as intended to lay down a rule that nothing is a material departure from the form unless it alters the effect of the instrument."

Lindley L.J. (a party also to *Ex parte Stamford* (3), says:—

> It is a hard thing to be obliged to upset a fair transaction because t's are not crossed and i's not dotted, but we must give effect to the act, and I cannot see that a document is in accordance with the form unless all particulars are filled up which the form requires to be filled up.

In *Bird* v. *Davey* (4) the bill of sale had two attestation clauses attesting the execution of the instrument by two different grantors respectively. The signature to both attestation clauses was the same, and in one of them the address and description of the attesting witness was given, but in the other they were not. It was held that the form was complied with because, from what appeared on the face of the bill itself, an irresistible inference, in the opinion of the court, arose that the witness in the two attestation clauses was the same person. Pollock B. and Day J. had decided adversely

(1) 25 Q.B.D. 110.
(2) 13 App. Cas. 506.
(3) 17 Q.B.D. 259.
(4) [1891] 1 Q.B. 29.

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to the bill of sale on the authority of *Parsons* v. *Brand* (1), but the Court of Appeal (Lord Esher, Lindley and Lopes L. JJ.) reversed the decision. The effect of the act is that the name, address and description of the attesting witness must appear on the face of the bill of sale.

Lord Esher says (2):

If any extraneous evidence were necessary to show that the two signatures were those of the same man I should say that such evidence could not be given, and that the requirements of the act had not been satisfied. But if on looking at what appears on the face of the bill of sale, the inference is irresistible, so that the court can have no doubt that it was the same man who signed both attestation clauses, then the result is that the address and description of the attesting witness to the second attestation clause are given on the face of the bill of sale. To say that the address and description must be given in any particular order, as suggested by the counsel for the execution creditor, would, I think, be construing the act too strictly. In this case each member of the court, on looking at the bill of sale, has not the smallest doubt that the evidence is irresistible that the two attestation clauses are signed by the same person. Under these circumstances the case is distinguishable from *Parsons* v. *Brand* (1).

Lindley L.J. says:—

The form in the schedule says: "Add witness's name, address and description." Therefore the name, address and description must appear on the face of the instrument, and in the attestation clause somewhere; but the act does not say that where the same witness is attesting several signatures, he must set out his address and description as often as he attests. I cannot bring myself to think that the act requires such strictness as that. If it plainly appears on the face of the instrument that it is the same witness that is attesting in each case, and his address and description be given once, it appears to me to be sufficient.

Lopes J. says:—

If from what appears on the face of the bill of sale, without any external evidence an irresistible interference arises, there is nothing to prevent us from drawing that inference.

This latter case appears to introduce a new element, the right of the court in such cases to draw inferences

(1) 25 Q.B.D. 110. (2) P. 32.

of fact from the physical appearance of the instrument, inferences of fact based on their knowledge of handwriting, as distinguished from conclusions as to the construction of the written matter. Still it lays down that there must be an irresistible inference to the same effect as the form requires.

Then there is the case of *Smith* v. *McLean* (1), a case under the statute now in question. The form requires that in the affidavit the occupation of the deponent shall be stated. The affidavit referred to the deponent as "the within named grantor," and in the body of the bill of sale the occupation of the grantor was given. It was held, following *Bird* v. *Davey* (2) that it was sufficient if the required fact appeared upon the face of the instrument, and that it did so appear by virtue of the words of reference contained in the affidavit and the fact referred to in the body of the bill of sale. It was, as the learned counsel for the appellant contends, a case of the deponent making a reference, and not of the court making an inference.

Patterson J says (3) :—

But whatever the deed shows respecting the grantor the affidavit also shows respecting the deponent, who swears that he is the same person as the grantor ; by this reference to the deed the occupation is shown and the statute satisfied.

It was said that there should be a presumption of regularity, but in *Ford* v. *Kettle* (4), Jessel M.R. says that where there is no act of Parliament things may be presumed to have been done which are not to be presumed where an act requires it to be stated.

It appears to me that, in principle, *Archibald* v. *Hubley* (5) is not to be distinguished from the case before us. It is a substantial thing that the affidavit should be sworn before the justice or commissioner. *Archibald* v. *Hubley* (5) holds that it is a substantial part of the

(1) 21 Can. S.C.R. 355.
(2) [1891] 1 Q. B. 29.
(3) P. 358.
(4) 9 Q. B. D. 139.
(5) 18 Can S.C.R. 116.

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form that this matter of substance should be stated. It is no less a substantial thing that the affidavit should be taken in the county where the justice or commissioner has jurisdiction to administer it. It must be equally, as in the other case, a substantial matter of form that this matter of substance should be stated.

If the jurat had any words of reference by which the place of swearing could be made to appear anywhere on the face of the instrument *e.g.* if it ran thus: "Sworn to at Middleton aforesaid," then as the deed made reference to but one Middleton and to it as being in the county of Annapolis, the case would be within *Smith* v. *McLean* (1). *Id certum est quod certum reddi potest.* The naming of the county at the head of the affidavit does not advance the matter at all. What is required is that the place of swearing shall be rendered reasonably certain as to the county by the jurat, and be so certified to in terms by the official administering the oath, as is done by a jurat following the form. It is a not unimportant matter as tending to the authentication of the swearing that the jurat should state the place where sworn.

Grant v. *Fry* (2), cited by the learned judge, is not to the contrary of this. The jurat there stated the affidavit to have been sworn in Cheltenham aforesaid, and the deponent was in the body of the affidavit described as of Cheltenham in the county of Gloucester.

The affidavit failing to satisfy the requirement of the act in substantial matters of form, the bill of sale is avoided. The result is that the appeal should be allowed.

Appeal allowed with costs.

Solicitors for the appellant: *Cummings & Lovitt.*

Solicitor for the respondent: *J. G. H. Parker.*

(1) 21 Can. S.C.R. 355.

(2) 8 Dowl. 234.

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*Oct. 17.
1894
*Feb. 20

SPECIAL CASE REFERRED BY THE GOVERNOR GENERAL IN COUNCIL.

Manitoba Constitutional Act—33 *Vic., ch.* 3, *sec.* 22, *subsec.* 2—*Powers of Provincial Legislature in matters of education—Rights and privileges —Legislative power to repeal previous statutes—Right of appeal to Governor General in Council—B. N. A. Act*, 1867, *sec.* 93 *subsec.* 3.

Sec. 22 of the Manitoba Act, 33 Vic. ch. 3 (D.) enacts: In and for the province the said legislature may exclusively make laws in relation to education, subject and according to the following provisions:—

(1.) Nothing in any such law shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons have by law or practice in the province at the union.

(2.) An appeal shall lie to the Governor General in Council from any Act or decision of the Legislature of the Province, or of any provincial authority, affecting any right or privilege of the Protestant or Roman Catholic minority of the Queen's subjects in relation to education.

Subsection 3 of sec. 93 of the British North America Act, 1867, enacts: (3.) Where in any province a system of separate or dissentient schools exists by law at the union, or it is thereafter established by the legislature of the province, an appeal shall lie to the Governor General in Council from any Act or decision of any provincial authority affecting any right or privilege of the Protestant or Roman Catholic minority of the Queen's subjects in relation to education.

By certain statutes of the Province of Manitoba, relating to education, passed in 1871 and subsequent years, the Catholic minority of Manitoba enjoyed up to 1890 the immunity of being taxed for other schools than their own, &c., &c., but by the Public Schools Act, 53 Vic. ch. 38 (1890), these acts were repealed and the Roman Catholics were made liable by assessment for the public schools which are non-denominational, but were left free to send their

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children to the public schools. On a petition and memorials sent to the Governor General in Council by the Catholic minority, alleging that rights and privileges in the matter of education secured to them since the union had been affected, and praying for relief under subsecs. 2 and 3 of sec. 22 of the Manitoba Act, 1871 a special case was submitted to the Supreme Court of Canada, and it was held :

1. That the said rights and privileges in the matter of education, being rights and privileges which the Legislature of Manitoba had itself created, and there being no clear express and unequivocal words in sec. 22 of the Manitoba Act, 1871, restricting the constitutional right of the legislature of the Province to repeal the laws it might itself enact in relation to education, no right of appeal lies to the Governor General in Council as claimed either under subsec. 2 of sec. 22 of the Manitoba Act, or subsec. 3 of sec. 93 of the British North America Act, 1867. Fournier and King JJ. contra.

2. That the right of appeal given by subsec. 2 of sec. 22 of the Manitoba Act is only from an act or decision of the legislature which might affect any rights or privileges existing at the time of union as mentioned in subsec. 1, or of any provincial executive or administrative authorities affecting any right or privilege existing at the time of the union. Fournier and King JJ. dissenting.

Per Taschereau and Gwynne JJ., that the decision in *Barrett* v. *Winnipeg* ([1892] A. C. 443), disposes of and concludes the present application.

Quære—Per Taschereau J.—Is section 4 of 54 & 55 Vic. ch. 25, which purports to authorize such a reference for hearing "or" consideration, *intra vires* of the Parliament of Canada ?

SPECIAL CASE referred by the Governor General in Council to the Supreme Court of Canada for hearing and consideration, pursuant to the provisions of "An Act respecting the Supreme and Exchequer Courts," Revised Statutes of Canada, chapter 135, as amended by 54 & 55 Vic., chap. 25, sec. 4.

The special case referred was as follows :—

[2103]

REPORT *of a Committee of the Honourable the Privy Council, approved by His Excellency the Governor General in Council, on the* 31*st July*, 1893.

On a report dated 20th of July, 1893, from the Acting Minister of Justice, submitting with reference to his

report of the 7th July, inst., which was approved on the 8th July, 1893, a case for reference to the Supreme Court of Canada, touching certain statutes of the province of Manitoba relating to education and the memorials of certain persons complaining thereof.

The Minister recommends that the case, a copy of which is appended to the above-mentioned Order in Council, be referred to the Supreme Court of Canada for hearing and consideration, pursuant to the provisions of an Act respecting the Supreme and Exchequer Courts, Revised Statutes, Canada, chap. 135, as amended by 54-55 Vic., chap. 25, sec. 4.

The Committee submit the same for Your Excellency's approval.

JOHN J. McGEE,
Clerk of the Privy Council.

[1990]

REPORT *of a Committee of the Honourable the Privy Council, approved by His Excellency the Governor General in Council, on the 8th July*, 1893.

On a report dated 7th July, 1893, from the Acting Minister of Justice, submitting that in conformity with an order of Your Excellency in Council, dated 22nd April, 1893, a draft case prepared for reference to the Supreme Court of Canada, touching certain statutes of the province of Manitoba relating to education, and the memorials of certain petitioners in Manitoba complaining thereof, was communicated to the Lieutenant-governor of Manitoba, and to Mr. John S. Ewart, Q.C., counsel for the petitioners, for such suggestions and observations as they might respectively desire to make in relation to such case, and the questions which should be embraced therein. No reply has been received from the Lieutenant-governor of Manitoba. Mr. Ewart, under date 4th May, 1893, has made certain observations and

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suggestions which he, the Minister, has had under consideration. The Minister, upon such consideration, has made some amendments to the draft case, which he submits for Your Excellency's approval.

The minister recommends that the case as amended, a copy of which is herewith submitted, be approved by Your Excellency, and that copies thereof be transmitted to the Lieutenant-governor of Manitoba and to Mr. Ewart, with the information that the same is the case which it is proposed to refer to the Supreme Court of Canada touching the statutes and memorials above referred to.

The Committee submit the same for Your Excellency's approval.

JOHN J. McGEE,
Clerk of the Privy Council.

CASE.

Annexed hereto is an order of His Excellency the Governor General in Council, made on the 29th December, 1892, approving of a report of a sub-Committee of Council thereto annexed upon certain memorials complaining of two statutes of the Legislature of Manitoba, relating to education, passed in the session of 1890. The memorials therein referred to, and all correspondence in connection therewith, are hereby made part of this case, together with all statutes, whether Provincial, Dominion, or Imperial, in any wise dealing with, or affecting the subject of education in Manitoba, and all proceedings had or taken before the Court of Queen's Bench, Manitoba, the Supreme Court of Canada, and the Judicial Committee of the Privy Council in the causes of *Barrett* v. *the City of Winnipeg*, and *Logan* v. *the City of Winnipeg*; and all decisions or judgments in such cases are to be considered as part of this case and are to be referred to accordingly.

The questions for hearing and consideration by the Supreme Court of Canada being the same as those indicated in the report of the Sub-Committee of Council above referred to, are as follows:—

(1.) Is the appeal referred to in the said memorials and petitions, and asserted thereby, such an appeal as is admissible by sub-section 3 of section 93 of the British North America Act, 1867, or by sub-section 2 of section 22 of the Manitoba Act, 33 Victoria (1870), chapter 3, Canada?

(2.) Are the grounds set forth in the petitions and memorials such as may be the subject of appeal under the authority of the sub-sections above referred to, or either of them?

(3.) Does the decision of the Judicial Committee of the Privy Council in the cases of *Barrett* v. *the City of Winnipeg*, and *Logan* v. *the City of Winnipeg*, dispose of or conclude the application for redress based on the contention that the rights of the Roman Catholic minority which accrued to them after the union under the statutes of the province have been interfered with by the two statutes of 1890, complained of in the said petitions and memorials?

(4.) Does subsection 3 of section 93 of the British North America Act, 1867, apply to Manitoba?

(5) Has His Excellency the Governor General in Council power to make the declarations or remedial orders which are asked for in the said memorials and petitions, assuming the material facts to be as stated therein, or has His Excellency the Governor General in Council any other jurisdiction in the premises?

(6.) Did the Acts of Manitoba relating to education, passed prior to the session of 1890, confer on or continue to the minority a "right or privilege in relation to education" within the meaning of subsection 2 of section 22 of the Manitoba Act, or establish a "system

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of separate and dissentient schools within the meaning of subsection 3 of section 93 of 'the British North America Act, 1867,'" if said section 93 be found to be applicable to Manitoba; and if so, did the two Acts of 1890 complained of, or either of them, affect any right or privilege of the minority in such a manner that an appeal will lie thereunder to the Governor General in Council?

REPORT *of a Committee of the Honourable the Privy Council, approved by His Excellency the Governor General in Council on the 29th of December*, 1892.

The Committee of the Privy Council have had under consideration a report, hereto annexed, from a sub-committee of Council, to whom where referred certain memorials to Your Excellency, complaining of two statutes of the Legislature of Manitoba, relating to education, passed in the session of 1890.

The Committee, concurring in the report of the sub-committee, submit the same for Your Excellency's approval, and recommend that Saturday, the 21st day of January, 1893, at the chamber of the Privy Council, at Ottawa, be fixed as the day on which the parties concerned shall be heard with regard to the appeal in the matter of the said statutes.

The Committee further advise that a copy of this minute, if approved, together with a copy of the report of the sub-committee of Council, be transmitted to the Lieutenant-governor of Manitoba.

JOHN J. McGEE,
Clerk of the Privy Council.

To His Excellency the Governor General in Council :—

The sub-committee to whom were referred certain memorials, addressed to Your Excellency in Council, complaining of two statutes of the Legislature of

Manitoba, relating to education, passed in the session of 1890, have the honor to make the following report:

The first of these memorials is from the officers and executive committee of the "National Congress," an organization which seems to have been established in June, 1890, in Manitoba.

This memorial sets forth that two Acts of the Legislature of Manitoba, passed in 1890, intituled respectively, "An Act respecting the Department of Education" and "An Act respecting Public Schools," deprive the Roman Catholic minority in Manitoba of rights and privileges which they enjoyed with regard to education previous to the establishment of the province, and since that time down to the passing of the Acts aforesaid, of 1890.

The memorial calls attention to the fact that soon after the passage of those Acts, (and in the year 1891) a petition was presented to Your Excellency, signed by a large number of the Roman Catholic inhabitants of Manitoba, praying that Your Excellency might entertain an appeal on behalf of the Roman Catholic minority against the said Acts, and that it might be declared "that such Acts had a prejudicial effect on the rights and privileges, with regard to denominational schools, which the Roman Catholics had, by law or practice, in the province, at the union;" also that directions might be given and provision made in the premises for the relief of the Roman Catholics of the Province of Manitoba.

The memorial of the "National Congress" recites, at length, the allegations of the petition last hereinbefore referred to, as having been laid before Your Excellency in 1891. The substance of those allegations seems to be the following: That, before the passage of the Act constituting the Province of Manitoba, known as the "Manitoba Act," there existed, in the territory now

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constituting the province, a number of effective schools for children, which schools were denominational, some of them being erected and controlled by the authorities of the Roman Catholic Church, and others by the authorities of various Protestant denominations; that those schools were supported, to some extent by fees, and also by assistance from the funds contributed by the members of the church or denomination under whose care the school was established; that at that period the Roman Catholics had no interest in or control over the schools of Protestant denominations, nor had Protestants any interest in or control over the schools of Roman Catholics; that there were no public schools in the province, in the sense of State schools; that members of the Roman Catholic Church supported schools for their own children and for the benefit of Roman Catholic children, and were not under obligations to contribute to the support of any other schools.

The petition then asserted that, in consequence of this state of affairs, the Roman Catholics were separate from the rest of the community, in the matter of education, at the time of the passage of the Manitoba Act.

Reference is then made to the provisions of the Manitoba Act by which the legislature was restricted from making any law on the subject of education which should have a prejudicial effect on the rights and privileges, with respect to denominational schools, "which any class of persons had, by law or practice, in the province at the "'union.'"

The petition then set forth that, during the first session of the Legislative Assembly of the Province of Manitoba, an Act was passed relating to education, the effect of which was to continue to the Roman Catholics the separate condition, with reference to education, which they had enjoyed previous to the union; and

that ever since that time, until the session of 1890, no attempt was made to encroach upon the rights of the Roman Catholics in that regard; but that the two statutes referred to, passed in the session of 1890, had the effect of depriving the Roman Catholics altogether of their separate condition with regard to education, and merged their schools with those of the Protestant denominations, as they required all members of the community, whether Roman Catholic or Protestant, to contribute to the support of what were therein called "Public Schools," but what would be, the petitioners alleged, in reality a continuation of the Protestant schools.

After setting forth the objections which Roman Catholics entertain to such a system of education as was established by the Acts of 1890, the petitioners declared that they appealed from the acts complained of and they presented the prayer for redress which is hereinbefore recited.

The petition of the "Congress" then sets forth the minute of Council, approved by Your Excellency on the 4th April, 1891, adopting a report of the Minister of Justice, which set out the scope and effect of the legislation complained of, and also the provisions of the Manitoba Act with reference to education. That report stated that a question had arisen as to the validity and effect of the two statutes of 1890, referred to as the subject of the appeal, and intimated that those statutes would probably be held to be *ultra vires* of the legislature of Manitoba if they were found to have prejudicially affected "any right or privilege with respect to denominational schools which any class of persons had, by law or practice, in the province at the union." The report suggested that questions of fact seemed to be raised by the petitions, which were then under consideration, as to the practice in Manitoba with regard

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to schools, at the time of the union, and also questions of law as to whether the state of facts then existing constituted a "right or privilege" of the Roman Catholics, within the meaning of the saving clauses in the Manitoba Act, and as to whether the acts complained of (of 1890) had "prejudicially affected" such "right or privilege." The report set forth that these were obviously questions to be decided by a legal tribunal, before the appeal asserted by the petitioners could be taken up and dealt with, and that if the allegations of the petitioners and their contentions as to the law, were well founded, there would be no occasion for Your Excellency to entertain or to act upon the appeal, as the courts would decide the act to be *ultra vires*. The report and the minute adopting it, were clearly based on the view that consideration of the complaints and appeal of the Roman Catholic minority, as set forth in the petitions, should be deferred until the legal controversy should be determined, as it would then be ascertained whether the appellants should find it necessary to press for consideration of their application for redress under the saving clauses of the British North America Act and the Manitoba Act, which seemed, by their view of the law, to provide for protection of the rights of a minority against legislation (within the competence of the legislature), which might interfere with rights which had been conferred on the minority, after the union.

The memorial of the "Congress" goes on to state that the Judicial Committee of the Privy Council, in England, has upheld the validity of the acts complained of, and the "memorial" asserts that the time has now come for Your Excellency to consider the petitions which have been presented by and on behalf of the Roman Catholics of Manitoba for redress under subsections 2 and 3 of section 22 of the Manitoba Act.

There was also referred to the sub-committee a memorial from the Archbishop of Saint Boniface, complaining of the two Acts of 1890, before mentioned, and calling attention to former petitions on the same subject from members of the Roman Catholic minority in the province. His Grace made reference, in this memorial, to assurances which were given by one of Your Excellency's predecessors before the passage of the Manitoba Act, to redress all well founded grievances and to respect the civil and religious rights and privileges of the people of the Red River territory. His Grace then prayed that Your Excellency should entertain the appeal of the Roman Catholics of Manitoba and might consider the same, and might make such directions for the hearing and consideration of the appeal as might be thought proper, and also give directions for the relief of the Roman Catholics of Manitoba.

The sub-committee also had before them a memorandum made by the "Conservative League" of Montreal remonstrating against the (alleged) unfairness of the Acts of 1890, before referred to.

Soon after the reference was made to the sub-committee of the memorial of the "National Congress" and of the other memorials just referred to, intimation was conveyed to the sub-committee, by Mr. John S. Ewart, counsel for the Roman Catholic minority in Manitoba, that, in his opinion, it was desirable that a further memorial, on behalf of that minority, should be presented before the pending application should be dealt with, and action on the part of the sub-committee was therefore delayed until the further petition should come in.

Late in November this supplementary memorial was received and referred to the sub-committee. It is signed by the Archbishop of St. Boniface, and by the President of the "National Congress," the Mayor of St.

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Boniface, and about 137 others, and is presented in the name of the "members of the Roman Catholic Church resident in the province of Manitoba."

Its allegations are very similar to those hereinbefore recited, as being contained in the memorial of the congress, but there is a further contention that the two acts of the Legislative Assembly of Manitoba, passed in 1890, on the subject of education, were "subversive of the rights and privileges of the Roman Catholic minority provided for by the statutes of Manitoba, prior to the passing of the said acts of 1890, thereby violating both the British North America Act and the Manitoba Act."

This last mentioned memorial urged:—

(1.) That Your Excellency might entertain the appeal and give directions for its proper consideration.

(2.) That Your Excellency should declare that the two acts of 1890 (chapters 37 and 38), do prejudicially affect the rights and privileges of the minority, with regard to denominational schools, which they had by law or practice, in the province, at the union.

(3.) That it may be declared that the said acts affect the rights and privileges of Roman Catholics in relation to education.

(4.) That the re-enactment may be ordered by Your Excellency of the statutes in force in Manitoba, prior to these acts of 1890, in so far, at least, as may be necessary to secure for Roman Catholics in the province the right to build, maintain, &c., their schools in the manner provided by such statutes, and to secure to them their proportionate share of any grant made out of public funds of the province for education, or to relieve such members of the Roman Catholic Church as contribute to such Roman Catholic schools from payment or contribution to the support of any other schools; or

that these acts of 1890 should be so amended as to effect that purpose.

Then follows a general prayer for relief.

In making their report the sub-committee will comment only upon the last memorial presented, as it seems to contain, in effect, all the allegations embraced in the former petitions which call for their consideration and is more specific as to the relief which is sought.

As to the request which the petitioners make in the second paragraph of their prayer, viz.: "That it may be declared that the said Acts (53 Vic., chs. 37 and 38) do prejudicially affect the rights and privileges with regard to denominational schools which the Roman Catholics had by law or practice in the province of Manitoba at the time of the union," the sub-committee are of opinion that the judgment of the Judicial Committee of the Privy Council is conclusive as to the rights with regard to denominational schools which the Roman Catholics had at the time of the union, and as to the bearing thereon of the statutes complained of, and Your Excellency is not, therefore, in the opinion of the sub-committee, properly called upon to hear an appeal based on those grounds. That judgment is as binding on Your Excellency as it is on any of the parties to the litigation, and, therefore, if redress is sought on account of the state of affairs existing in the province at the time of the union, it must be sought elsewhere and by other means than by way of appeal under the sections of the British North America Act and of the Manitoba Act, which are relied on by the petitioners as sustaining this appeal.

The two Acts of 1890, which are complained of, must, according to the opinion of the sub-committee, be regarded as within the powers of the Legislature of Manitoba, but it remains to be considered whether the appeal should be entertained and heard as an appeal

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against statutes which are alleged to have encroached on rights and privileges with regard to denominational schools which were acquired by any class of persons in Manitoba, not *at the time of the union*, but *after the union*.

The sub-committee were addressed by counsel for the petitioners as to the right to have the appeal heard, and from his argument, as well as from the documents, it would seem that the following are the grounds of the appeal :—

A complete system of separate and denominational schools, *i.e.*, a system providing for Public Schools and for Separate Catholic Schools, was, it is alleged, established by Statute of Manitoba in 1871, and by a series of subsequent Acts. That system was in operation until the two Acts of 1890 (chapters 37 and 38) were passed.

The 93rd section of the British North America Act, in conferring power on the provincial legislatures exclusively to make laws in relation to education, imposed on that power certain restrictions, one of which was (sub-section 1) to preserve the right with respect to denominational schools which any class of persons had by law in the province at the union. As to this restriction it seems to impose a condition on the validity of any Act relating to education, and the sub-committee have already observed that no question, it seems to them, can arise, since the decision of the Judicial Committee of the Privy Council.

The third sub-section, however, is as follows :—

"Where in any province a system of separate or dissentient schools exists by law at the union, or is thereafter established by the legislature of the province, an appeal shall lie to the Governor General in Council from any Act or decision of any provincial authority, affecting any right or privilege of the Protestant or

Roman Catholic minority of the Queen's subjects in relation to education."

The Manitoba Act passed in 1870, by which the province of Manitoba was constituted, contains the following provisions, as regards that province:—

By section 22 the power is conferred on the legislature exclusively to make laws in relation to education, but subject to the following restrictions:

(1) "Nothing in any such law shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons have, by law or practice, in the province at the union."

This restriction, the sub-committee again observe, has been dealt with by the judgment of the judicial committee of the Privy Council.

Then follows:

(2) "An appeal shall lie to the Governor General in Council from any Act or decision of the legislature of the province, or of any provincial authority, affecting any right or privilege of the Protestant or Roman Catholic minority of the Queen's subjects in relation to education."

It will be observed that the restriction contained in subsection 2 is not identical with the restriction of subsection 3 of the 93rd section of the British North America Act, and questions are suggested, in view of this difference, as to whether subsection 3 of section 93 of the British North America Act applies to Manitoba, and, if not, whether subsection 2 of section 22 of the Manitoba Act is sufficient to sustain the case of the appellants; or, in other words, whether, in regard to Manitoba, the minority has the same protection against laws which the legislature of the province has power to pass, as the minorities in other provinces have, under the subsection before quoted from the British North

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America Act, as to separate or denominational schools established after the union.

The argument presented by counsel on behalf of the petitioners was, that the present appeal comes before Your Excellency in Council, not as a request to review the decision of the judicial committee of the Privy Council, but as a logical consequence and result of that decision, inasmuch as the remedy now sought is provided by the British North America Act, and the Manitoba Act, not as a remedy to the minority against statutes which interfere with the rights which the minority had at the time of the union, but as a remedy against statutes which interfere with rights acquired by the minority after the union. The remedy, therefore, which is sought, is against acts which are *intra vires* of the provincial legislature. His argument is also that the appeal does not ask Your Excellency to interfere with any rights or powers of the legislature of Manitoba, inasmuch as the power to legislate on the subject of education has only been conferred on that legislature with the distinct reservation that Your Excellency in Council shall have power to make remedial orders against any such legislation which infringes on rights acquired after the union by any Protestant or Roman Catholic minority in relation to separate or dissentient schools.

Upon the various questions which arise on these petitions the sub-committee do not feel called upon to express an opinion, and, so far as they are aware, no opinion has been expressed on any previous occasion in this case or any other of a like kind, by Your Excellency's Government or any other Government of Canada. Indeed, no application of a parallel character has been made since the establishment of the Dominion.

The application comes before Your Excellency in a manner differing from applications which are ordinarily

made, under the constitution, to Your Excellency in Council. In the opinion of the sub-committee the application is not to be dealt with at present as a matter of a political character or involving political action on the part of Your Excellency's advisers. It is to be dealt with by Your Excellency in Council, regardless of the personal views which Your Excellency's advisers may hold with regard to denominational schools and without the political action of any of the members of Your Excellency's Council being considered as pledged by the fact of the appeal being entertained and heard. If the contention of the petitioners be correct, that such an appeal can be sustained, the inquiry will be rather of a judicial than a political character. The sub-committee have so treated it in hearing counsel, and in permitting their only meeting to be open to the public. It is apparent that several other questions will arise, in addition to those which were discussed by counsel at that meeting, and the sub-committee advises that a date be fixed at which the petitioners, or their counsel, may be heard with regard to the appeal, according to their first request.

The sub-committee think it proper that the Government of Manitoba should have an opportunity to be represented at the hearing, and they further recommend, with that view, that if this report should be approved, a copy of any minute approving it, and of any minute fixing the date of the hearing with regard to the appeal, be forwarded, together with copies of all the petitions referred to, to His Honour the Lieutenant-Governor of Manitoba, for the information of His Honour's advisers.

In the opinion of the sub-committee the attention of any person who may attend on behalf of the petitioners, or on behalf of the Provincial Government, should be called to certain preliminary questions which seem to arise with regard to the appeal.

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Among the questions which the sub-committee regard as preliminary are the following:—

(1.) Whether this appeal is such an appeal as is contemplated by sub-section 3 of section 93 of the British North America Act, or by sub-section 2 of section 22 of the Manitoba Act.

(2.) Whether the grounds set forth in the petitions are such as may be the subject of appeal under either of the sub-sections above referred to.

(3.) Whether the decision of the Judicial Committee of the Privy Council in any way bears on the application for redress based on the contention that the rights of the Roman Catholic minority which accrued to them after the union have been interfered with by the two statutes of 1890 before referred to.

(4.) Whether subsection 3 of section 93 of the British North America Act applies to Manitoba.

(5.) Whether Your Excellency in Council has power to grant such orders as are asked for by the petitioner, assuming the material facts to be as stated in the petition.

(6.) Whether the Acts of Manitoba, passed before the session of 1890, conferred on the minority a "right or privilege with respect to education," within the meaning of sub-section 2 of section 22 of the Manitoba Act, or established "a system of separate or dissentient schools," within the meaning of sub-section 3 of section 93 of the British North America Act, and if so, whether the two Acts of 1890, complained of, affect, "the right or privilege" of the minority in such a manner as to warrant the present appeal.

Other questions of a like character may be suggested at the hearing, and it may be desirable that arguments

should be heard upon such preliminary points before any hearing shall take place on the merits of the appeal.

Respectfully submitted,

JNO. S. D. THOMPSON,
M. BOWELL,
J. A. CHAPLEAU,
T. MAYNE DALY.

ST. BONIFACE, 22nd September, 1892.

SIR,—I have the honour to transmit to you herewith inclosed a petition for the consideration of His Excellency the Governor General in Council concerning the appeal of the Roman Catholics of the province of Manitoba with regard to education.

I have, etc.,

† ALEX. TACHÉ,
Arch. of St. Boniface, O.M.I.

To the Honourable
The Secretary of State for Canada,
Ottawa, Ont.

To His Excellency the Governor General in Council:

The humble petition of the undersigned, Archbishop of the Roman Catholic Church in the province of Manitoba, respectfully sheweth :—

1st. That two statutes, 53 Vic., chap. 37 and 38, were passed in the Legislative Assembly of Manitoba to merge the Roman Catholic Schools with those of the Protestant denominations, and to require all members of the community, whether Roman Catholic or Protestant, to contribute, through taxation, to the support of what are therein called Public Schools, but which are in reality a continuation of the Protestant Schools.

2nd. That on the 4th of April, 1890, James E. P. Prendergast, M.P.P. for Woodlands, transmitted to the

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honourable the Secretary of State for Canada a petition, signed by eight members of the legislative assembly of Manitoba, to make known to His Excellency the Governor General the grievances under which Her Majesty's Roman Catholic subjects of the province of Manitoba were suffering by the passage of the said two acts, respectively intituled: "An Act respecting the Department of Education," and "An Act respecting Public Schools," (53 Vic., chaps. 37 and 38). The said petition ended by the following words:—"Your petitioners, therefore, humbly pray that Your Excellency may be pleased to take such action and grant such relief and remedy as to Your Excellency may seem meet and just."

3rd. That on the 7th of April, the same year, 1890, the Catholic section of the Board of Education, in a petition signed by its president, the Archbishop of St. Boniface, and its secretary, T. A. Bernier, "most respectfully and earnestly prayed His Excellency the Governor General in Council that said last mentioned acts (53 Vic., chaps. 37 and 38) be disallowed to all intents and purposes."

4th. That on the 12th of April, 1890, the undersigned brought before His Excellency some of the facts concerning the outbreak which occurred at Red River during the winter of 1869-70; the part that the undersigned was invited, by Imperial and Federal authorities, to take in the pacification of the country; the promise intrusted to the undersigned in an autograph letter from the then Governor General that the people of Red River "may rely that respect and attention will be extended to the different religious persuasions;" the furnishing the undersigned with a proclamation to be made known to the dissatisfied population, in which proclamation the then Governor General declared:—"Her Majesty commands me to state to you that she

will be always ready, through me as her representative, to redress all well-founded grievances." By Her Majesty's authority, I do therefore assure you that on your union with Canada "all your civil and religious rights and privileges will be respected." In the strength of such assurance the people of Red River consented to their union with Canada, and the Act of Manitoba was passed, giving guarantees to the minority that their rights and privileges, acquired by law or practice, with regard to education, would be protected. The cited Acts, 53 Vic., chaps. 37 and 38, being a violation of the assurances given to the Red River population, through the Manitoba Act, the undersigned ended his petition of the 12th April, 1890, by the following words:—

"I therefore most respectfully and most earnestly pray that Your Excellency, as the representative of our most beloved Queen, should take such steps that in your wisdom would seem the best remedy against the evils that the above mentioned and recently enacted laws are preparing in this part of Her Majesty's domain."

5th. That later on, working under the above mentioned disadvantage and wishing for a remedy against laws which affected their rights and privileges, in the matter of education, 4,267 members of the Roman Catholic Church, in the province of Manitoba, on behalf of themselves and their co-religionists, appealed to the Governor General in Council from the said acts of the legislature of the province of Manitoba, the prayer of their petition being as follows:—

"(1.) That Your Excellency, the Governor General in Council, may entertain the said appeal, and may consider the same, and may make such provisions and give such directions for the hearing and consideration of the said appeal as may be thought proper.

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"(2.) That it may be declared that such Provincial law does prejudicially affect the rights and privileges with regard to denominational schools which Roman Catholics had by law or practice in the province at the union.

"(3.) That such directions may be given and provisions made for the relief of the Roman Catholics of the Province of Manitoba, as to Your Excellency in Council may seem fit."

6th. That in the month of March, 1891, the Cardinal Archbishop of Quebec and the Archbishops and Bishops of the Roman Catholic Church in Canada, in a petition to His Excellency the Governor General in Council, shew that the 7th Legislature of the Province of Manitoba, in its 3rd session assembled, had passed an Act intituled: "An Act respecting the Department of Education," and another Act to be cited: "The Public School Act," which deprived the Catholic minority of the province of the rights and privileges they enjoyed with regard to education; and the venerable prelates added:—"Therefore your petitioners humbly pray Your Excellency in Council to afford a remedy to the pernicious legislation above mentioned, and that in the most efficacious and just way."

7th. That on the 21st March, 1891, the Honourable the Minister of Justice reported on the two Acts alluded to above, cap. 37, "An Act respecting the Department of Education," and cap. 38, "An Act respecting Public Schools," and here are the conclusions of his report:—"If the legal controversy should result in the decision of the Court of Queen's Bench (adverse to Catholic views) being sustained, the time will come for Your Excellency to consider the petitions which have been presented by and on behalf of the Roman Catholics of Manitoba for redress under subsections 2 and 3 of section 22 of the Manitoba Act, quoted in the early part

of this report, and which are analogous to the provisions made by the British North America Act in relation to the other provinces.

"Those subsections contain in effect the provisions which have been made as to all the provinces, and are obviously those under which the constitution intended that the Government of the Dominion should proceed if it should at any time become necessary that the Federal powers should be resorted to for the protection of a Protestant or Roman Catholic minority against any act or decision of the Legislature of the province, or of any provincial authority, affecting any 'right or privilege' of any such minority 'in relation to education.'"

A committee of the Honourable the Privy Council having had under consideration the above report submitted the same for approval, and it was approved by His Excellency the Governor General in Council on the 4th of April, 1891.

8th. That the Judicial Committee of Her Majesty's Privy Council has sustained the decision of the Court of Queen's Bench.

9th. That your petitioner believes that the time has now "come for Your Excellency to consider the petitions which have been presented by and on behalf of the Roman Catholics of Manitoba, for redress, under subsections 2 and 3 of section 22 of the Manitoba Act" as it has "become necessary that the Federal power should be resorted to for the protection of the Roman Catholic minority."

Your petitioner therefore prays—

1. That Your Excellency the Governor General in Council may entertain the appeal of the Roman Catholics of Manitoba, and may consider the same, and may make such provisions and give such directions for the hearing and consideration of the said appeal as may be thought proper.

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2. That such directions may be given and provisions made for the relief of the Roman Catholics of the province of Manitoba as to Your Excellency in Council may seem fit.

And your petitioner will ever pray.

† ALEX. TACHÉ, *Archbishop of St. Boniface.*

ST. BONIFACE, 22nd September, 1892.

(*Translation.*)

ST. BONIFACE, MANITOBA,
30th September, 1892.

To the Hon. J. C. PATTERSON,
Secretary of State, &c.,

SIR,—I have the honour to transmit herewith, for submission to His Excellency the Governor General in Council, a petition signed by the executive of the National Congress, organized on the 24th June, 1890, asking the Dominion Government to consider the petitions already presented by the Catholics of this province, with a view to obtain redress of the grievances inflicted upon them in relation to education by the action of the provincial legislature of Manitoba, in 1890, and to request that you will submit the said petition to His Excellency in Council with as little delay as possible.

I have, &c.,
A. A. C. LARIVIÈRE.

(*Translation.*)

OFFICE OF THE NATIONAL CONGRESS,
ST. BONIFACE, 20th Sept., 1892.

To the Hon. Mr. LARIVIÈRE, M.P., St. Boniface.

SIR,—In behalf of the National Congress, organized 24th June, 1890, I beg to request that you will transmit to His Excellency the Governor General in Council the inclosed petition asking the Dominion Government to consider the petitions already presented by the Catholics of this province, with a view to obtaining redress

of the grievances inflicted upon them in the matter of education, by the provincial legislation of Manitoba, in 1890.

I have the honour, &c.,

T. A. BERNIER,

Pres. pro tem.

TO HIS EXCELLENCY THE GOVERNOR GENERAL IN COUNCIL.

The humble petition of the undersigned members of the Roman Catholic Church, in the province of Manitoba, and dutiful subjects of Her Most Gracious Majesty, doth hereby respectfully represent that:—

The seventh legislature of the province of Manitoba, in its third session assembled, did pass in the year eighteen hundred and ninety an act intituled "An Act respecting the Department of Education," and also an act respecting public schools, which deprive the Roman Catholic minority in the said province of Manitoba of the rights and privileges they enjoyed with regard to education previous to and at the time of the union, and since that time up to the passing of the acts aforesaid.

That subsequent to the passing of said acts, and on behalf of the members of said Roman Catholic Church, the following petition has been laid before Your Excellency in Council:—

To His Excellency the Governor General in Council:

The humble petition of the undersigned members of the Roman Catholic Church, in the province of Manitoba, presented on behalf of themselves and their co-religionists in the said province, sheweth as follows:—

1. Prior to the passage of the Act of the Dominion of Canada, passed in the thirty-third year of the reign of Her Majesty Queen Victoria, chapter three, known as the Manitoba Act, and prior to the Order in Council

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issued in pursuance thereof, there existed, in the territory now constituting the province of Manitoba, a number of effective schools for children.

2. These schools were denominational schools, some of them being regulated and controlled by the Roman Catholic Church, and others by various Protestant denominations.

3. The means necessary for the support of the Roman Catholic schools were supplied to some extent by school fees paid by some of the parents of the children who attended the schools and the rest was paid out of the funds of the church contributed by its members.

4. During the period referred to Roman Catholics had no interest in or control over the schools of the Protestant denominations, and the Protestant denominations had no interest in or control over the schools of the Roman Catholics. There were no public schools in the sense of state schools. The members of the Roman Catholic Church supported the schools of their own church for the benefit of the Roman Catholic children and were not under obligation to, and did not, contribute to the support of any other schools.

5. In the matter of education, therefore, during the period referred to, Roman Catholics were as a matter of custom and practice separate from the rest of the community.

6. Under the provisions of the Manitoba Act it was provided that the Legislative Assembly of the province should have the exclusive right to make laws in regard to education, subject to the following provisions :—

(1.) Nothing in any such law shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons have by law or practice in the province at the union.

(2.) An appeal shall lie to the Governor General in Council from any act or decision of the Legislature of

the province, or of any provincial authority affecting any right or privilege of the Protestant or Roman Catholic minority of the Queen's subjects in relation to education.

(3.) In case any such provincial law as from time to time seems to the Governor General in Council requisite for the due execution of the provisions of this section is not made, or in case any decision of the Governor General in Council, or any appeal under this section is not duly executed by the proper provincial authority in that behalf, then, and in every such case, and as far only as the circumstances of each case require, the Parliament of Canada may make remedial laws for the due execution of the provisions of this section, and of any decision of the Governor General under this section.

7. During the first session of the Legislative Assembly of the province of Manitoba an act was passed relating to education, the effect of which was to continue to the Roman Catholics that separate condition with reference to education which they had enjoyed previous to the erection of the province.

8. The effect of the statute, so far as the Roman Catholics were concerned, was merely to organize the efforts which the Roman Catholics had previously voluntarily made for the education of their own children. It provided for the continuance of schools under the sole control and management of Roman Catholics, and of the education of their children according to the methods by which alone they believe children should be instructed.

9. Ever since the said legislation, and until the last session of the legislative assembly, no attempt was made to encroach upon the rights of the Roman Catholics so confirmed to them as above mentioned, but during said session statutes were passed (53 Vic., chaps. 37 and 38) the effect of which was to deprive the

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Roman Catholics altogether of their separate condition in regard to education; to merge their schools with those of the Protestant denominations; and to require all members of the community, whether Roman Catholic or Protestant, to contribute, through taxation, to the support of what are therein called public schools, but which are in reality a continuation of the Protestant schools.

10. There is a provision in the said act for the appointment and election of an advisory board, and also for the election in each municipality of school trustees. There is also a provision that the said advisory board may prescribe religious exercises for use in schools, and that the said school trustees may, if they think fit, direct such religious exercises to be adopted in the schools in their respective districts. No further or other provision is made with reference to religious exercises, and there is none with reference to religious training.

11. Roman Catholics regard such schools as unfit for the purposes of education, and the children of Roman Catholic parents cannot and will not attend any such schools. Rather than countenance such schools Roman Catholics will revert to the voluntary system in operation previous to the Manitoba Act, and will at their own private expense establish, support and maintain schools in accordance with their principles and their faith, although by so doing they will have in addition thereto to contribute to the expense of the so-called public schools.

12. Your petitioners submit that the said act of the legislative assembly of Manitoba is subversive of the rights of Roman Catholics guaranteed and confirmed to them by the statute erecting the province of Manitoba, and prejudicially affects the rights and privileges with respect to Roman Catholic schools which Roman Catholics had in the province at the time of its union with the Dominion of Canada.

13. Roman Catholics are in minority in said province.

14. The Roman Catholics of the province of Manitoba therefore appeal from the said act of the Legislative Assembly of Manitoba.

YOUR PETITIONERS THEREFORE PRAY—

1. That Your Excellency the Governor General in Council may entertain the said appeal, and may consider the same, and may make such provisions and give such directions for the hearing and consideration of the said appeal as may be thought proper.

2. That it may be declared that such provincial law does prejudicially affect the rights and privileges with regard to denominational schools which Roman Catholics had by law or practice in the province at the union.

3. That such directions may be given and provisions made for the relief of the Roman Catholics of the Province of Manitoba as to Your Excellency in Council may seem fit.

And your petitioners will ever pray.

†ALEX., Arch. of St. Boniface.
HENRI F., Ev. d'Anemour.
JOSEPH MESSIER, P.P. of St. Boniface.
T. A. BERNIER.
J. DUBUC.
L. A. PRUD'HOMME.
M. A. GIRARD.
A. A. LARIVIÈRE, M.P.
JAMES E. PRENDERGAST, M.P.P.
ROGER MARION, M.P.P.,
and 4,257 more names.

That on the consideration by the Privy Council of Canada of the two Acts aforesaid, the following report of the Honourable the Minister of Justice, dated 21st March, 1891, was approved by His Excellency the

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Governor General in Council on the 4th of April, 1891, viz. :—

DEPARTMENT OF JUSTICE,
CANADA, 21st March, 1891.

To His Excellency the Governor General in Council:

The undersigned has the honour to report upon the two Acts of the following titles passed by the Legislature of the Province of Manitoba at its session held in the year 1890, which Acts were received by the Honourable the Secretary of State on the 11th April, 1890:—

Chapter 37, "An Act respecting the Department of Education," and chapter 38, "An Act respecting the Public Schools."

The first of these Acts creates a Department of Education, consisting of the Executive Council or a Committee thereof appointed by the Lieutenant-Governor in Council, and defines its powers. It also creates an Advisory Board, partly appointed by the Department of Education and partly elected by teachers, and defines its powers. Also.

The "Act respecting Public Schools" is a consolidation and amendment of all previous legislation in respect to public schools. It repeals all legislation which created and authorized a system of separate schools for Protestants and Roman Catholics. By the Acts previously in force either Protestants or Roman Catholics could establish a school in any school district, and Protestant ratepayers were exempted from contribution for the Catholic schools, and Catholic ratepayers were exempted from contribution for Protestant schools.

The two Acts now under review purport to abolish these distinctions as to the schools, and these exemptions as to ratepayers, and to establish instead a system under which public schools are to be organized in all the schools districts, without regard to the religious views of the ratepayers.

The right of the province of Manitoba to legislate on the subject of education is conferred by the act which created the province, viz., 32-33 Vict., chap. 3 (The Manitoba Act), section 22, which is as follows :—

"22. In and for the province of Manitoba the said legislature may exclusively make laws in relation to education, subject to the following provisions :—

"(1.) Nothing in any such law shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons have by law or practice in the province at the union.

"(2.) An appeal shall lie to the Governor General in Council from the Act or decision of the legislature of the province, or of any provincial authority affecting any right or privilege of the Protestant or Roman Catholic minority of the Queen's subjects in relation to education.

"(3.) In case any such provincial law as from time to time seems to the Governor General in Council requisite for the due execution of the provisions of this section is not made, or in case any decision of the Governor in Council, on any appeal under this section, is not duly executed by the proper provincial authority in that behalf, then, and in every such case, and as far only as the circumstances of each case require, the Parliament may make remedial laws for the due execution of the provisions of this section, and of any decision of the Governor General in Council under this section."

In the year 1870, when the "Manitoba Act" was passed there existed no system of education established or authorized by law, but at the first session of the provincial legislature in 1871 an "Act to establish a system of education in the province" was passed. By that act the Lieutenant Governor in Council was empowered to appoint not less than ten or more than fourteen to be a Board of Education for the province, of whom

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one-half were to be Protestants and the other half Catholics, with one superintendent of Protestant and one superintendent of Catholic schools. The Board was divided into two sections, Protestant and Catholic, each section to have under its control and management the discipline of the schools of its faith, and to prescribe the books to be used in the schools under its care which had reference to religion or morals.

The moneys appropriated for education by the legislature were to be divided equally, one moiety thereof to the support of Protestant schools, and the other moiety to the support of Catholic schools.

By an act passed in 1875 the board was increased to twenty-one, twelve Protestants and nine Roman Catholics; the moneys voted by the legislature were to be divided between the Protestant and Catholic schools in proportion to the number of children of school age in the schools under the care of Protestant and Catholic sections of the board respectively.

The Act of 1875 also provided that the establishment in a school district of a school of one denomination should not prevent the establishment of a school of another denomination in the same district.

Several questions have arisen as to the validity and effect of the two statutes now under review; among those are the following:—

It being admitted that "no class of persons" (to use the expression of the Manitoba Act), had "by law" at the time the province was established, "any right or privilege with respect to denominational (or any other) school," had "any class of persons" any such right or privilege with respect to denominational schools "by practice" at that time? Did the existence of separate schools for Roman Catholic children, supported by Roman Catholic voluntary contributions, in which their religion might be taught and in which

text books suitable for Roman Catholic schools were used, and the non-existence of any system by which Roman Catholics, or any other, could be compelled to contribute for the support of schools, constitute a "right or privilege" for Roman Catholics "by practice" within the meaning of the Manitoba Act? The former of these, as will at once be seen, was a question of fact and the latter a question of law based on the assumption, which has since been proved to be well founded, that the existence of separate schools at the time of the "union" was the fact on which the Catholic population of Manitoba must rely as establishing their "right or privilege" "by practice." The remaining question was whether, assuming the foregoing questions, or either of them, to require an affirmative answer, the enactments now under review, or either of them, affected any such "right or privilege."

It became apparent at the outset that these questions required the decision of the judicial tribunals, more especially as an investigation of facts was necessary to their determination. Proceedings were instituted with a view to obtaining such a decision in the Court of Queen's Bench of Manitoba several months ago, and in course of these proceedings the facts have been easily ascertained, and the two latter of the three questions above stated were presented for the judgment of that court with the arguments of counsel for the Roman Catholics of Manitoba on the one side, and of counsel for the provincial government on the other.

The court has practically decided, with one dissentient opinion, that the acts now under review do not "prejudicially affect any right or privilege with respect to denominational schools" which Roman Catholics had "by practice at the time of the union," or, in brief, that the non-existence, at that time, of a system of public schools and the consequent exemption from taxation

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for the support of public schools and the consequent freedom to establish and support separate or "denominational" schools did not constitute a "right or privilege" "by practice" which these acts took away.

An appeal has been asserted and the case is now before the Supreme Court of Canada, where it will, in all probability, be heard in the course of next month.

If the appeal should be successful these acts will be annulled by judicial decision; the Roman Catholic minority of Manitoba will receive protection and redress. The acts purporting to be repealed will remain in operation, and those whose views have been represented by a majority of the Legislature cannot but recognize that the matter has been disposed of with due regard to the constitutional rights of the province.

If the legal controversy should result in the decision of the Court of Queen's Bench being sustained the time will come for Your Excellency to consider the petitions which have been presented by and on behalf of the Roman Catholics of Manitoba for redress under subsections 2 and 3 of section 22 of the "Manitoba Act" quoted in the early part of this report and which are analogous to the provisions made by the British North America Act in relation to the other provinces.

Those subsections contain in effect the provisions which have been made as to all the provinces and are obviously those under which the constitution intended that the Government of the Dominion should proceed if it should at any time become necessary that the Federal powers should be resorted to for the protection of a Protestant or Roman Catholic minority against any Act or decision of the Legislature of the province, or of any provincial authority, affecting any "right or privilege" of any such minority "in relation to education."

Respectfully submitted,

JOHN S. D. THOMPSON,

Minister of Justice.

That a recent decision of the Judicial Committee of the Privy Council in England having sustained the judgment of the Court of Queen's Bench of Manitoba, upholding the validity of the Acts aforesaid, your petitioners most respectfully represent that, as intimated in said report of the Honourable the Minister of Justice, the time has now come for Your Excellency to consider the petitions which have been presented by and on behalf of the Roman Catholics of Manitoba for redress under subsections 2 and 3 of section 22 of the "Manitoba Act."

That your petitioners, notwithstanding such decision of the Judicial Committee of the Privy Council in England, still believe that their rights and privileges in relation to education have been prejudicially affected by said Acts of the Provincial Legislature.

Therefore, your petitioners most respectfully and most earnestly pray that it may please Your Excellency in Council to take into consideration the petitions above referred to, and to grant the conclusions of said petitions and the relief and protection sought for by the same.

And your petitioners will ever pray.

SAINT BONIFACE, 20th September, 1892.

Members of the Executive Committee of the National Congress.

T. A. BERNIER, Acting President,
A. A. C. LARIVIÈRE,
JOSEPH LECOMTE,
JAS. E. P. PRENDERGAST,
J. ERNEST CYR,
THEO. BERTRAND,
H. F. DESPARS,
M. A. KERVALK,
TÉLESPHORE PELLETIER,
DR. J. H. OCT. LAMBERT,
JOSEPH Z. C. AUGER,
A. F. MARTIN.

Secretaries, A. E. VERSAILLES, R. GOULET, JR.

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WINNIPEG, MAN., 31st October, 1892.

The Honourable the Secretary of State,
Ottawa, Ont.

SIR,—I have the honour to inclose you another petition on behalf of the Catholic minority of Manitoba with reference to the position in which they find themselves in reference to education in this province. I do not desire that this petition should be substituted for the others already presented, but that it should rather be taken as supplementary to those others. May I ask that the matter may be brought before His Excellency the Governor General in Council at the earliest possible date?

I have, &c.,
JOHN S. EWART.

—

TO HIS EXCELLENCY THE GOVERNOR GENERAL IN COUNCIL.

The humble petition of the members of the Roman Catholic Church residing in the Province of Manitoba sheweth as follows:—

1. Prior to the passage of the Act of the Dominion of Canada, passed in the 33rd year of the reign of Her Majesty Queen Victoria, chap. 3, known as the Manitoba Act, and prior to the Order in Council issued in pursuance thereof, there existed in the territory now constituting the Province of Manitoba a number of effective schools for children.

2. These schools were denominational schools, some of them being regulated and controlled by the Roman Catholic Church, and others by various Protestant denominations.

3. The means necessary for the support of the Roman Catholic schools were supplied to some extent by school fees paid by some of the parents of the children who

attended the schools, and the rest was paid out of the funds of the church contributed by its members.

4. During the period referred to Roman Catholics had no interest in or control over the schools of the Protestant denominations, and the members of the Protestant denominations had no interest in or control over the schools of the Roman Catholics. There were no public schools in the sense of State schools. The members of the Roman Catholic Church supported the schools of their own church for the benefit of Roman Catholic children and were not under obligation to, and did not, contribute to the support of any other schools.

5. In the matter of education, therefore, during the period referred to, Roman Catholics were as a matter of custom and practice separate from the rest of the community.

6. Under the provisions of the Manitoba Act it was provided that the Legislative Assembly of the province should have the exclusive right to make laws in regard to education, subject, however, and according to the following provisions:—

"(1.) Nothing in any such law shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons have by law or practice in the province at the union.

"(2.) An appeal shall lie to the Governor General in Council from any Act or decision of the Legislature of the province, or of any provincial authority, affecting any right or privilege of the Protestant or Roman Catholic minority of the Queen's subjects in relation to education.

"(3.) In case any such provincial law as from time to time seems to the Governor General in Council requisite for the due execution of the provisions of this section is not made, or in case any decision of the Governor

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General in Council on any appeal under this section is not duly executed by the proper provincial authority in that behalf, then, and in every such case, and as far only as the circumstances of each case require, the Parliament of Canada may make remedial laws for the due execution of the provisions of this section, and of any decision of the Governor General under this section."

7. During the first session of the Legislative Assembly of the province of Manitoba an act was passed relating to education, the effect of which was to continue to the Roman Catholics that separate condition with reference to education which they had enjoyed previous to the erection of the province.

8. The effect of this statute, so far as the Roman Catholics were concerned, was merely to organize the efforts which Roman Catholics had previously voluntarily made for the education of their own children. It provided for the continuance of schools under the sole control and management of Roman Catholics, and for the education of their children according to the methods by which alone they believe children should be instructed. Between the time of the passage of the said act, and prior to the statute next hereinafter referred to, various acts were passed amending and consolidating the said act, but in and by all such later acts the rights and privileges of the Roman Catholics were acknowledged and conserved and their separate condition in respect to education continued.

9. Until the session of the Legislative Assembly held in the year 1890 no attempt was made to encroach upon the rights of the Roman Catholics so confirmed to them as above mentioned, but during said session statutes were passed (53 Vic., chaps. 37 and 38) the effect of which was to repeal all the previous acts; to deprive the Roman Catholics altogether of their sepa-

rate condition in regard to education; to merge their schools with those of the Protestant denomination; and to require all members of the community, whether Roman Catholic or Protestant, to contribute, through taxation, to the support of what are therein called public schools, but which are in reality a continuation of the Protestant schools.

10. There is a provision in the said act for the appointment and election of an advisory board, and also for the election in each district of school trustees. There is also a provision that the said advisory board may prescribe religious exercises for use in schools, and that the said school trustees may, if they think fit, direct such religious exercises to be adopted in the schools in their respective districts. No further or other provision is made with reference to religious exercises, and there is none with reference to religious training.

11. Roman Catholics regard such schools as unfit for the purposes of education, and the children of the Roman Catholic parents cannot and will not attend any such schools. Rather than countenance such schools Roman Catholics will revert to the voluntary system in operation previous to the Manitoba Act, and will at their own private expense establish, support and maintain schools in accordance with their principles and their faith, although by so doing they will have in addition thereto to contribute to the expense of the so-called public schools.

12. Your petitioners submit that the said acts of the Legislative Assembly of Manitoba are subversive of the rights of the Roman Catholics guaranteed and confirmed to them by the statute erecting the province of Manitoba, and prejudicially affect the rights and privileges with respect to Roman Catholic schools which Roman Catholics had in the province at the time of its union with the Dominion of Canada.

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13. Your petitioners further submit that the said acts of the legislative assembly of Manitoba are subversive of the rights and privileges of Roman Catholics provided for by the various statutes of the said legislative assembly prior to the passing of the said acts and affect the rights and privileges of the Roman Catholic minority of the Queen's subjects in the said province in relation to education so provided for as aforesaid, thereby offending both against the British North America Act and the Manitoba Act.

14. Roman Catholics are in a minority in the said province, and have been so for the last fifteen years.

15. The Roman Catholics of the province of Manitoba, therefore, appeal from the said acts of the legislative assembly of the province of Manitoba.

Your petitioners therefore pray—

1. That Your Excellency the Governor General in Council may entertain the said appeal and may consider the same, and may make such provisions and give such directions for the hearing and consideration of the said appeal as may be thought proper.

2. That it may be declared that the said acts (53 Vic. chaps. 37 and 38) do prejudicially affect the rights and privileges with regard to denominational schools which Roman Catholics had by law or practice in the province at the union.

3. That it may be declared that the said last mentioned acts do affect the rights and privileges of the Roman Catholic minority of the Queen's subjects in relation to education.

4. That it may be declared that to Your Excellency the Governor General in Council it seems requisite that the provisions of the statutes in force in the province of Manitoba prior to the passage of the said acts should be re-enacted, in so far at least as may be necessary to secure to the Roman Catholics in the said

province the right to build, maintain, equip, manage, conduct and support their schools in the manner provided for by the said statutes, to secure to them their proportionate share of any grant made out of the public funds for the purposes of education, and to relieve such members of the Roman Catholic Church as contribute to such Roman Catholic schools from all payment or contribution to the support of any other schools; or that the said Acts of 1890 should be so modified or amended as to effect such purposes.

5. And that such further or other declaration or order may be made as to Your Excellency the Governor General in Council shall, under the circumstances, seem proper, and that such directions may be given, provisions made and all things done in the premises for the purpose of affording relief to the said Roman Catholic minority in the said province as to Your Excellency in Council may seem meet.

And your petitioners will ever pray.

† ALEX., Arch. of St. Boniface, O.M.I.
T. A. BERNIER, President of the National Congress.
JAMES E. P. PRENDERGAST, Maire de la Ville de St. Boniface.
J. ALLARD, O.M.I., V.G., and about 137 others.
JOHN S. EWART, Counsel for the Roman Catholic minority in the Province of Manitoba.

THE MANITOBA SCHOOL LAW.

The Conservative League, faithful to the enduring traditions of the Conservative party, wishes to record its regret that good feeling and a spirit of conciliation, so essential to the well-being of our public affairs, do not actuate the Government and the majority of the people of Manitoba; it regrets that, in the name of "Equal Rights," liberty of conscience, justice and

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equality of rights have been denied by the school law of 1890 to a very large portion of the inhabitants of that province.

In common with every citizen of the province of Quebec this League has the right to make itself heard on this question, because the province of Quebec accepted confederation only on the express condition that the rights of minorities would be respected and kept safe. Therefore it is that the League asserts itself to vindicate its principles and to defend the privileges and immunities of the minority in Manitoba.

The education of children is the exclusive province of the father of the family, and their education devolves on him as a matter of strict duty. It follows as a necessary consequence from this principle that the father of a family has the undeniable right to fulfil this duty according to the dictates of his conscience, that in the exercise of this duty and of this right the State has no lawful power to interfere with or restrict his freedom of action, and that any law which tends to trammel such free action is offensive to good conscience.

The Manitoba School Law of 1890 is a usurpation by the State of the rights of the *pater familias*. It is an Act subversive of his rights,—it is an abuse of power inspired by intolerance and fanaticism and is of a nature to inspire fear for the very existence of confederation if a remedy be not applied in good time.

No one can honestly deny the treaty of 1870, between the Government of Canada and the people of Manitoba, by which it was formally covenanted and agreed that their separate schools should be preserved to them. Nor can any one with honesty deny that the Manitoba School law of 1871, made and adopted by the very men who had themselves been parties to the treaty of the year before, maintained these separate schools for Catholics and Protestants.

And yet, the highest tribunal in England took into account neither the solemn treaty of 1870, nor the unequivocal interpretation of that treaty contained in the law of 1871.

For a moment only let the opposite state of things be supposed; let us suppose that a French Catholic majority in Manitoba refused separate schools to a Protestant minority. Who will believe that in such a state of things the Privy Council would have interpreted the Manitoba treaty in the same sense? Their Lordships would have shewn that our Catholic good faith, that our national honour were solemnly bound. They would have been eloquent in defence of the liberty of the citizens and learned as to the rights belonging to a father of a family; and they would have been right. But the supposition is altogether unfounded, for French Canadians have ever given constant proof, not in mere words but by deed and practice, of the truest liberality towards the Protestant minority of the province of Quebec. Fair play deserves fair play in return.

But there is more than this to be said. The Treaty of Paris (1763) fixed the conditions of the cession of Canada to England, and by this treaty England promised that the people of this country should remain free in the exercise of the Catholic religion. But, since it is obligatory for the Catholic to give his children a religious education, it follows that to banish religious instruction from the primary school is to deny him the right to obey the precepts of his religion, and this can only be done in violation of the exacted promise on the faith of which Canada became a British colony.

For these reasons the Conservative League protests against the school law in force in Manitoba, and expresses the hope that our statesmen and public men

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will labour manfully and uncompromisingly until these laws shall have been remedied.

Another question arises out of this subject, and claims our earnest attention. The present crisis would have been avoided if the Privy Council in England had rendered a decision according to equity, and based on the true state of the case. Unfortunately in the present instance, as in every other where the interests of the Catholics of this country and of the French Canadians have been involved, that high tribunal has rendered an arbitrary judgment. Since unhappily this appears to be true, it is most opportune to consider whether indeed the Privy Council has jurisdiction in such matters and to have it taken away if it exists: for the time has gone by and is past when a country or a people can be made to suffer injustice indefinitely.

MONTREAL, 3rd November, 1892.

THE CONSERVATIVE LEAGUE.

DERARTMENT OF THE SECRETARY OF STATE OF CANADA,

OTTAWA, 26th September, 1892.

MY LORD ARCHBISHOP,—I have the honour to acknowledge the receipt of your letter of the 22nd instant, transmitting for the consideration of His Excellency the Governor General a petition concerning the appeal of the Roman Catholics of the province of Manitoba with regard to education, and to state that the matter will receive consideration.

I have, &c.,

L. A. CATELLIER,

Under-Secretary of State.

His Grace the Lord Archbishop of St. Boniface,

St. Boniface, Man.

DEPARTMENT OF THE SECRETARY OF STATE,

OTTAWA, 5th October, 1892.

SIR,—I have the honour to acknowledge receipt of your letter of the 30th of last month, inclosing for sub-

mission to His Excellency the Governor General in Council a petition signed by the members of the Executive of the National Congress, asking the Dominion Government to consider the petitions presented by the Catholics of the province of Manitoba on the question of the schools of that province, and to inform you that the said petition will receive attention.

I have, &c.,

L A. CATELLIER,

Under-Secretary of State.

A. A. C. LARIVIÈRE, M.P., St. Boniface, Man.

DEPARTMENT OF THE SECRETARY OF STATE OF CANADA,

OTTAWA, 5th November, 1892.

JOHN S. EWART, Esq., Q.C., of Messrs. Ewart, Fisher & Wilson, Barristers, Winnipeg, Man.

SIR,—I have the honour to acknowledge the receipt of your letter of the 31st ult., transmitting for submission to His Excellency the Governor General in Council another petition on behalf of the Catholic minority in Manitoba with reference to the position in which they find themselves consequent on the passing of certain provincial statutes, dealing with education in Manitoba, as therein set forth, and to state that the said petition will receive attention.

I have, &c.,

L. A. CATELLIER,

Under-Secretary of State.

DEPARTMENT OF THE SECRETARY OF STATE,

OTTAWA, 4th January, 1893.

To His Honour the Lieutenant-Governor of Manitoba, Winnipeg, Man.

SIR,—I have to inform you that His Excellency the Governor General, having had under his consideration in Council a report from a sub-committee of the honourable the Privy Council, to whom had been

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referred certain memorials to His Excellency, complaining of two statutes of Manitoba, relating to education, passed in the session of 1890, has been pleased to make an order in the premises, a copy of which, together with a copy of the report above mentioned, I have the honour to transmit herewith, for the information of Your Honour's Government.

I have, &c.,

L. A. CATELLIER,

Under-Secretary of State.

GOVERNMENT HOUSE,

WINNIPEG, 7th January, 1893.

The Under-Secretary of State, Ottawa.

SIR,—I have the honour to acknowledge the receipt of your despatch No. 13, file No. 4,988, dated 4th instant, informing me that His Excellency the Governor General, having had under his consideration in Council a report from a sub-committee of the honourable the Privy Council (to whom had been referred certain memorials to His Excellency, complaining of two statutes of Manitoba, relating to education, passed in the session of 1890), has been pleased to make an order in the premises, and transmitting, for the information of my government, a copy of the order referred to, together with a copy of the report above mentioned, and to inform you that I have this day transmitted the inclosures mentioned to my government.

I have, &c.,

JOHN SCHULTZ,

Lieutenant-Governor.

GOVERNMENT HOUSE,

WINNIPEG, 18th January, 1893.

The Under-Secretary of State, Ottawa.

SIR,—Referring to your letter No. 13, file No. 4988, dated the 4th instant, covering the certified copy of a

report of a committee of the honourable the Privy Council, to whom had been referred certain memorials to His Excellency the Governor General, (complaining of two statutes of Manitoba, relating to education, passed in the session of 1890), approved by His Excellency the Governor General in Council on the 29th December, 1892, a copy of which was transmitted to my government on the 7th instant, I have now the honour to inform you that my government have this day advised me as follows:—

"DEPARTMENT OF THE PROVINCIAL SECRETARY,

"WINNIPEG, 18th January, 1893.

"The Hon. JOHN C. SCHULTZ, Lieutenant Governor,

"Province of Manitoba, Winnipeg.

"SIR,—With reference to Your Honour's letter of the 7th instant, regarding two petitions presented to His Excellency the Governor General in Council, complaining of two (2) statutes of Manitoba, relating to education, passed in the session of 1890, and the documents transmitted therewith, I am instructed to say that Your Honour's Government has decided that it is not necessary that it should be represented on the hearing of the appeal, to take place on the 21st instant, before the Privy Council. I have, &c., J. D. CAMERON, *Provincial Secretary.*"

I have the honour to be sir,

Your obedient servant,

JOHN SCHULTZ,

Lieutenant Governor.

DEPARTMENT OF THE SECRETARY OF STATE,

OTTAWA, 21st January, 1893.

To His Honour the Lieutenant-Governor of Manitoba,

Winnipeg, Manitoba.

SIR,—In continuation of prior correspondence on the subject of an Order of His Excellency the Governor-

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General in Council, dated 29th December last, in the matter of certain memorials complaining of two statutes of Manitoba, relating to education, passed in the session of 1890, I have now to acknowledge receipt of your despatch No. 55 C., dated the 18th instant, in which is given the text of a letter from Your Honour's Provincial Secretary, dated concurrently, setting forth that your advisers had decided that it is not necessary for your Government to be represented on the hearing of the appeal, to take place this day, the 21st instant, before the Honourable the Privy Council.

I have, &c.,

L. A. CATELLIER,

Under Secretary of State.

The following are the statutes of Manitoba referred to and relating to the subject of education :—

34 Victoria (1871), Chap. XII., " An Act to establish a system of education in this province."

36 Victoria (1873), Chap. XXII., " An Act to amend the Act to establish a system of education in this province."

39 Victoria (1876), Chap. I., " An Act to amend the School Acts of Manitoba, so as to meet the special requirements of incorporated cities and towns."

41 Victoria (1878), Chap. XIII., " An Act to create a fund for educational purposes."

44 Victoria (1881), Chap. IV., " An Act to establish a system of Public Schools in the Province of Manitoba."

53 Victoria (1890), Chap. XXXVII., " An Act respecting the Department of Education."

53 Victoria (1890), Chap. XXXVIII., " An Act respecting Public Schools."

On the 4th October, 1893, the Solicitor General of the Dominion of Canada submitted the case to the court. Ewart Q.C. being present on behalf of the petitioners, and there being no person present to

represent the Province of Manitoba, the Chief Justice stated that the court in exercise of the powers conferred by 54 & 55 Vic. ch. 25, sec. 4, substituted for sec. 37 R. S. C. c. 135, would direct the registrar to request C. Robinson Q.C., the senior member of the Ontario bar, to appear and argue the case as to any interest of the Province of Manitoba which is affected.

On October 17, 1893, the case having been called :—

Solicitor-General Curran :—My learned friends, representing the other parties, are ready.

Mr. Ewart :—I appear for the petitioners, my lords.

Mr. Robinson :—I appear, under the statute, by direction of the court.

TASCHEREAU J. :—You represent Manitoba Mr. Robinson? It is just as well to know whom you represent.

THE CHIEF JUSTICE :—You appear under the statute?

Mr. Robinson :—I appear. under the statute, by direction of the court.

Mr. Wade :—I appear on behalf of the Province of Manitoba. I desire to state, that while Manitoba appears here it is simply to acknowledge that the Province has been served with a copy of the case by the Clerk of the Privy Council, and not to take any part in the argument; I appear, out of deference to the court, to acknowledge that the Province has been served.

I might say further, my lords, as to Mr. Robinson, that the Province does not know him in the matter.

The argument of the case was then proceeded with.

Ewart Q.C. for the petitioners. Under the 22nd section of the Manitoba act there may be two readings, viz., in the first place, that which would make of the first two subsections two limitations of the jurisdiction of the province; the other reading would

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be that which would make the first subsection a limitation of the jurisdiction, and the second subsection the remedy which was provided in case of excess of jurisdiction.

In the view that I have the honour of submitting to your lordships the former of these two is the correct reading, that there are two limitations in these two subsections, and not merely a limitation in the first and a remedy provided in the second.

Under the first subsection of section 22 of the Manitoba act I beg to point out that a statute which offends against it is *ultra vires*. Then, it would seem to be an extraordinary thing that after the first subsection declares something to be *ultra vires* the second subsection should provide for an appeal from that statute, because, if the statute is *ultra vires*, there is no necessity of appealing from it at all, in fact there is nothing to appeal from, it has no operation, there is nothing upon which an appeal would rest. That is rendered stronger when one considers the third subsection, which is the complement, as it were, of the second subsection and provides what is to be done upon that appeal. Remedial legislation may follow upon that appeal. It would be in the last degree absurd if, starting with an *ultra vires* statute, we were to have, not only an appeal from it but remedial legislation in consequence of it.

I would further illustrate it in this way: The present Manitoba statute of 1890 has been held to be *intra vires*; supposing it had been held to be *ultra vires* we could not ask remedial legislation; there is nothing to remedy; we could not say that any of our rights and privileges had been affected; the statute is *ultra vires*, it has done nothing; there can be no appeal, and there can be no remedial legislation.

Then again, under the British North America Act, which in every respect is *in pari materiâ* with the Manitoba Act, that is clearly the law as to the other provinces.

There the first subsection provides for a limitation of the jurisdiction of the legislature; it shall not prejudicially affect any right or privilege with respect to denominational schools which any class of persons has by law in the province at the union. That is almost the same as the wording of the Manitoba act. The third subsection also, which corresponds with the second in the Manitoba act, provides for cases where separate or dissentient schools have existed at the time of the union, or are thereafter established; there is to be an appeal to the Governor General in Council.

Under that statute it seems to me that the appeal provided for is not what is provided for in the first subsection, that what is provided for in the first subsection is that something is to be *ultra vires*. Then, if it is not *ultra vires*, what can you do? If you feel yourself aggrieved at any time during any period of the subsequent history of any of the provinces in which separate schools existed at the time of the union, or were thereafter established, you can appeal if your rights which existed at any time during that period are interfered with.

I wish further, in support of that argument that those two subsections are dealing with different matters and different sets of cases, to point out the difference between them in two or three respects. If it is intended that the appeal is to lie in case of a breach of the first subsection then we would certainly find that the person to appeal under the second subsection was the person injured under the first. It would not be possible that the person to appeal would be a different person from the person affected under the first subsection, and yet,

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when one looks at the first subsection, we see "that no right or privilege" whether of the majority or the minority, is to be affected. If any right or privilege, either of the majority or the minority, is affected the act is *ultra vires* but who can appeal? It is only a member of the minority that can appeal. If it is claimed that the act is *ultra vires* then any member of the community can set the law in motion and contend that the act is *ultra vires*. If this appeal that is given is intended to be from an *ultra vires* statute then there is this extraordinary thing, a great many people who can be hurt under the first subsection cannot appeal under the second; for instance, Mr. Logan, who took action against this very statute, under the first subsection, claiming that the act was *ultra vires*, was not a member of the minority but was a member of the majority. He had a perfect right under the first subsection to go into the court and question the *intra vires* character of the statute, but he could not be an appellant, such as we are, because, under the second subsection, it is only given to a member of the Protestant or Roman Catholic minority. So that we would have the extraordinary case of there being a wrong, and the remedy being given in favour of some person who was not wronged. Under the first subsection, Mr. Logan, as a member of the community, as a member of the Church of England, in that capacity, moved the courts to take action, but, under the second subsection, your lordships will see that it is only a member of the Protestant or Roman Catholic minority that can appeal. That seems to me to be a very strong argument to show that these sections are dealing with different cases.

A further argument in the same line is this:—That the rights which are to be interfered with under the two sections are different rights, or may be different rights; not only is the appellant, possibly, a different person,

but what he has to appeal in respect of may be different, under the two sections. If under the first subsection, it is only in case rights which existed at the union are interfered with; and, under the second subsection, any right or privilege is dealt with, no matter when it arises.

The next point that I submit to your lordships, and perhaps the principal one, is, whether an appeal is given in respect of rights which arose subsequent to the union, or whether the statute is limited to rights which existed at the time of the union.

I quite admit we have no right or privilege which was infringed upon prior to the union; we say we have rights or privileges subsequent, and in respect of those we have an appeal. I say this statute applies to that, and I refer to the analogous section of the British North America Act, and I say it is perfectly clear that that section, at all events, covers the case of rights and privileges arising subsequent to the union; sec. 93, subsec. 3. Your lordships will observe that it applies to cases in which separate schools are established in a province for the first time subsequent to the union. For instance, if New Brunswick to-day were to establish a system of separate schools, it would come under subsec. 3, sec. 93.

Now, it is perfectly evident, I submit, that New Brunswick, having no separate school system at the time of the union, might establish one after the union; then that would be a case within this statute. Rights and privileges would be given to the Roman Catholic minority by that statute subsequent to the union, and there would be an appeal from an infringement of any of the rights and privileges given by that statute. That seems perfectly clear under the British North America Act.

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It is a provision similar to various provisions under our charter, under the British North America Act, for the supersession, by the Dominion, of acts of the local legislatures. We know that with reference to railways the Dominion Parliament may declare railways, and did declare all railways, even built by provinces, to be for the general benefit of Canada, and so swept all the railways, generally speaking, outside of the jurisdiction of the provinces. We know that under our decisions in bankruptcy and insolvency numbers of provincial statutes may be passed providing for various things, but if the Dominion legislates upon these subjects the Dominion legislation supersedes the other legislation. We have a particularly good example of that with reference to agriculture and immigration, under sec. 93 of the British North America Act, two subjects that one would think peculiarly came within the exclusive jurisdiction of the province, and yet it is provided that : " Any law of the legislature of a province relative to agriculture or to immigration shall have effect in and for the province as long and as far only as it is not repugnant to any act of the Parliament of Canada." In other words, that the law is not the law of the United States where every State is supreme, where the residuum, as it were, of the legislation is given to it, but that the legislatures here act under restricted charters, and that large supervisory powers have been retained by the Dominion in the way of disallowance, in the way of appeal, in the way of supersession of its legislation, bankruptcy, insolvency and a great many subjects ; and so I say it is not opposed to the general scope and the genius of the British North America Act if we find that in such a subject as education there is a limitation upon the right of a province, having once accorded to a religious minority in the province certain rights and privileges under which

they may have obtained large vested rights, accumulated large properties, that the British North America Act should say to the majority those rights are not to be ruthlessly swept away; while you have a right to legislate with reference to it it is always subject to an appeal to the Executive of the Dominion, and then to the final arbitrament of the general Parliament.

Then, my first point is that all the other Provinces are in the position that Manitoba is to-day; that is, if there were separate schools at the union then there is an appeal; if separate schools are established since the union, then there is an appeal in respect of any rights and privileges given subsequent to the union, because they could not have been given prior.

Otherwise, that clause clearly means nothing. It seems to me the scope of it is clearly this: The Province may hereafter give to minorities certain privileges; it may have given them prior to the union, or it may think proper to give them after the union; why should there be an appeal in the one case and none in the other? It does not matter, so far as the principle of appeal is concerned, whether given prior to or subsequent to the union, the principle being that rights or privileges having been accorded at one time are not to be ruthlessly swept away without an appeal.

Another argument in support of this present point, that the appeal arises in respect of rights after the union, is to be derived from a consideration of how rights and privileges may arise? How can rights and privileges arise, such as are contemplated, in the first place, by the British North America Act? Under the British North America Act the rights and privileges referred to, no doubt, are those which have arisen by statute, that is, not by constitutional acts, but by ordinary statutes of the different provinces. Those acts may have been passed prior to the union, they

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may be passed subsequent to the union, that seems to make no difference under the British North America Act; then, why should it make any difference under the Manitoba Act? It says, an appeal shall lie from *any* act affecting any right or privilege. It does not say when that right or privilege came into being, it does not limit it and say it must be a right or privilege which existed at the time of the union. Quite the contrary. If your lordships will observe, the words "at the union" are left out of this second subsection. Under the first subsection, in order that a statute may be *ultra vires*, rights and privileges which existed at the union must be affected; but there may be an appeal no matter when any right or privilege arose.

Manitoba's Constitutional Act is intended to last, not for a year or two but for all time, with perhaps modifications. It seems to me it would be absurd to argue that Manitoba may go on legislating with reference to education for say 50 years, by which time a perfectly new system has been established, something that perhaps we have not conceived of at the present time but something agreeable to all parties, and then in the 51st year to say, that all that is reversed, and when we desire to appeal to have it said, let us go back to the union and see what your rights were at that time. That is not the case at all. It is not the rights and privileges which existed at the union that we have an appeal in respect of, but the rights and privileges which have accrued to us subsequent to that, and which existed at that time. It would seem to me as reasonable to say that your lordships' court, having jurisdiction on appeal from all final judgments of a court, were not to entertain appeals from judgments decided after your lordships' constituting act. Your lordships are given jurisdiction of appeal from every judgment, no matter when it has been decided. These

rights and privileges arising by statute are prior to or after the union. Now, if we are limited to a statute passed prior to the union, that is, if we can only appeal in respect of rights and privileges which were given to us by a statute prior to the union, of course there is no such thing, and Parliament, when it passed this statute, knew there was no such thing, and so there would be no appeal at all; the only possible case in which there is an appeal is from a statute which is passed after the union giving rights and privileges, and therefore the appeal here, unless the provision is nugatory altogether, must be an appeal in respect of rights and privileges subsequent to the union.

I would venture to suggest an analogous case to this, provided for by subsection 2, which provides for an appeal from "any Act or decision affecting any right or privilege." Supposing a statute provided, if any one interfered with another man's right to a property that there should be a certain redress, would it be argued for an instant that that statute only applied to rights which existed at the time of the statute? It is intended to apply, I should think, clearly, to any interference with rights no matter when the rights arise; it is always a question of whether rights were interfered with, not a question of when they came into being.

I wish to cite to your lordships two cases upon this point. *Attorney-General* v. *Saggers* (1); *Lane* v. *Cotton* (2).

There is one more matter to which I wish to call attention upon this point, as to whether the rights and privileges referred to in subsection 2 are those which arose subsequent to the union or not, and that is this: that an appeal is given, not only from an act of the legislature, but from the decision of any provincial

(1) 1 Price 182. (2) 12 Mod. 486.

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authority, and I would submit then, that under that part of the section, if we were administering this present statute of 1890, there would be an appeal from its wrongful administration. Supposing we had any rights under this present act of 1890, that would be a case within this section for an appeal from its wrongful administration. It seems to me that it could not have been intended to limit it to statutes which existed at the time of the union, but it was clearly intended to give a right of appeal from wrongful administration of statutes existing at a subsequent time, otherwise there would be really no appeal from administration at all; as soon as one statute was repealed, and another statute passed, they would say, well, there was a right of appeal from the administration under that old statute, but there was no right of appeal from the administration under this present statute. It seems to me it is a constitutional statute, intended to give a right of appeal from wrongful administration at any time. The rights and privileges spoken of here are the rights and privileges as they exist from time to time.

I will now deal with the question as to whether rights and privileges have been in any way prejudicially affected; and of course in entering upon this discussion we must observe what the Privy Council decided in *Barrett* v. *Winnipeg* (1)

The effect of 53 Vic. ch. 38 was that all the Roman Catholic schools, all their property, all their arrangements of every kind came under this new statute, and became what they call public schools. All their organization was swept away; everything was swept into this new arrangement. A provision is made by two or three sections at the close of the statute with reference to assets and liabilities (sec. 108 and following sections), but your lordships will observe that those sections

(1) [1892] A.C. 445.

only relate to the very few cases in which the boundaries of a Roman Catholic and a Protestant school district were identical. It provided for only those two or three cases. In every other case section 3 applies, and everything comes under the new school act.

So that I say the rights and privileges which have been interfered with are, in the first place, that all properties which we had are swept away, our separate condition, our organization, our right to self-government, our right to taxation for our own purposes, our right to share in government grants, all the rights incident to the condition of separate schools have been taken away from us.

I would also, upon that point, refer your lordships to the judgments of this court when the case was before your lordships before.

One other point remains. The fourth question which has been referred to your lordships may or may not turn out to be material; at all events your lordships are asked to give an answer to it.

The clause which seems to govern the answer to that question is the second section of the Manitoba Act.

I submit the British North America Act does apply to Manitoba, and for this reason:—I submit that one statute does not vary another, if it merely makes further provisions. For instance, if a statute provided that certain acts shall constitute theft, and then another act provided that a certain other thing shall constitute theft, that would not be a variation of the previous statute, it would be an addition to it. I argue in the same way here with reference to this second subsection, that it is wider, that it does not vary at all the third subsection of the British North America Act, save in this, that there is an addition to it, that it is inclusive and goes beyond it. The third subsection of the British North America Act provides that in two cases

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there is to be an appeal. There is nothing inconsistent in the Manitoba Act which says that in all cases there shall be an appeal. It goes beyond it, it does not vary it; it leaves it as it is, and adds to it.

There are a number of cases that might be referred to upon this point, but as they are all grouped together I will content myself with giving your lordships the pages at which they are to be found in Maxwell on Statutes (1). The treatment of the subjects extends beyond the particular pages that I give.

There is a case, analogous in some respects, which arose under the statute of Wills of Ontario, *Crawford* v. *Curragh* (2).

ROBINSON Q. C.—The subject matter for decision by the court in respect of the various questions on this important matter which have been referred by the Government of the Dominion is, how they should be answered, having reference simply to the construction of this statute. And I take it, that the whole thing depends upon the construction of these two statutes, the British North America Act and the Manitoba Act, taken and read in connection with the judgment of the Judicial Committee of the Privy Council in *Barrett* v. *Winnipeg* (3).

I submit that the British North America Act has no application. One would hardly expect it should have any application for this reason, that the subject matter of education is taken up and specially dealt with, as regards other provinces, by the British North America Act; the same subject is taken up and specially dealt with by the Manitoba Act as regards Manitoba; and, one would therefore expect that the provisions to be found in the Manitoba Act were intended to be the

(1) [2 ed., pp. 186, 198, 204, 222.] (2) 15 U.C.C.P. 55.
(3) [1892] A. C. 445.

complete and the only provisions dealing with that subject matter with regard to that province.

A difference, and a very marked difference, is plain upon the two statutes.

I do not concur with my learned friend, if I may venture to say so, when he says that adding to an enactment is not varying it. I should have thought, on the contrary, it was a very plain variation. To suggest a very familiar instance; if you were to say that murder should be a capital crime, I think you would be very materially varying that by saying that other things should be capital crimes. In one case, it is intended to deal with the whole subject of what is a capital felony, and if you were to add larceny to that, or other crimes, I think you would very materially vary it, and, therefore, when we find that particular subject matter dealt with specifically and by itself in the Manitoba Act, dealt with in a different manner from the way in which it is treated in the British North America Act, and when we find in the Manitoba Act a provision that except so far as the British North America Act may be varied by this act it shall be applicable to the Province of Manitoba, I should have thought the inference was very plain.

I cannot cite authorities upon such a point; it is almost impossible to find them. However, I may refer to a case your lordships may recollect of *Major* v. *The Canadian Pacific Railway* (1). There was a general provision in the Railway Act with respect to building branches, and a special provision in the Canadian Pacific Act. It was contended that that provision in the special Railway Act, in the Canadian Pacific Charter, was varied, and added to, by the general provision of the Railway Act, because it was imported into the Canadian Pacific Charter in very much the same words

(1) 13 Can. S.C.R. 233.

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as the British North America Act is imported here It having been held that that modified the special clause in the Canadian Pacific Act the judgment was reversed on the ground that that was an error.

It may be a natural question to ask: Can it have been intended that Manitoba should be in a worse position than the other provinces? I cannot say whether it was to be in a better or a worse position, but the statute very plainly says Manitoba is to be in a different position.

There are three questions which my learned friend has suggested which stand apart from the main subject:

First, does the the British North America Act apply?

Secondly, what is the effect of the distinction between the two statutes, in the introduction of the words "Provincial authority," in one, and the addition in the other of the words "Acts of the Legislature"?

Lastly, are the rights and privileges in the Manitoba Act confined to rights and privileges existing at the union, or do they include rights and privileges subsequent as well?

Those are three questions which, so to speak, are separated from the main subject. I would like, in a few words, to dispose of them.

With regard to those words "Provincial authority" your lordships will remember that in section 93 subsection 3, an appeal shall lie from any act or decision of any provincial authority. In the Manitoba Act it is from any act or decision of the Legislature of the Province or of any provincial authority."

Now, one thing is very clear, that whoever framed those two statutes, and we may assume that the Manitoba section was framed in view of the similar section of the British North America Act, evidently had, to say the least of it, a doubt whether the words "Provincial authority" included legislation. My learned friend is

quite right in saying it may have been only *ex majore cautelâ*, but possibly for the want of some better reason, it suggests itself to me that perhaps the term "Provincial authority" hardly includes legislation, because the act of legislation is the act of the province itself, as it were. That is to say, the legislature, composed of the crown and the representatives of the people, is the province itself. It is not, in ordinary language, a provincial authority. I do not think you speak of the Dominion Parliament and the provincial legislatures, as being respectively Dominion authorities, and provincial authorities. The legislation of the country is the act of the province itself, not of any authority appointed, so to speak, by the province. At all events, we find it clear that there was the addition in the subsequent statute of the specific words which would seem to show that the legislature thought they were not included in the words "act or decision of provincial authority" in the first statute. I do not know that more can be said about that. It does not admit of much elaboration. The difference made by the legislature is plain. I suggest the probable reason for it, that it would be doubtful whether a statute of the legislature was an act or decision of a provincial authority. Whether it means an act in the sense of a statute, or an act of a provincial authority, all depends upon whether it is spelled with a capital "A" or a small "a," that is the real truth. We are speaking here of very refined distinctions in words. I see it spelled with a capital "A" in the statute I have before me, but if it meant an act or a decision of a provincial authority, you do not speak of an act of Parliament as a decision.

A suggestion occurred to me, that the act of the legislature was not exactly a provincial authority, it was an act of the province itself. I do not know

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whether an order in council might not be an act of "Provincial authorlty." There is some difference between the two.

Then, the next question my learned friend raised was, that the words "affecting any right or privilege" means affecting any right or privilege which existed at the union or was subsequently acquired.

Now, in the first place, we find that in subsection 1, rights and privileges at the union are specifically spoken of. One, therefore, assumes *primâ facie*, that when you find rights and privileges spoken of, with those words omitted, there was to be some sort of distinction and when we come to consider the effect of saying that those words "rights and privileges" mean rights and privileges whenever acquired, we are met with this obvious and, I submit, almost insuperable difficulty: it is contrary to all our ideas of legislation, contrary almost to our constitution, that the same legislature which creates cannot destroy. We have no instance of that, except in the British North America Act, that I know of. It is contrary to all principles of legislation, it is contrary to all principles of Government, and it is contrary to all constitutional principles if I may express it so strongly, that the same legislature to which you go for the creation of a right, and under which you enjoy the exercise of a right, has no power to deprive you of the right. It must surely, I submit, require most express and specific words to bring about that state of things.

When you add to that, that the insertion or the omission of those words involves a change of the organic law, then the argument becomes stronger that the omission of them cannot be supplied by anything in the shape of implication or construction, because to put them in would say that the legislature which made

a law, and created the right, could not repeal that law, or deprive those to whom they gave the right, of it.

Now, as to the main question, is there any right of appeal? I will read afterwards to your lordships the six questions, and see what specific answers should be given to them, and what reasons there are for suggesting that they should be answered in an opposite sense from that for which my learned friend contends; but, speaking substantially, he says the answers to all the questions should be in the affirmative. I submit reasons why the answers to the questions should be in the negative, but you may condense it all into one question: Is it competent for our Privy Council to entertain this appeal after the decision of the Judicial Committee of the Privy Council?

I submit that the obvious and plain difficulty in my learned friend's way is, that, as we read, or as I read and suggest to the court, that the judgment of the Judicial Committee should be read, they have decided, practically, that there is no such act to appeal from as is described in the appealing clause. What is it that you have a right to appeal from under the Manitoba Act? Leaving out the immaterial words, you have a right to appeal from any act of the provincial legislature "affecting any right or privilege of the Protestant or Roman Catholic minority of the Queen's subjects in relation to education."

What I say is this: The Judicial Committee decided that the existence of denominational schools, or the existence of a national system of non-sectarian schools, is in no way inconsistent with the rights and privileges which they have always enjoyed, and still enjoy, with respect to denominational schools.

Of course, if the section upon which the judicial committee proceeded in their judgment was precisely the same as the present section, there would

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be nothing more to argue. The question is, whether it is not the same in principle, and whether the principles which they have laid down do not necessarily make it applicable to the section we are now considering. If they do, there is no appeal; if they do not, there is an appeal.

Now, let us see what the differences are. In the first place, the words in the first subsection are "prejudicially affect"; is there any distinction between "prejudicially affect" and "affect"? In the argument, as my learned friend has mentioned to your lordships, it was said, and said, I submit, with unanswerable force, that there could be no distinction, for present purposes, between "affecting" and "prejudicially affecting"; in other words, the "affecting" which gives a right of appeal must be, in some sense, "prejudicially affecting." Any change, of course, is "affecting," but there could not be a right of appeal from a change enormously adding to their powers. There might be beneficial changes, changes which would give them infinitely greater rights; there could be no appeal there; therefore, I submit, there is no distinction between "affecting" and "prejudicially affecting."

Now, I quite admit that there is, in words, and in more than words, a plain distinction between the words "rights or privileges with respect to denominational schools which any class of persons has by law or practice in the province at the union," and "any right or privilege of the Protestant or Roman Catholic minority of the Queen's subjects in relation to education." Of course there is a very plain difference between those words and between, in some respects, the meaning of those words; but, in the first place, speaking of the words "in relation to education," and the way in which the "rights or privileges" of this statute were affected with reference to education, it

was that they were affected in relation to denominational schools. It was only because they alleged that their "rights or privileges in relation to denominational schools" were affected, that they said our rights "in relation to education" are affected. There was no other way in which they were assumed to be affected, so that I say there can be no distinction.

Then, was any right or privilege affected? Let us see what principle the judgment of the judicial committee lays down. The submission is, and the reason suggested to the court why those questions should be answered in the negative, and why no right of appeal exists, is, because there is no such statute existing as is defined in the clause giving the right of appeal. They can only appeal from a statute having a certain effect. The judicial committee of the Privy Council, as I submit, has decided that the statute from which they desire to appeal has not that effect. If it has not then of course there is no right of appeal.

The Judicial Committee says:—"Nothing in any such law shall prejudicially affect any right or privilege with respect to denominational schools" (page 147). Then they cite the words of the appeal section "affecting any right or privilege of the Protestant or Roman Catholic minority of the Queen's subjects in relation to education."

Then, at the foot of page 147 the court says:—"Their lordships are convinced that it must have been the intention of the legislature to preserve every legal right or privilege and every benefit or advantage in the nature of a right or privilege, with respect to denominational schools, which any class of persons practically enjoyed at the time of the union."

Those words are strong, in this sense, that they define the kind of "right and privilege" which in their view the statute applied to, and intended to preserve. This

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statute they say was intended "to preserve every legal right or privilege, and every benefit or advantage in the nature of a right or privilege, with respect to denominational schools, which any class of persons practically enjoyed at the time of the union." And they say this statute does not infringe upon any legal right or privilege, with respect to denominational schools, which any class of persons practically enjoyed at the time of the union. That means "by practice," or practically, enjoyed at the time of the union.

Then, if that is the true construction of the statute, as laid down by the judicial committee of the Privy Council, they have decided that this is a statute which has not the effect of interfering with any such right or privilege.

Now, I am coming to the question: If it is not so restrained, does it make any difference, because the statute of 1871 established a system of denominational schools, as the Judicial Committee said? The statute of 1890 swept away that system; but, they go on to ask, and to define, what are the rights and privileges which the existence of that system involved, what are the immunities which it involved? First, they say there is no dispute as to the state of things which existed in Manitoba at the time of the union, and they describe it of course accurately, citing from the description of it by the archbishop. Then they say, even if that state of things which was described as existing in practice, had been established by law, what would have been the rights and privileges of the Roman Catholics with respect to denominational schools? They would have had, by law, the right to establish schools at their own expense, and so they have still, to maintain their schools by school fees, or voluntary contributions, and to conduct them in accordance with their own religion. "Every other religious body which was engaged in a

similar work at the time of the union would have had precisely the same right with respect to their denominational schools," I understood the Judicial Committee to say. So they have still. Possibly this right, if it had been defined or recognized by positive enactment, might have attached to it, as a necessary or appropriate incident, the right of exemption from any contribution under any circumstances to schools of a different denomination. But, in their lordships' opinion, it would be going much too far to hold that the establishment of a national system of education upon a non-sectarian basis is so inconsistent with the right to set up and maintain denominational schools that the two things cannot exist together, or that the existence of one necessarily implies or involves immunity from taxation for the purpose of the other.

I have read this judgment many times with the greatest possible care, because, I thought every thing turned upon it. If I understand rightly, it lays down in the broadest terms this principle, that the establishment of a national non-sectarian system of education, and the obligation of all persons, indifferently of every creed and denomination, to contribute to it, is in no way inconsistent with their rights with regard to denominational schools, nor with their rights, as I submit is the inference, in relation to education, because the only complaint is, that this is an infringement of their rights in relation to denominational schools. But the Judicial Committee have said it is not. How to meet that is the insuperable difficulty produced by that judgment.

Then they go on to say that no child is compelled to attend a public school. They say "but what right or privilege is violated or prejudicially affected by the law?"

Then, going to the other point, which my learned friend has called my attention to, of course if we are

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right in the contention that this only touches rights which existed at the union, why, there is an end of the matter, because these rights did not exist at the union. The act of 1871, and the subsequent acts under which my learned friend says they had certain rights in relation to education, and of which they were deprived by the legislation of 1890, has no application if my first contention is right. If that contention is not right, and by the appeal clause in the Manitoba Act, just as by the appeal clause in the other act, any rights which are called into existence by the legislature of Manitoba after the union cannot be interfered with or affected by the same legislature, then my learned friend points out, and points out truly, as I understand it, that this is the state of affairs, and these were the kind of rights they had, as is correctly described in the judgment of the Judicial Committee. They had a system of separate schools, or denominational schools, whichever you choose to call them, established, by which the Roman Catholics supported their own schools, and the Protestants supported their schools, nor could a Catholic be taxed for a protestant school. None of those privileges were interfered with. But, my learned friend says they had certain rights given to them by law by which they were entitled to assess their own people for the support of their own schools, and to participate in a certain legislative grant out of the general funds of the province. So far as I can understand my learned friend is perfectly right in that, and the result of establishing a system of national schools by the act of 1890 is to sweep that away. That seems beyond all question. That is the fact, as I understand it, and therefore, the question is: Is that a right or privilege in relation to education? As I understand it now, if the Roman Catholics or Protestants choose to support a school of their own for their own people, the law gives

them no power of assessment, the law does not assist them in doing it, it must be voluntary. And whatever right they had to any portion of the legislative grant to a denominational school, *qua* denominational school, they no longer get under the present act, because the present act establishes a national unsectarian system, and it simply says to everyone, you must all contribute to that. As to your denominational schools do just as you please, go to our schools or not, just as you like, and your children or not, as you please, we impose no disability on you because you do not take advantage of our schools; what we say is, that all people alike must contribute to this system of national education, all in the same degree and with equality; beyond that we do not interfere with you. Then, we submit that the judgment of the Privy Council says, in substance and in principle, that there is no right or privilege interfered with by this legislation. They had all these statutes before them, though I am quite free to admit, and your lordships will understand me always to admit, that they had nothing to deal with but the rights or privileges with regard to denominational schools.

From the position I occupy, having no special interest to insist upon, and no special interest of any client to advance, I do not think I would be justified in taking up more of the time of the court. I have done what seemed to be the desire of the court, given such assistance as I could by pointing out the considerations which seemed to me to indicate the reason why these different questions should be answered, not as my learned friend contends, but in the opposite sense.

I think that is all that occurs to me to say: First, that the rights and privileges which must be affected are only rights and privileges existing at the time of the union. That if they have other rights and privi-

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leges given by the legislature of Manitoba that legislature has a right to deal with them as they please. They created them, they can destroy them; and, as a matter of fact, in the result, there is no statute here affecting any right or privilege with regard to education which would form the subject matter of an appeal. I said I should read the different questions and suggest the answers which the court should give, but on reflection I hardly think that is worth while, because, if I am right, your lordships will see, from the result, exactly how those questions must inevitably be answered. If I am wrong, and my learned friend is right, they must be answered in the affirmative.

Ewart Q. C. in reply.—I shall refer very shortly to the points put forward by Mr. Robinson. First, upon the point that if there is this right of appeal from the legislature that it is something incongruous, something inconsistent with our whole system. I answered that to some extent before. I may perhaps add now, as his argument has led to this, that there is clearly a prohibition with reference to all the provinces which had a separate school system prior to the union. Those separate school systems existed by virtue of their own statutes, passed prior to the union. My learned friend says: Is it possible that a province which passes a statute has not power to repeal it? And I say yes, and I think my learned friend will have to agree with me, that in cases where there were rights and privileges prior to the union, by virtue of the province's own statute, they have not the power.

Then, if they are prohibited from repealing a statute passed prior to the union, why not prohibit them from repealing one they passed subsequent to the union? There is, after all, not an absolute prohibition, but it is this, that they shall not repeal it so as to prejudicially affect people to whom they had given rights, and who

had vested rights, as it were, grown up under the statutes which they themselves had passed.

We have something of the same sort in another part of our constitution, under the disallowance provision, and it was exercised in the case of *McLaren* v. *Caldwell* (1). It was because Ontario interfered with vested rights. There is a provision for the maintenance of vested rights.

My learned friend has referred to the decision of the Privy Council in *Barrett* v. *Winnipeg* (2), as being a complete answer to my position here. I think it is not, and for two reasons. He says that the Privy Council decided that it was only in respect of denominational schools, or contribution to denominational schools, that we could by any possibility object, that we could never object to subscriptions to national schools. Now, if that be so, in the Province of Quebec there is no guarantee for the protestants, although we have always assumed that there is a very carefully prepared clause guarding the protestants in Quebec. We all know that in the Province of Quebec there is not the national system, but there is the denominational system, the protestant and the catholic system. If my learned friend is right, why, the Province of Quebec to-morrow can pass an act establishing what it may choose to call what the Manitoba Act chooses to call these schools, national schools, and abolish all the protestant schools, and require the protestants to subscribe to the national schools.

If the principle in *Barrett* v. *Winnipeg* (2) were applied, not to the section to which they apply it, but to the subsequent section, then that would be the effect of it, and that is what my learned friend desires your lordship to do, to take the principle applied by their lord-

(1) 9 App. Cas. 392. (2) [1892] A. C. 445.

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ships in *Barrett* v. *Winnipeg* (1) in one section and apply it to the other section. I think that would be unfortunate, because it would lead, in Quebec, to what I have said.

Then, the other reason is this, that even if that principle be applied to this section, still, that is only one of the points in which we are hurt.

Our principal grievance to-day is that we are without organization. We had organization under these statutes, we had a right to tax ourselves, we had a right to conduct our own schools under Governmental inspection and direction, we had to work up to a secular standard, and we are perfectly willing to do that and did do that, practically to the satisfaction of Manitoba, and what we are deprived of really is our organization. If we had that organization we would not care very much about the subscription to their national schools, because there are not any where we are. That does not apply to the cities where there would be national schools and where there would be our schools. There, we would be supporting our own, and we might have to support national schools too, but it does not apply to the great majority of cases. I mention that, not that your lordships may take it that the great majority of the schools are in that position, because your lordships have not that fact before you, but to emphasize this, that it is the deprivation of our organization that has hurt us specially, or that possibly may hurt us. One can easily see how it can hurt us. There are some matters of fact which appear in the petition which will go far to uphold what I have said.

I ask your lordships to refer amongst all the statutes that have been mentioned and those that have been printed and put before your lordships to the statute of 1885 particularly, which will show what our powers were, what moneys we got, and what powers of assessment we had, and where the revenue came from.

(1) [1892] A. C. 445.

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THE CHIEF JUSTICE:—This case has been referred to the court for its opinion by His Excellency the Governor General in Council, pursuant to the provisions of "An Act respecting the Supreme and Exchequer Courts," Revised Statutes of Canada, chapter 135 as amended by 54 & 55 Victoria, ch. 25, sec. 4.

Six questions are propounded which are as follows:

The Chief Justice.

(1.) Is the appeal referred to in the said memorials and petitions (referring to certain petitions and memorials presented to the Governor General in Council) and asserted thereby, such an appeal as is admissible by subsection 3 of section 93 of the British North America Act, 1867, or by subsection 2 of section 22 of the Manitoba Act, 33 Vic. (1870) chapter 3, Canada?

(2.) Are the grounds set forth in the petitions and memorials such as may be the subject of appeal under the authority of the subsections above referred to or either of them?

(3.) Does the decision of the Judicial Committee of the Privy Council in the cases of *Barrett* v. *Winnipeg* and *Logan* v. *Winnipeg* (1), dispose of or conclude the application for redress based on the contention that the rights of the Roman Catholic minority which accrued to them after the union under the statutes of the province, have been interfered with by the two statutes of 1890 complained of in the said petitions and memorials?

(4.) Does subsection 3 of section 93 of the British North America Act, 1867, apply to Manitoba?

(5.) Has His Excellency the Governor General in Council power to make the declarations or remedial orders which are asked for in the said memorials and petitions assuming the material facts to be as stated therein, or has His Excellency the Governor General in Council any other jurisdiction in the premises?

(6.) Did the Acts of Manitoba passed prior to the session of 1890 confer on or continue to the minority 'a right or privilege in relation to education' within the meaning of subsection 2 of section 22 of the Manitoba Act or establish a system of 'separate or dissentient schools' within the meaning of subsection 3 of section 93 of the British North America Act, 1867, if said section 93 be found to be applicable to Manitoba; and if so, did the two Acts of 1890 complained of, or either of them, affect any right or privilege of the minority in such a manner that an appeal will lie thereunder to the Governor General in Council?

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The Chief Justice.

To put it in a concise form, the questions which we are called upon to answer are whether an appeal lies to the Governor General in Council either under the British North America Act, 1867, or under the Dominion Act establishing the Province of Manitoba, against an act or acts of the Legislature of Manitoba passed in 1890, whereby certain acts or parts of acts of the same legislature, previously passed, which had conferred certain rights on the Roman Catholic minority in Manitoba in respect of separate or denominational schools, were repealed.

The matter was brought before the court by the Solicitor General, on behalf of the crown, but was not argued by him. On behalf of the petitioners and memorialists who had sought the intervention of the Governor General, Mr. Ewart Q.C. appeared. Mr. Wade Q.C. appeared as counsel on behalf of the Province of Manitoba when the matter first came on, but declined to argue the case, and the court then, in exercise of the powers conferred by 54 & 55 Vic., chapter 25, section 4, (substituted for the Revised Statutes of Canada, chapter 135, section 37,) requested Mr. Christopher Robinson Q.C., the senior member of the bar practising before this court, to argue the case in the interest of the Province of Manitoba, and on a subsequent day the matter was fully and ably argued by Mr. Ewart and Mr. Robinson.

The proper answers to be given to the questions propounded depend principally on the meaning to be attached to the words "any right or privilege of the Protestant or Roman Catholic minority of the Queen's subjects in relation to education" in subsection 2 of section 22 of the Manitoba Act. Do these words include rights and privileges in relation to education which did not exist at the union, but (in the words of section 93, subsection 3 of the British North America

Act) have been "thereafter established by the legislature of the province," or is this right or privilege mentioned in subsection 2 of section 22 of the Manitoba Act the same right or privilege which is previously referred to in subsection 1 of section 22 of the Manitoba Act, viz.: one which any class of persons had by law or practice in the province at the union or a right or privilege other than one which the legislature of Manitoba itself created?

Section 93 of the British North America Act, 1867, is as follows:—

In and for each Province the legislature may exclusively make laws in relation to education subject and according to the following provisions.

Subsec. 1 of the same section is as follows:—

Nothing in any such law shall prejudicially affect any right or privilege with reference to denominational schools which any class of persons have by law in the Province at the Union.

And subsec. 3 is in these words:—

Where in any province a system of separate or dissentient schools exists by law at the union or is thereafter established by the legislature of the province, an appeal shall lie to the Governor General in Council from any Act or decision of any provincial authority affecting any right or privilege of the Protestant or Roman Catholic minority of the Queen's subjects in relation to education.

Section 22 of the Manitoba Act is as follows:—

In and for the Province the said legislature may exclusively make laws in relation to education subject and according to the following provisions:

(1) Nothing in any such law shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons have by law or practice in the Province at the Union.

(2) An appeal shall lie to the Governor General in Council from any Act or decision of the legislature of the Province or of any Provincial authority affecting any right or privilege of the Protestant or Roman Cathotic minority of the Queen's subjects in relation to education.

It is important to contrast these two clauses of the acts in question, inasmuch as there is intrinsic evidence

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in the later act that it was generally modelled on the Imperial statute, the original Confederation Act; and the divergence in the language of the two statutes is therefore significant of an intention to make some change as regards Manitoba by the provisions of the later act.

It will be observed that the British North America Act, section 93, subsection 3, contains the words "or is thereafter established by the legislature of the province," which words are entirely omitted in the corresponding section (section 22, subsection 2) of the Manitoba Act. Again, the same subsection of the Manitoba Act gives a right of appeal to the Governor General in Council from the legislature of the province, as well as from any provincial authority, whilst by the British North America Act the right of appeal to the Governor General is only to be from the act or decision of a provincial authority. I can refer this difference of expression in the two acts to nothing but to a deliberate intention to make some change in the operation of the respective clauses. I do not see why there should have been any departure in the Manitoba Act from the language of the British North America Act unless it was intended that the meaning should be different. On the one hand, it may well be urged that there was no reason why the provinces admitted to confederation should have been treated differently; why a different rule should prevail as regards Manitoba from that which, by express words, applied to the other provinces. On the other hand there is, it seems to me, much force in the consideration, that whilst it was reasonable that the organic law should preserve vested rights existing at the union from spoliation or interference, yet every presumption must be made in favour of the constitutional right of a legislative body to repeal the laws which it has itself enacted. No doubt

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this right may be controlled by a written constitution which confers legislative powers, and which may restrict those powers and make them subject to any condition which the constituent legislators may think fit to impose. A notable instance of this is, as my brother King has pointed out, afforded by the constitution of the United States, according to the construction which the Supreme Court in the well known "Dartmouth College case" put upon the provision prohibiting the state legislatures from passing laws impairing the obligation of contracts. It was there held, with a result which has been found most inconvenient, that a legislature which had created a private corporation could not repeal its own enactment granting the franchise, the reason assigned being that the grant of the franchise of a corporation was a contract. This has in practice been got over by inserting in such acts an express reservation of the right of the legislature to repeal its own act. But, as it is a *primâ facie* presumption that every legislative enactment is subject to repeal by the same body which enacts it, every statute may be said to contain an implied provision that it may be revoked by the authority which has passed it, unless the right of repeal is taken away by the fundamental law, the over-riding constitution which has created the legislature itself. The point is a new one, but having regard to the strength and universality of the presumption that every legislative body has power to repeal its own laws, and that this power is almost indispensable to the useful exercise of legislative authority since a great deal of legislation is of necessity tentative and experimental, would it be arbitrary or unreasonable, or altogether unsupported by analogy, to hold as a canon of constitutional construction that such an inherent right to repeal its own acts cannot be deemed to be withheld from a legislative

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body having its origin in a written constitution, unless the constitution itself, by express words, takes away the right. I am of opinion that in construing the Manitoba Act we ought to proceed upon this principle and hold the legislature of that province to have absolute powers over its own legislation, untrammelled by any appeal to federal authority, unless we find some restriction of its rights in this respect in express terms in the constitutional act.

Then, keeping the rule of construction just adverted to in view, is there anything in the terms of subsection 2 of section 22 of the Manitoba Act by which the right of appeal is enlarged and an appeal from the legislature is expressly added to that from any provincial authority, whilst in the British North America Act, section 93, subsection 3, the appeal is confined to one from a provincial authority only, which expressly or necessarily implies that it was the intention of those who framed the constitution of Manitoba to impose upon its legislature any disability to exercise the ordinary powers of a legislature to repeal its own enactments? I cannot see that it does, and I will endeavour to demonstrate the correctness of this opinion.

It might well have been considered by the Parliament of the Dominion in passing the Manitoba Act that the words "any provincial authority" did not include the legislature. Then, assuming it to have been intended to conserve all vested rights—"rights or privileges existing by law or practice at the time of the union,"—and to exclude or subject to federal control even legislative interference with such pre-existent rights or privileges, this prohibition or control would be provided for by making any act or decision of the legislature so interfering the subject of appeal to the Governor General in Council.

If, however, the words of section 93, subsection 3, "or is thereafter established by the legislature" had been repeated in section 22, the legislature would have been in express and unequivocal terms restrained from repealing laws of the kind in question which they had themselves enacted except upon the conditions of a right to appeal to the Governor General. If it was intended not to do this but only to restrain the legislature of Manitoba from interfering with "rights and privileges" of the kind in question existing at the union, this end would have been attained by just omitting altogether from the clause the words "or shall have been thereafter established by the legislature of the province." This was done.

Next, it is clear that in interpreting the Manitoba Act the words "any provincial authority" do not include the legislature, for that expression is there used as an alternative to the "legislature of the province."

It is not to be presumed that Manitoba was intended to be admitted to the union upon any different terms from the other provinces or with rights of any greater or lesser degree than the other provinces. Some difference may have been inevitable owing to the difference in the pre-existing conditions of the several provinces. It would be reasonable to attribute any difference in the terms of union and in the rights of the province to this and as far as possible by interpretation to confine any variation in legislative powers and other matters to such requirements as were rendered necessary by the circumstances and condition of Manitoba at the time of the union.

Now let us see what would be the effect of the construction which I have suggested of both acts—the British North America Act, section 93, and the Manitoba Act, section 22, in their practical application to the different provinces as regards the right of provincial

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legislatures to interfere with separate or denominational schools to the prejudice of a Roman Catholic or Protestant minority.

First then let us consider the cases of Ontario and Quebec, the two provinces which had by law denominational schools at the union. In these provinces any law passed by a provincial legislature impairing any right or privilege in respect of such denominational schools would, by force of the prohibition contained in subsection one of section 93 of the British North America Act, be *ultra vires* of the legislature and of no constitutional validity.

Should the legislatures of these provinces (Ontario and Quebec) after confederation have conferred increased rights or privileges in relation to education or minorities, I see nothing to hinder them from repealing such acts to the extent of doing away with the additional rights and privileges so conferred by their own legislation without being subject to any condition of appeal to federal authority.

What is meant by the term "provincial authority"? The Parliament of the Dominion, as shewn by the Manitoba Act, hold that it does not include the legislature, for in subsection 2 of section 22 they use it as an alternative expression and so expressly distinguish it from the legislature. It is true the British North America Act did not emanate from the Dominion Parliament, but nevertheless the construction which that Parliament has put on the British North America Act if not binding on judicial interpreters is at least entitled to the highest respect and consideration. Secondly, the words "provincial authority" are not apt words to describe the legislature, and in order that a provincial legislature should be subjected to an appeal, when it merely attempts to recall its own acts, the terms used should be apt, clear and unambiguous. To return

then to the cases of Ontario and Quebec, should any "provincial authority," not including in these words the legislature but interpreting the expression as restricted to administrative authorities (without at present going so far as to say it included courts of justice), by any act or decision affect any right or privilege whether derived under a law or practice existing at the time of confederation or conferred by a provincial statute since the union, still remaining unrepealed and in force, that would be subject to an appeal to the Governor General.

Secondly. As regards the Provinces of Nova Scotia and New Brunswick, those provinces not having had any denominational schools at the time of the union, there is nothing in their case for subsection one of section 93 to operate upon. Should either of these provinces by after-confederation legislation create rights and privileges in favour of Protestant or Catholic minorities in relation to education, then so long as these statutes remained unrepealed and in force an appeal would lie to the Governor General from any act or decision of a provincial administrative authority affecting any of such rights or privileges of a minority, but there would be nothing to prevent the legislatures of the provinces now under consideration from repealing any law which they had themselves enacted conferring such rights and privileges, nor would any act so repealing their own enactments be subject to appeal to the Governor General in Council.

Thirdly. We have the case of the Province of Manitoba; here applying the construction before mentioned the provincial powers in relation to education would be not further restricted but somewhat enlarged in comparison with those of the other provinces. Acting upon the presumption that in the absence of express words in the act of the Dominion Parliament, which

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embodies the constitution of the province, withholding from the legislature of the province the normal right of altering or repealing its own acts, we must hold that it was not the intention of Parliament so to limit the legislature by the organic law of the province. What, then, is the result of the legislation of the Dominion as regards Manitoba? What effect is to be given to section 22 of the Manitoba Act? By the first subsection any law of the province prejudicing any right or privilege with respect to denominational schools in the province existing at the union is *ultra vires* and void. This clause was the subject and the only subject, of interpretation in *Barrett* v. *Winnipeg* (1) and the point there decided was that there was no such right or privilege as was claimed in that case existing at the time of the admission of the province into the union. Had any such right or privilege been found to exist there is nothing in the judgment of the Privy Council against the inference that legislation impairing it would have been unconstitutional and void. That decision has, in my opinion, but a very remote application to the present case. The second subsection of section 22 of the Manitoba Act is as follows:—

> An appeal shall lie to the Governor General in Council from any act or decision of the legislature of the province or of any provincial authority affecting any right or privilege of the Protestant or Roman Catholic minority of the Queen's subjects in relation to education.

I put aside as entirely irrelevant here the question whether it was or was not intended by this subsection 2 to confer on the Privy Council of the Dominion appellate jurisdiction from the provincial judiciary, a question the decision of which, I may say in passing, might well be influenced by the consideration that the power given to Parliament by the British North America Act to create federal courts had not at the time of the passage of the Manitoba act been exercised.

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The first subject of appeal is then, any act or decision of the legislature of the province affecting any right or privilege of the minority in respect of the matters in question. Now if we are to hold, as I am of opinion we must hold, that it was not the intention of Parliament by these words so to circumscribe the legislative rights conferred by them on Manitoba as to incapacitate that legislature from absolutely, and without any subjection to federal control, repealing its own enactments and thus taking away rights which it had itself conferred, the right of appeal to the Governor General against legislative acts must be limited to a particular class of such acts, viz.: to such as might prejudice rights and privileges not conferred by the legislature itself, but rights and privileges which could only have arisen before confederation, being those described in the first subsection of section 22. That we must assume in the absence of express words that it was not the intention of Parliament to impose upon the Manitoba legislature a disability so anomalous as an incapacity to repeal its own enactments, except subject to an appeal to the Governor General in Council and possibly the intervention of the Dominion Parliament as a paramount legislature, is a proposition I have before stated.

Therefore, the right of appeal to the Governor General in Council must be confined to acts of the legislature affecting such rights and privileges as are mentioned in the first subsection, viz.: those existing at the union when belonging to a minority, either Protestant or Catholic. Then there would also be the right of appeal from any provincial authority. I will assume that the description "provincial authority" does not apply to the courts of justice. Then these words "provincial authority" could not, as used in this subsection 2 of section 22 of the Manitoba Act, have

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been intended to include the provincial legislature, for it is expressly distinguished from it being mentioned alternatively with the legisiature. "An appeal shall lie from any act or decision of the legislature or of any "provincial authority," is the language of the section. It must then apply to the provincial executive or administrative authorities. No doubt an appeal would lie from their acts or decisions, upon the ground that some right or privilege existing at the date of the admission of the province to the federal union was thereby prejudiced. In this respect Manitoba would be in the same position as Ontario and Quebec. Unlike the cases of those provinces, and also unlike the case of the two maritime provinces, Nova Scotia and New Brunswick, there would not, however, in the case of Manitoba, be an appeal to the Governor General in Council from the act or decision of any "provincial authority," upon the ground that some right or privilege not existent at the time of union, but conferred subsequently by legislation, had been violated. This construction must necessarily result from the right of appeal against acts or decisions of provincial authorities, and against acts or decisions of the legislature, being limited to such as prejudiced the same class of rights or privileges. The wording of this subsection 2 shows clearly that only one class of rights or privileges could have been meant, and that the right of appeal was therefore to arise upon an invasion of these, either by the legislature or by a provincial authority. Then, as the impossibility of holding that it could have been intended to impose fetters on the legislature and to incapacitate it from absolutely repealing its own acts, requires us to limit the appeal against its enactments to acts affecting rights and privileges existing at the union, it must follow that the right of appeal must be in like manner limited as regards acts or decisions of provincial

authorities. This, however, although it makes a difference between Manitoba and the other provinces, is not a very material one. The provincial authorities would of course be under the control of the courts; they could therefore be compelled, by the exercise of judicial authority, to conform themselves to the law. Much greater would have been the difference between Manitoba and the other provinces if we were to hold that whilst, as regards the provinces of Nova Scotia and New Brunswick, their legislatures could enact a separate school law one session and repeal it the next, without having their repealing legislation called in question by appeal, and whilst, as regards Ontario and Quebec, although rights and privileges existing at confederation were made intangible by their legislatures, yet any increase or addition to such rights and privileges which these legislatures might grant could be withdrawn by them at their own pleasure, subject to no federal revision, yet that the legislation of Manitoba, on the same subject, should be only revocable subject to the revisory power of the Governor General in Council.

I have thus endeavoured to show that the construction I adopt has the effect of placing all the provinces virtually in the same position, with an immaterial exception in favour of Manitoba, and it is for the purpose of demonstrating this that I have referred to appeals from the acts and decisions of provincial authorities, which are not otherwise in question in the case before us.

That the words "any provincial authority" in the third subsection of section 93 of the British North America Act do not include the legislature is a conclusion which I have reached not without difficulty. In interpreting the Manitoba Act, however, what we have to do is to ascertain in what sense the Dominion

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Parliament in adopting the same expression in the Manitoba Act understood it to have been used in the British North America Act.

That they understood these words not to include the provincial legislatures is apparent from section 22, subsection 2 of the Manitoba Act, wherein the two expressions "provincial authority" and "legislature of the province" are used in the alternative, thus indicating that in the intendment of Parliament they meant different subjects of appeal.

Again, why were the words contained in the third subsection of section 93 of the British North America Act "or is thereafter established by the Legislature of the Province" omitted, when that section was in other respects transcribed in the Manitoba Act. The reason it appears to me is plain. So long as these words stood with the context they had in the British North America Act they did not in any way tie the hands of the provincial legislatures as regards the undoing, alteration or amendment of their own work, for the words "any provincial authority" did not include the legislature. But when in the Manitoba Act the Dominion Parliament thought it advisable for the better protection of vested rights—"rights and privileges" existing at the union—to give a right of appeal from the legislature to the Governor General in Council, it omitted the words "or is thereafter established by the legislature of the province," with the intent to avoid placing the provincial legislature under any disability or subjecting it to any appeal as regards the repeal of its own legislation, which would have been the effect if the third subsection of section 93 of the British North America Act had been literally re-enacted in the Manitoba Act with the words "of the legislature of the province" interpolated as we now find them in subsection 2 of the latter act. This seems to me to show con

clusively that the words "rights or privileges" in subsection 2 of section 22 were not intended to include rights and privileges originating under provincial legislation since the union, and that the legislature of Manitoba is not debarred from exercising the common legislative right of abrogating laws which it has itself passed relating to denominational or separate schools or educational privileges, nor is such repealing legislation made subject to any appeal to the Governor General in Council.

In my opinion all the questions propounded for our opinion must be answered in the negative.

FOURNIER J.—By the statute 33 Vic. ch. 3, sec. 2 (D), the Manitoba Act, the provisions of the British North America Act, except so far as the same may be varied by the said act, are made applicable to the province of Manitoba, in the same way and to the like extent as they apply to the several provinces of Canada, and as if the province of Manitoba had been one of the provinces united by the British North America Act. This act was imperialized, so to speak, by 34 Vic. ch. 38 (Imp.) which declares that 32 & 33 Vic. ch. 3 (D) shall be deemed to have been valid and effectual for all purposes whatsoever.

If we are now called upon to construe certain provisions of this statute, it seems to me that the same considerations will apply as if the provisions appeared in the British North America Act itself under the heading "Manitoba," and therefore as stated by the late Chief Justice of this court, Sir W. Richards, in the case of *Severn* v. *The Queen* (1), "in deciding important questions arising under the act passed by the Imperial Parliament for federally uniting the provinces of Canada, Nova Scotia, and New Brunswick, we must con-

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sider the circumstances under which that statute was passed, the condition of the different provinces, their relations to one another, as well as the system of government which prevailed in those provinces and countries." For convenience therefore, I will place in parallel columns the sections of the Manitoba Act and the corresponding sections of the British North America Act in relation to education, upon which we are required to give an answer.

British North America Act. Sec. 93.	Manitoba Act. Sec. 22.
In and for the province the Legislature may exclusively make laws in relation to education, subject and according to the following provisions :—	In and for the province the said legislature may exclusively make laws in relation to education, subject and according to the following provisions :—
(1). Nothing in any such law shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons have by law in the province at the union.	(1). Nothing in any such law shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons have by law or practice in the province at the union.
(2). All powers, privileges and duties at the union by law conferred and imposed by Upper Canada on the separate schools and school trustees of the Queen's Roman Catholic subjects shall be and the and the same are hereby extended to the dissentient schools of the Queen's Protestant and Roman Catholic subjects in Quebec.	
(3). Where in any province a system of separate or dissentient schools exists by law at the union, or is thereafter established by the legislature of the province, an appeal shall lie to the Governor General in Council from any act or decision of any provincial authority affecting any right or privilege of the Protestant or Roman Catholic minority of the Queen's subjects in relation to education.	(2). An appeal shall lie to the Governor General in Council from any Act or decision of the legislature of the province, or of any provincial authority, affecting any right or privilege of the Protestant or Roman Catholic minority of the Queen's subjects in relation to education.

(4). In case any such provincial law as from time to time seems to the Governor General in Council requisite for the due execution of the provisions of this section is not made, or in case any decision of the Governor General in Council on any appeal under this section is not duly executed by the proper authority in that behalf, then and in every such case, and as far only as the circumstances of each case may require, the Parliament of Canada may make remedial laws for the due execution of the provisions of this section and of any decision of the Governor General in Council.

(3). In case any such provincial law as from time to time seems to the Governor General in Council requisite for the due execution of the provisions of this section is not made, or in case any decision of the Governor General in Council on any appeal under this section is not duly executed by the proper provincial authority in that behalf, then and in every such case, and as far only as the circumstances of each case require, the Parliament of Canada may make remedial laws for the due execution of this section, and of any decision of the Governor General in Council under this section.

What was the existing state of things in the territory then being formed into the province of Manitoba? Rebellion, as I have already stated in the case of *Barrett* v. *Winnipeg* (1) had thrown the people into a strong and fierce agitation, inflamed religious and national passions, and caused the greatest disorder, which rendered necessary the intervention of the Federal Government; and as matters then stood on the 2nd March, 1870, the government of Assiniboia, in order to pacify the inhabitants, appointed the Rev. Mr. Ritchot and Messrs. Black and Scott as joint delegates to confer with the Government of Ottawa, and negotiate the terms and conditions upon which the inhabitants of Assiniboia would consent to enter confederation with the Provinces of Canada.

Mr. Ritchot was instructed to immediately leave with Messrs. Black and Scott for Ottawa, in view of opening negotiations on the subjects of their mission with the Government at Ottawa.

When they arrived at Ottawa the three delegates, Messrs. Ritchot, Black and Scott, received on the 25th

(1) 19 Can. S.C.R. 374.

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April, 1870, from the Hon. Mr. Howe, the then Secretary of State for the Dominion of Canada, a letter informing them that the Hon. Sir John A. Macdonald and Sir George Cartier had been authorized by the Government of Canada to confer with them on the subject of their mission, and that they were ready to meet them.

The Rev. Mr. Ritchot was the bearer of the conditions upon which they were authorized to consent for the inhabitants of Assiniboia to enter confederation as a separate province.

These facts appear in exhibit L, Sessional Papers of Canada, 1893, 33 D., and in exhibit N of the same Sessional Paper, we see that the following conditions, arts. 5 and 7, read as follows:—

"(5.) That all properties, all rights and privileges possessed be respected, and the establishing and settlement of the customs, usages and privileges be left for the sole decision of the local legislature."

"(7.) That the schools shall be separate, and that the moneys for schools shall be divided between the several denominations *pro ratâ* of their respective populations."

Now, after negotiations had been going on, and despatches and instructions from the Imperial Government to the Government of Canada on the subject of the entrance of the province of Manitoba into the confederation had been received, the Manitoba Constitutional Act was prepared, and section 22 inserted as a satisfactory guarantee for their rights and privileges in relation to matters of education, as claimed by the above articles 5 and 7. And until 1890 the inhabitants of the province of Manitoba enjoyed these rights and privileges under the authority of this section and local statutes passed in conformity therewith.

However, it seems by the decision of the judicial committee of the Privy Council in the case of *Barrett* v.

Winnipeg (1) that the delegates of the North-west and the Parliament of Canada, although believing that the inhabitants of Assiniboia had before the union "by law or by practice," certain rights and privileges with respect to denominational schools—for the words used in subsection 1 of this section 32 are, "which any class have by law or practice in the province at the union" —had in point of fact no such right or privilege by law or practice with respect to denominational schools, and therefore that subsection 1 is, so to speak, wiped out of the Manitoba Constitutional Act, having nothing to operate upon.

But if the parties agreeing to these terms of union, were in error in supposing they had by law or practice prior to the union certain rights or privileges, they certainly were not in error in trusting that the provincial legislature, (as the legislature of Quebec did after the union for the Protestant minority) which was being created would forthwith settle and establish their usages and privileges and secure by law and in accordance with Arts. 5 & 7 of the bill of rights separate schools for the Catholics of Manitoba and would make provisions so that the moneys would be divided between the Protestant and Catholic denominations *pro ratâ* to their respective populations. These once established and secured by their own local legislature in accordance with the terms of the union, is not the minority perfectly within the spirit and the words of the constitutional act in contending that rights and privileges so secured by an act of the legislature are at least in the same position as rights secured to minorities in the provinces of Quebec and Ontario under section 93 of the British North America Act and that subsections 2 and 3 were inserted in the act so that they might be protected by the Governor General against any subsequent legisla-

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tion, by either a Protestant or Catholic majority in after years ?

In the present reference, being again called upon to construe this same section 22, but as if subsection 1 was repealed or wiped out by judicial authority, we must, I think, take into consideration the historical fact that the Manitoba Act of 1870 was the result of the negotiations with parties who agreed to join and form part of the confederation as if they were inhabitants of one of the provinces originally united by the British North America Act, and we must credit the Parliament of Canada with having intended that the words "an appeal shall lie to the Governor General in Council from any act or decision of the legislature of the province or of any provincial authority affecting any right or privilege of the Protestant or Roman Catholic minority of the Queen's subjects in relation to education" (which are also the words used in the 93rd section of the British North America Act) should have some effect. The only meaning and effect I can give them is that they were intended as an additional guarantee or protection to the minority, either protestant or catholic, whichever it might happen to be, that the laws which they knew would be enacted immediately after the union by their own legislature in reference to education, would be in accordance with the terms and conditions upon which they were entering the union; this guarantee was given so as to prevent later on interference with their rights and privileges by subsequent legislation without being subject to an appeal to the Governor General in Council should such subsequent act of the legislature affect any right or privilege thus secured to the Protestant or Catholic minority by their own legislature.

In my opinion the words used in subsection 2: "an appeal shall lie from any act of the legislature," neces-

sarily mean an appeal from any statute which the legislature has power to pass in relation to education if *at the time* of the passing of such statute there exists by law any right or privilege enjoyed by the minority. There is no necessity of appealing from statutes which are *ultra vires*, for the assumption of any unauthorized power by any local legislature under our system of government is not remedied by appeal to the Governor General in Council but by courts of justice.

Then, as to the words "right or privilege" in this subsection, they refer to some right or privilege in relation to education to be created by the legislature which was being brought into existence, and which, once established, might thereafter be interfered with at the hand of a local majority so as to affect the Protestant or Catholic minority in relation to education.

It is clear, therefore, that the Governor General in Council has the right of entertaining an appeal by the British North America Act, as well as by subsection 2 of section 22 of the Manitoba Act. He has also the power of considering the application upon its merits. When the application has been considered by him upon its merits, if the local legislature refuses to execute any decision to which the Governor General in Council has arrived in the premises, the Dominion Government may then, under subsection 3 of section 22 of the Manitoba Act, pass remedial legislation for the execution of his decision.

In construing, as I have done, the words of subsection 2 of the 22nd section of the Manitoba Constitutional Act, which is, as regards an appeal to the Governor General in Council, but a reproduction of subsection 3 of section 93 of the British North America Act, except that the clear, unequivocal and comprehensive words, "from any act or decision of the legislature of the province," are added, I am pleased to see that I am but concurring in

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the view expressed by Lord Carnarvon in the House of Lords on the 19th February, 1867, when speaking of this right of appeal to be granted to minorities when a local act might affect rights or privileges in matters of education, as the following extract from Hansard's Parliamentary Debates, 3rd series, Feb. 19, 1867, shows:—

LORD CARNARVON.—Lastly, in the 93rd clause, which contains the exceptional provisions to which I referred, your Lordships will observe some rather complicated arrangements in reference to education. I need hardly say that this great question gives rise to nearly as much earnestness and division of opinion on that as on this side of the Atlantic. This clause has been framed after long and anxious controversy in which all parties have been represented, and on conditions to which all have given their consent. It is an understanding which, as it only concerns the local interests affected, is not one that Parliament would be willing to disturb, even if in the opinion of Parliament it were susceptible of amendment; but I am bound to add, as the expression of my own opinion, that the terms of the agreement appear to me to be equitable and judicious. For the object of the clause is to secure to the religious minority of one province the same rights and privileges and protection which the religious minority of another province may enjoy. The Roman Catholic minority of Upper Canada, the Protestant minority of the Maritime Provinces, will thus stand on a footing of entire equality. But in the event of any wrong at the hand of the local majority, the minority have a right of appeal to the Governor General in Council, and may claim the application of any remedial laws that may be necessary from the central parliament of the Confederation.

This being so, the next point of inquiry is whether the acts of 1890 of Manitoba affect any right or privilege secured to the Catholic minority in matters of education after the union, for we have now nothing to do with the inquiry whether the Catholic minority had at the time of the union any right by law or practice, that point, as I have already stated, having been decided adversely to their contention by the decision of the Privy Council in the case of *Barrett* v. *Winnipeg* (1). By referring to the legislation from the date of the union to 1890, it is evident that the Catholics enjoyed the immunity of

(1) [1892] A.C. 445.

being taxed for other schools than their own, the right of organization, the right of self-government in this school matter, the right of taxation of their own people, the right of sharing in Government grants for education, and many other rights under the statute of a most material kind. All these rights were swept away by the acts of 1890, as well as the properties they had acquired under these acts with their taxes and their share of the public grants for education. Could the prejudice caused by the acts of 1890 be greater than it has been? The scheme that runs through the acts of 1871 and 1881 up to 1890, as Lord Watson of the Privy Council is reported to have so concisely stated on the argument of the case of *Barrett* v. *Winnipeg* (which is printed in the sessional papers of Canada, 1893), appears to have been that "no rate payers shall be taxed for contribution towards any school except one of his own denomination," and I will add that this scheme is clearly pointed out in Arts. 5 and 7 of the conditions of union above already referred to, which were the basis of the constitutional act.

Now is this a legal right or privilege enjoyed by a class of persons? In this case the immunity from contributing to any schools other than one of its own denomination was acquired by the Catholic minority *quâ* Catholics by statute and Catholics certainly, at the time the legislation was passed, represented a class of persons comprising at least one-third of the inhabitants of the Province of Manitoba. It is unnecessary, I think, after reading the able judgments delivered in the case of *Barrett* v. *Winnipeg* (1) to show by authority that the right so acquired by the Catholic minority after the union by the act of 1871 was a legal right, and that if it is shown by subsequent legislation enacted by the legislature of the Province of Manitoba that there has been any interference with such

(1) 19 Can. S.C.R. 374; [1892] A. C. 445.

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right, then I am of the opinion that such interference would come within the very words of this section 22 of the Manitoba Constitutional Act, which gives a right of appeal to the Governor General in Council from "any act of the legislature" (words which are not in section 93 of the British North America Act, but are in subsection 2 of section 22 of the Manitoba Act), affecting a right acquired by the Roman Catholic minority of the Queen's subjects in relation to education.

The only other question submitted to us I need refer to is the 4th question. Does subsection 3 of section 93 of the British North America Act, 1867, apply to Manitoba? The answer to this question is to be found in the second section of the Manitoba Act (33 Vic.) which says "from and after the said date the provisions of the British North America Act shall apply, except those parts thereof which are in terms made, or by reasonable intendment, may be held to be, specially applicable to, or only to affect one or more, but not the whole of the Provinces now comprising the Dominion, and except so far as the same may be varied by this act, and be applicable to the Province of Manitoba, in the same way, and to the like extent as they apply to the several provinces of Canada, and as if the Province of Manitoba had been one of the provinces originally united by the said Act." The Manitoba Act has not varied the British North America Act though subsection 2 of section 22 has a somewhat more comprehensive wording than the subsection 3 of section 93 of the British North America Act, in relation to appeal in educational matters. A statute does not vary or alter if it merely makes further provision, it is simply an addition to it. The 2nd subsection is wider but does not vary at all from the 3rd subsection of section 93 of the British North America Act, save in this

that there is an addition to it, that it includes it, and goes beyond it by adding the words "and from any act of the legislature." The 3rd subsection of the British North America Act provides that in two cases there is to be an appeal. There is nothing inconsistent in the Manitoba Act which says that in all cases there shall be an appeal, it goes beyond the British North America Act, it does not vary it, but leaves it as it is and adds to it.

We see by the opinion expressed by some of the Lords of the Privy Council, how far the right of appeal extends under section 2 of the Manitoba Act, for in the argument on that question before the Privy Council, Sessional Papers, No. 33*a*, 33*b*, 1893, we read, at p. 134, that when Mr. Ram (counsel) was arguing on behalf of Mr. Logan in the case of *Winnipeg* v. *Logan* he said :—

> I venture to think that under subsection 2 what was contemplated was this : that apart from any question, *ultra vires* or not, if a minority said, "I am oppressed," that was the party who had to come under that section 3 and appeal to the Government.

Lord Hannen added :—

> It has a right to appeal against any act of the legislature.

And Lord Shand :—

> Even *intra vires*.

This being also my opinion, I will only add that, having already stated that I think that we should read the Manitoba Constitutional Act in the light of the British North America Act, and that it was intended, as regards all civil rights in educational matters, to place the province of Manitoba on the same footing as the provinces of Quebec and Ontario, and that subsection 1 of section 22 having been enacted for the purpose of protecting rights held by law or practice prior to the union, but which have been declared not to exist, I am of the opinion that subsection 2 of section 22 of the

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Manitoba Constitutional Act provides for an appeal to the Governor General in Council, by memorial or otherwise, on the part of the Roman Catholic minority contending that the two acts of the legislative assembly of Manitoba, passed in 1890, on the subject of education, are subversive of the rights and privileges of the Roman Catholic ratepayers not to be taxed for contribution towards schools, except those of their own denomination, and that such right has been acquired by statute subsequent to the union.

For the above reasons, I answer the questions submitted by His Excellency the Governor General in Council, as follows:—

(1.) Is the appeal referred to in the said memorials and petitions, and asserted thereby, such an appeal as is admissible by subsection 3 of section 93 of the British North America Act, 1867, or by subsection 2 of section 22 of the Manitoba Act, 33 Vic. (1870) chapter 3, Canada?—Yes.

(2.) Are the grounds set forth in the petitions and memorials such as may be the subject of appeal under the authority of the subsections above referred to, or either of them?—Yes.

(3.) Does the decision of the judicial committee of the Privy Council in the cases of *Barrett* v. *The City of Winnipeg*, and *Logan* v. *The City of Winnipeg*, dispose of or conclude the application for redress, based on the contention that the rights of the Roman Catholic minority, which accrued to them after the union, under the statutes of the province, have been interfered with by the two statutes of 1890, complained of in the said petitions and memorials?—No.

(4.) Does subsection 3 of section 93 of the British North America Act, 1867, apply to Manitoba?—Yes.

(5.) Has His Excellency the Governor General in Council power to make the declarations or remedial

orders which are asked for in the said memorials and petitions, assuming the material facts to be as stated therein, or has His Excellency the Governor General in Council any other jurisdiction in the premises?—Yes.

(6.) Did the Acts of Manitoba, relating to education, passed prior to the session of 1890, confer on or continue to the minority a "right or privilege in relation to education" within the meaning of subsection 2 of section 22 of the Manitoba Act, "or establish a system of separate or dissentient schools" within the meaning of subsection 3 of section 93 of the British North America Act, 1867, if said section 93 be found applicable to Manitoba, and if so, did the two acts of 1890 complained of, or either of them, affect any right or privilege of the minority in such a manner that an appeal will lie thereunder to the Governor General in Council?—Yes.

TASCHEREAU J.—I doubt our jurisdiction on this reference or consultation. Is section 4 of 54 & 55 Vic. ch. 25 which purports to authorize such a reference to this court for hearing "or" consideration *intra vires* of Parliament? By which section of the British North America Act is Parliament empowered to confer on this statutory court any other jurisdiction than that of a court of appeal under section 101 thereof? This court is evidently made, in the matter, a court of first instance, or rather, I should say, an advisory board of the federal executive, substituted, *pro hâc vice*, for the law officers of the crown, and not performing any of the usual functions of a court of appeal, nay, of any court of justice whatever. However, I need not, at present, further investigate this point. It has not been raised, and a similar enactment to the same import has already been acted upon. That is not con-

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clusive, it is true: but our answers to the questions submitted will bind no one, not even those who put them, nay, not even those who give them, no court of justice, not even this court. We give no judgment, we determine nothing, we end no controversy; and, whatever our answers may be, should it be deemed expedient, at any time, by the Manitoba executive to impugn the constitutionality of any measure that might hereafter be taken by the federal authorities against the provincial legislation, whether such measure is in accordance with or in opposition to the answers to this consultation, the recourse, in the usual way, to the courts of the country remains open to them. That is, I presume, the consideration, and a very legitimate one, I should say, upon which the Manitoba executive acted by refraining to take part in the argument on the reference, a course that I would not have been surprised to see followed by the petitioners, unless indeed they are assured of the interference of the federal authorities should it eventually result from this reference that, constitutionally, the power to interfere with the provincial legislation as prayed for exists. For if, as a matter of policy, in the public interest, no action is to be taken upon the petitioners' application, even if the appeal lies, the futility of these proceedings is apparent.

Assuming, then, that we have jurisdiction, I will try to give, as concisely as possible, the reasons upon which I have based my answers to the questions submitted.

In the view I take of the application made to His Excellency the Governor General in Council by the Catholics of Manitoba, I think it better to intervert the order of the questions put to us, and to answer first the fourth of these questions, that is, whether subsection 3 of section 93 of the British North America Act applies to Manitoba. To that question the answer,

in my opinion, must be in the negative. That section of the British North America Act applies to every one of the provinces of the Dominion, with the exception however of Manitoba, for the reason that, for Manitoba, in its special charter, the subject is specifically provided for by section 22 thereof. The maxims *lex posterior derogat priori*, and *specialia generalibus derogant* have both here, it seems to me, their application. If it had been intended to purely and simply extend the operation of that section 93 of the British North America Act to Manitoba, section 22 of its charter would not have been enacted. The course since pursued for British Columbia and Prince Edward Island would have been followed. But where we see a different course pursued we have to assume that the difference in the law was intended. I cannot see any other reason for it, and none has been suggested. True it is that the words "or practice" in subsection 1, of section 22, are an addition in the Manitoba charter which the Dominion Parliament desired to specially make to the analogous provision of the British North America Act, but that was no reason to word subsection 2 thereof so differently as it is from subsection 3 of section 93 of the British North America Act. Then this difference may be easily explained though its consequences may not have been foreseen; I speak cautiously and mindful that I am not here allowed to controvert or even doubt any thing that has been said on the subject by the Privy Council. It is evident, to my mind, that it was simply because it was assumed by the Dominion Parliament, that separate or denominational schools had previously been, in that region, and were then, at the union, the basis and principle of the educational system, and with the intention of adapting such system to the new province, or rather of continuing it as found to exist, that, in the Union Act of 1870, the words of subsection 3 of

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section 93 of the British North America Act: "where in any province a system of separate or dissentient schools exists by law, at the union, or is thereafter established by the legislature of the province," were stricken out as unnecessary and inapplicable to the new province. And I do not understand that the Privy Council denies to the petitioners their right to separate schools.

However, the reason of this difference between the constitution of the province and the British North America Act cannot, in my view of the question, bring much assistance in the present investigation: the fact remains, whatever may have been the reason for it, that no appeal is given to the minority, in Manitoba, in relation to the rights and privileges conceded to them since the union as distinguished from those in existence at the union. They have no rights but what is left to them by the judgment in the *Barrett* case; and, if I do not misunderstand that judgment, the appeal they now lay claim to is not, as a logical inference, thereby left to them.

And in vain now, to support their appeal, would they urge that the statute so construed is unreasonable, unjust, inconsistent and contrary to the intentions of the law giver; uselessly would they contend that to force them to contribute pecuniarily to the maintenance of the public, non-catholic schools is to so shackle the exercise of their rights as to render them illusory and fruitless, or that to tax, not only the property of each and every one of them individually but even their school buildings for the support of the public schools is almost ironical; uselessly would they demonstrate the utter impossibility for them to efficaciously provide for the organization, maintenance and management of separate schools, and the essential requirements of a separate school system without statutory powers and

the necessary legal machinery; ineffectively would they argue that to concede their right to separate schools, and withal, deprive them of the means to exercise that right, is virtually to abolish it, or to leave them nothing of it but a barren theory. With all these, and kindred considerations, we, here, in answering this consultation, are not concerned. The law has authoritatively been declared to be so, and with its consequences, we have nothing to do. *Dura lex, sed lex. Judex non constituitur ad leges reformandas. Non licet judicibus de legibus judicare, sed secundum ipsas.* The Manitoba legislation is constitutional, therefore it has not affected any of the rights or privileges of the minority, therefore the minority has no appeal to the federal authority. The Manitoba legislature had the right and power to pass that legislation; therefore any interference with that legislation by the federal authority would be *ultra vires* and unconstitutional.

By an express provision of the British North America Act of 1871, it must not be lost sight of, the Dominion Parliament has not the power to, in any way, alter the Manitoba Union Act of 1870.

For these reasons I would answer negatively the fourth of the questions submitted, and say that, in my opinion, sub-section 3 of section 93 of the British North America Act does not apply to Manitoba.

I take up now the first of these questions: Does the right of appeal claimed by the petitioners exist under section 22 of the Manitoba Act? And here again, in my opinion, the answer must be in the negative, for the reason that it is conclusively determined, by the judgment of the Privy Council, that the Manitoba legislation does not prejudicially affect any right or privilege that the Catholics had by law or practice at the union, and if their rights and privileges are not

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affected there is no appeal. The rights or privileges mentioned in sub-section 2 of section 22 are the same rights and privileges that are mentioned in subsection 1, that is to say, those existing at the union, upon which subsection 3 provides for the interference, in certain cases, of His Excellency the Governor General in Council, and it is as to such rights or privileges only that an appeal is given. The appeal given, in the other provinces, by section 93 of the British North America Act as to the rights or privileges conferred on a minority after the union, is, as I have remarked, left out of the Manitoba constitution. Assuming, however, that the Manitoba constitution is wide enough to cover an appeal, by the minority, upon the infringement of any of their rights or privileges created since the union, or assuming that section 93 of the British North America Act, subsection 3, applies to Manitoba, I would be inclined to think that, by the *ratio decidendi* of the Privy Council, there are no rights or privileges of the Catholic minority that are infringed by the Manitoba legislation so as to allow of the exercise of the powers of the Governor in Council in the matter, as the Manitoba statutes must now be taken not to prejudicially affect any right or privilege whatever enjoyed by the Catholic community. It would seem, no doubt, by the language of both section 93 of the British North America Act and of section 22 of the Manitoba charter, that there may be provincial legislation which, though *intra vires*, yet might affect the rights or privileges of the minority so as to give them the right to appeal to the Governor in Council. For it cannot be of *ultra vires* legislation that an appeal is given. And the petitioners properly disclaiming any intention to base their application on the unconstitutionality of the Manitoba statutes, even for infringement of rights conferred upon them since the union, urge that though

the Privy Council has determined that the legislation in question does not affect the rights existing at the union so as to render it *ultra vires* yet that it does affect the rights conferred upon them by the provincial legislature since the union, so as to give them, though *intra vires*, an appeal to the Governor in Council. I fail to see, however, how this ingenious distinction, for which I am free to admit both the British North America Act and the Manitoba special charter give room, can help the petitioners. I assume here that the petitioners have an appeal upon rights or privileges conferred upon them since the union, as contra-distinguished from the rights previously in existence. The case is precisely the same as if the present appeal was as to their rights existing at the union. They might argue that though the Privy Council has held this legislation to have been *intra vires* yet their right to appeal subsists, and, in fact, exists because it is *intra vires*. But what would be this ground of appeal? Because the legislation affects the rights and privileges they had at the union. And the answer would be one fatal to their appeal, as it was to their contentions in the *Barrett case*, that none of these rights and privileges have been illegally affected. Now, the rights and privileges they lay claim to under the provincial legislation anterior to 1890 are, with the additions rendered necessary by the political organization of the country to enable them to exercise these rights, the same, in principle, that they had by practice at and before the union, and which were held by the Privy Council not to be illegally affected by the legislation of 1890.

And I am unable to see how, on the one hand, this legislation might be said to affect those rights so as to support an appeal and, on the other hand, not to affect the same rights so as to render it *ultra vires*.

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The petitioners, it seems to me, would virtually renew their impeachment of the constitutionality of the Manitoba legislation of 1890 upon another ground than the one taken in the *Barrett case*, namely, upon the rights conferred upon them since the union, whilst the controversy in the *Barrett case* was limited to their rights as they existed at the union. But that legislation, as I have said, is irrevocably held to have been *intra vires*, and it is not open to the petitioners to argue the contrary even upon a new ground. And if it is *intra vires*, it cannot be that it has illegally affected any of the rights or privileges of the Catholic minority though it may be prejudicial to such right. And if it has not illegally affected any of those rights or privileges they have no appeal to the Governor in Council.

It has been earnestly urged, on the part of the petitioners, in their attempt to distinguish the two cases, that in the *Barrett case* it was only their liability to assessment for the public schools that was in issue, and, consequently, that the decision of the Privy Council, binding though it be, does not preclude them from now taking, on appeal from the provincial legislation of 1890, the ground that this legislation sweeps away the statutory powers conceded to them under the previous statutes, and without which their establishment and administration of a separate school system is impracticable. But here again, it must necessarily be on the ground that their rights and privileges, or some of their rights and privileges, have been prejudicially affected that they have to rest their case, and from that ground they are irrevocably ousted by the judgment of the Privy Council, where not only the assessment clauses thereof, more directly in issue, but each and every one of the enactments of the statute impugned, were, as I read that judgment, held to have been and to be *intra vires*.

Were it otherwise, and could the question be treated as *res integra*, it might have been possible for the petitioners to establish that they are entitled to the appeal claimed on that ground, namely, that the statutes of 1890, by taking away the rights and privileges of a corporate body vested with the powers essential to the organization and maintenance of a school system that had been granted to them by the previous statutes, are subversive of those rights and privileges and prejudicially affect them.

They might cogently urge, in support of that proposition, and might, perhaps, have succeeded in convincing me, that to take away a right, to cancel a grant, to repeal the grant of a right, to revoke a privilege, prejudicially affects that grant, prejudicially, injuriously affects that privilege. They might also perhaps have been able to convince me that the license to own real estate, the authorization to issue debentures, to levy assessments, the powers of a corporation, that had been granted to them, constituted for them rights and privileges.

And to the objection that no appeal lies under section 22 of the Manitoba charter but upon rights existing at the union they might perhaps have successfully answered, either that section 93 of the British North America Act extends to Manitoba, or, if not, that the legislation of Manitoba in the matter, since the union, prior to 1890, should be construed as declaratory of their right to separate schools, or a legislative admission of it, a legislation required merely to secure to them the means whereby to exercise that right, and that, consequently, their appeal relates back to a right existing at the union, so as to bring it, if necessary, under the terms of section 22 of the Manitoba Union Act.

However, from these reasons the petitioners are now precluded. If any of their rights and privileges had

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been prejudicially affected this legislation would be *ultrâ vires*; and it is settled that it is not *ultra vires*.

And the argument against their contention is very strong, that it being determined that it would have been in the power of the Manitoba legislature to establish, in 1871, at the outset of the political organization of the province, the system of schools that they adopted in 1890 by the statutes which the petitioners now complain of, it cannot be that by their adopting and regulating a system of separate schools, though not obliged to do so, they, forever, bound the future generations of the province to that policy, so that, as long at least as there would be even only one Roman Catholic left in the province, the legislature should be, for all time to come, deprived of the power to alter it, though the constitution vests them with the jurisdiction over education in the province. To deny to a legislative body the right to repeal its own laws, it may be said, is so to curtail its powers that an express article of its constitution must be shown to support the proposition; it is not one that can be deductively admitted.

If this legislation of 1890, it may be still further argued against the petitioners' contentions, had been adopted in 1871, it would, it must now be conceded, have been constitutional, and that being so, would the Catholic minority, then, in 1871, have had a right of appeal to the Governor in Council? Certainly, that is partly the same question in a different form. But it demonstrates, put in that shape, that the petitioners have now no right of appeal. The answer to their claim would then have been that they had no appeal because none of their rights and privileges had been prejudicially affected. Now, in my opinion, they have no other rights and privileges, in the construction that these words bear in the Manitoba charter, than the rights and privileges they had in 1870. And if they

would have had no appeal then, on a legislation in 1871 similar to that of 1890, they have none now if none of their rights and privileges have been prejudicially affected.

I would answer the first question in the negative. This conclusion determines my answers to the other questions submitted to the court, and, consequently, as at present advised, I would answer the six of them as follows:—

To no. 1.—Is the appeal referred to in the said memorials and petitions, and asserted thereby, such an appeal as is admissible by subsection 3 of section 93 of the British North America Act, 1867, or by subsection 2 of section 22 of the Manitoba Act, 33 Victoria (1870), chapter 3, Canada? I would answer, no.

To no. 2.—Are the grounds set forth in the petitions and memorials such as may be the subject of appeal under the authority of the subsections above referred to, or either of them? I would answer, no.

To no. 3.—Does the decision of the Judicial Committee of the Privy Council of the cases of *Barrett* v. *the City of Winnipeg*, and *Logan* v. *the City of Winnipeg*, dispose of or conclude the application for redress based on the contention that the rights of the Roman Catholic minority which accrued to them after the union under the statutes of the province have been interfered with by the two statutes of 1890, complained of in the said petitions and memorials? I would answer, yes.

To no. 4.—Does subsection 3 of section 93 of the British North America Act, 1867, apply to Manitoba? I would answer, no.

To no. 5.—Has His Excellency the Governor General in Council power to make the declarations or remedial orders which are asked for in the said memorials and petitions, assuming the material facts to be as stated therein, or has His Excellency the Governor General in

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Council any other jurisdiction in the premises? I would answer, no.

To no. 6.—Did the acts of Manitoba relating to education, passed prior to the session of 1890, confer on or continue to the minority a "right or privilege in relation to education" within the meaning of subsection 2 of section 22 of the Manitoba Act, or establish a system of separate or dissentient schools "within the meaning of subsection 3 of section 93 of the British North America Act, 1867, if said section 93 be found to be applicable to Manitoba; and if so, did the two acts of 1890 complained of, or either of them, affect any right or privilege of the minority in such a manner that an appeal will lie thereunder to the Governor General in Council? I would answer, no.

GWYNNE J.—The questions submitted in the case stated by the order of His Excellency the Governor General in Council for the opinion of this court are as follows:—

I. Is the appeal referred to in the memorials and petitions stated in and made part of the case and asserted thereby, such an appeal as is admissible by subsection 3 of section 93 of the British North America Act of 1867, or by subsection 2 of section 22, of the Manitoba Act, 33 Vic. (1870) chapter 3, Canada?

2. Are the grounds set forth in the petitions and memorials such as may be the subject of appeal under the authority of the subsections above referred to or either of them?

3. Does the decision of the Judicial Committee of the Privy Council in the cases of *Barrett* v. *The City of Winnipeg* and *Logan* v. *The City of Winnipeg*, dispose of or conclude the application for redress based on the contention that the rights of the Roman Catholic minority which accrued to them after the union under the statutes of the province have been interfered with by the two statutes of 1890, complained of in the said petitions and memorials.

4. Does subsection 3, of section 93, of the British North America Act 1867, apply to Manitoba?

5. Has His Excellency the Governor in Council power to make the declarations or remedial orders which are asked for in the said

memorials and petitions assuming the material facts to be as stated therein, or has His Excellency the Governor General in Council any other jurisdiction in the premises?

6. Did the Acts of Manitoba relating to education, passed prior to the session of 1890, confer or continue a "right or privilege in relation to education" within the meaning of subsection 2, of section 22, of the Manitoba Act, or establish a system of separate or dissentient schools, "within the meaning of subsection 3, of section 93, of the British North America Act 1867, if said section be found to be applicable to Manitoba" and if so, did the two acts of 1890 complained of, or either of them, affect any right or privilege of the minority in such a manner that an appeal will lie thereunder to the Governor General in Council.

The memorials and petitions referred to in and made part of the case were presented to His Excellency the Governor General in Council in April, 1890, and in September and October, 1892; that of April, 1890, was signed by His Grace the Archbishop of St. Boniface and 4,266 others members of the Roman Catholic Church.

It alleged:—

1. That prior to the creation of the Province of Manitoba there existed in the territory now constituting that province a number of effective schools for children.

2. That these schools were denominational schools, some of them being regulated and controlled by the Roman Catholic Church and others by various Protestant denominations.

3. That the means necessary for the support of the Roman Catholic schools were supplied to some extent by school fees paid by some of the parents of the children who attended the schools and the rest was paid out of the funds of the church contributed by its members.

4. That during the period referred to Roman Catholics had no interest in or control over the schools of the Protestant denominations, and the Protestant denominations had no interest in or control over the schools of the Roman Catholics; there were no public schools in the sense of State schools. The members of the Roman Catholic Church supported the schools of their own church for the benefit of the Roman Catholic children and were not under obligation to, and did not, contribute to the support of any other schools.

5. That in the matter of education therefore, during the period referred to, Roman Catholics were, as a matter of custom and practice separate from the rest of the community.

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The petition then set forth the 22nd section of the Manitoba Act (33 Vic. ch. 3) and proceeded as follows in paragraph 7 and following paragraphs:—

7. During the first session of the Legislative Assembly of the Province of Manitoba an Act was passed relating to education, the effect of which was to continue to the Roman Catholics that separate condition with reference to education which they had previous to the erection of the province.

8. The effect of the statute so far as Roman Catholics were concerned was merely to organize the efforts which Roman Catholics had previously voluntarily made for the education of their own children. It provided for the continuance of schools under the sole control and management of Roman Catholics, and of the education of their children according to the methods by which alone they believe children should be instructed.

9. Ever since the said legislation and until the last session of the Legislative Assembly no attempt was made to encroach upon the rights of the Roman Catholics, so confirmed to them as above mentioned, but during said session statutes were passed, 53 Vic., chaps. 37 and 38, the effect of which was to deprive the Roman Catholics altogether of their separate condition in regard to education, to merge their schools with those of the Protestant denominations, and to require all members of the community, whether Roman Catholic or Protestant, to contribute through taxation to the support of what was therein called public schools, but which are in reality a continuation of the Protestant schools.

10. There is a provision in the said act for the appointment and election of an advisory board, and also for the election in each municipality of school trustees; there is also a provision that the said advisory board may prescribe religious exercises for use in schools, and that the said school trustees may, if they think fit, direct such religious exercises to be adopted in the schools in their respective districts. No further or other provision is made with reference to religious exercises, and there is none with reference to religious training.

11. Roman Catholics regard such schools as unfit for the purposes of education, and the children of Roman Catholic parents cannot, and will not, attend any such schools. Rather than countenance such schools Roman Catholics will revert to the ordinary system in operation previous to the Manitoba Act, and will, at their own private expense, establish, support and maintain schools in accordance with their principles and their faith, although by so doing they will have, in addition thereto, to contribute to the expense of the so-called public schools.

12. Your petitioners submit that the said Act of the Legislative Assembly of Manitoba is subversive of the rights of Roman Catholics guaranteed and confirmed to them by the statute creating the province of Manitoba, and prejudicially affects the rights and privileges with respect to Roman Catholic schools which Roman Catholics had in the province at the time of its union with the Dominion of Canada.

13. That Roman Catholics are in minority in said province.

14. The Roman Catholics of the province of Manitoba therefore appeal from the said Act of the Legislative Assembly of Manitoba.

The petitioners therefore prayed:—

1. That His Excellency the Governor General in Council may entertain the said appeal and may consider the same, and may make such provisions and give such directions for the hearing and consideration of the said appeal as might be thought proper.

2. That it might be declared that such provincial law does prejudicially affect the rights and privileges with regard to denominational schools which Roman Catholics had by law or practice in the province at the union.

3. That such directions might be given, and provisions made, for the relief of the Roman Catholics of the province as to His Excellency in Council might seem fit.

A report of the Minister of Justice dated 21st March 1891, upon the two acts of the legislature of the province of Manitoba 53 Vic. ch. 37 and 38 has also been made part of the case submitted to us, in which reference is made to the cases of *Barrett* v. *Winnipeg* and *Logan* v. *Winnipeg* then proceeding in appeal to the Supreme Court of Canada and also to the said petition of His Grace the Archbishop of St. Boniface and others in the following terms:—

If the appeal should be successful these acts will be annulled by judicial decision. The Roman Catholic minority of Manitoba will receive protection and redress, the acts purporting to be repealed will remain in operation and those whose views have been represented by a majority of the legislature cannot but recognize that the matter had been disposed of with due regard to the constitutional rights of the province.

If the controversy should result in the decision of the Court of Queen's Bench (of Manitoba) being sustained the time will come for Your Excellency to consider the petitions which have been presented

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by and on behalf of the Roman Catholics of Manitoba for redress under subsections 2 and 3 of section 22 of the Manitoba Act.

The petitions of September 1892 were two, the one of T. A. Bernier representing himself to be acting president of the body called the National Congress and of eleven others, members of the executive committee of the said body; and the other dated the 22nd September 1892 was the petition of His Grace the Archbishop of St. Boniface.

In the former the petitioners set out at large the above petition of April 1890 and the report of the Minister of Justice from which the above extract is taken and concluded as follows:—

That a recent decision of the judicial committee of the Privy Council in England having sustained the judgment of the Court of Queen's Bench of Manitoba upholding the validity of the act aforesaid, your petitioners most respectfully represent that, as intimated in the said report of the Minister of Justice, the time has now come for Your Excellency to consider the petitions which have been presented by and on behalf of the Roman Catholics of Manitoba for redress under subsections 2 and 3 of section 22 of the Manitoba Act.

That your petitioners notwithstanding such decision of the judicial committee in England still believe that their rights and privileges in relation to education have been prejudicially affected by said acts of the provincial legislature.

Therefore your petitioners most respectfully and most earnestly pray that it may please Your Excellency in Council to take into consideration the petitions above referred to and to grant the conclusions of said petitions and the relief and protection sought by the same.

The petition of His Grace the Archbishop of St. Boniface sets forth the matter as alleged in the petition signed by him and others in the petition of April 1890, and certain extracts from the said report of the Minister of Justice, of March 1891 including that above extracted, and concluded as follows:—

8. That the judicial committee of Her Majesty's Privy Council has sustained the decision of the Queen's Bench.

9. That your petitioner believes that the time has now come for Your Excellency to consider the petitions which have been presented

by and on behalf of the Roman Catholics of Manitoba for redress under subsections 2 and 3 of section 22 of the Manitoba Act as it has become necessary that the federal power should be resorted to for the protection of the Roman Catholic minority.

And the petition prayed that His Excellency the Governor General in Council might entertain the appeal of the Roman Catholics of Manitoba and might consider the same and might make such provisions and give such directions for the hearing and consideration of the said appeal as might be thought proper and that such directions might be given and provisions made for the relief of the Roman Catholics of the province of Manitoba as to His Excellency in Council might seem fit.

These petitions are framed upon the contention and assumption that the facts as stated in the petitions as to the rights and privileges of Roman Catholics in Manitoba in relation to education at the time of the creation of the province entitled them to procure, by appeals to His Excellency in Council under section 22, of the Manitoba Act, the annulment and repeal of Provincial Acts 53 Vic. ch. 37 and 38, notwithstanding that these acts had been declared by the judgment of the Judicial Committee of the Privy Council in England to have been and to be acts quite within the jurisdiction of the Legislature of Manitoba to enact. The petition of October, 1892, is however framed with a further contention. It is signed by His Grace the Archbishop of St. Boniface, T. A. Bernier as president of the body called the National Congress, James E. P. Prendergast as mayor of St. Boniface, J. Allard O. M. I., V. G., John S. Ewart and 137 others. The petition sets out verbatim the matters alleged in the first twelve paragraphs of the above petition of April, 1890, and it then proceeds:—

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13. Your petitioners further submit that the said acts of the Legislative Assembly of Manitoba are subversive of the rights and privileges of Roman Catholics provided for by the various statutes of the said Legislative Assembly prior to the passing of the said acts and affect the rights and privileges of the Roman Catholic minority of the Queen's subjects in the said province in relation to education, so provided for as aforesaid, thereby offending both against the British North America Act and the Manitoba Act.

And the petition prayed as follows:—

Your petitioners therefore pray:

1. That Your Excellency the Governor General in Council may entertain the said appeal and may consider the same and may make such provisions and give such directions for the hearing and consideration of the said appeal as may be thought proper.

2. That it may be declared that the said acts 53 Vic. chap. 37 and 38, do prejudicially affect the rights and privileges with regard to denominational schools which Roman Catholics had by law or practice in the province at the union.

3. That it may be declared that the said last mentioned acts do affect the rights and privileges of the Roman Catholic minority of the Queen's subjects in relation to education.

4. That it may be declared that to Your Excellency the Governor General in Council it seems requisite that the provisions of the statutes in force in the Province of Manitoba prior to the passage of the said acts should be re-enacted in so far at least as may be necessary to secure to the Roman Catholics in the said province the right to build, maintain, equip, manage, and conduct these schools in the manner provided for by the said statutes, to secure to them their proportionate share of any grant made out of the public funds for the purposes of education, and to relieve such members of the Roman Catholic Church as contribute to such Roman Catholic schools from all payments or contribution to the support of any other schools, or that the said acts of 1890 should be so modified or amended as to effect such purpose.

5. And that such further or other declaration or order may be made as to Your Excellency the Governor General in Council shall, under the circumstances, seem proper, and that such directions may be given, provisions made and all things done in the premises for the purpose of affording relief to the said Roman Catholic minority in the said province, as to Your Excellency in Council may seem meet.

And your petitioners will ever pray, etc.

The pretension of the petitioners therefore appears to be that the 22nd section of the Manitoba Act entitled

the petitioners, notwithstanding the judgment of the Privy Council in England in *Barrett* v. *Winnipeg* and *Logan* v. *Winnipeg* (1), to invoke and to obtain the interference of His Excellency the Governor General in Council to compel, in effect, a repeal by the provincial legislature of the said acts of 53rd Vic., and the re-enactment of the statutes in force in the province in relation to education at the time of the passing of the acts 53rd Vic., upon the grounds following:—

1. That the acts of 53rd Vic. prejudicially affect the rights and privileges with regard to denominational schools which Roman Catholics had enjoyed previous to the erection of the province; and

2. That the said acts 53rd Vic. prejudicially affect the rights and privileges of Roman Catholics in the province, provided for by various statutes of the provincial legislature enacted prior to the passing of the acts of 53rd Vic. Under these circumstances, the case which has been submitted to us has been framed in the shape in which it has been for the purpose of presenting to us purely abstract questions of law.

The learned members of the judicial committee of the Privy Council who advised Her Majesty upon the appeals in the cases of *Barrett* v. *Winnipeg* and *Logan* v. *Winnipeg* (1) adopting the evidence of the Archbishop of St. Boniface as to the rights and privileges in relation to denominational schools enjoyed by Roman Catholics before the passing of the Manitoba Act in the territory by that act erected into the province of Manitoba, say in their report:—

> Now, if the state of things which the Archbishop describes as existing before the union had been a system established by law, what would have been the rights and privileges or the Roman Catholics with respect to denominational schools? They would have had by law the right to establish schools at their own expense, to maintain their schools by

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school fees or voluntary contributions, and to conduct them in accordance with their own religious tenets. Every other religious body which was engaged in a similar work at the time of the union would have had precisely the same right with respect to their denominational schools. Possibly the right, if it had been defined or recognized by positive enactment, might have had attached to it, as a necessary or appropriate incident, the right of exemption from any contribution, under any circumstances, to a school of a different denomination. But in their Lordships' opinion it would be going much too far to hold that the establishment of a national system of education upon a non-sectarian basis is so inconsistent with the right to set up and maintain denominational schools, that the two things cannot exist together, or that the existence of one necessarily implies or involves immunity from taxation for the purpose of the other.

They then minutely review the provisions of the provincial statutes enacted prior to the passing of the acts of 1890, and of the acts of 1890 themselves, and proceed as follows :—

Notwithstanding the Public School Acts, 1890, Roman Catholics and members of every other religious body in Manitoba are free to establish schools throughout the province ; they are free to maintain their schools by school fees or voluntary contributions ; they are free to conduct their schools according to their own religious tenets, without molestation or interference. No child is compelled to attend a public school, no special advantage, other than the advantage of a free education in schools conducted under public management, is held out to those who do attend.

To this it may be added, that Roman Catholics are not excluded from the advisory board erected by the acts. They are equally eligible as Protestants to such board, and as members thereof can equally with Protestants exert their influence upon the board with regard to religious exercises in the public schools, and in short Roman Catholics and Protestants of every denomination are in every respect placed, by the acts, in precisely the same position. The judgment of the Privy Council then proceeds as follows :—

But then it is said that it is impossible for Roman Catholics or for members of the Church of England (if their views are correctly repre-

sented by the Bishop of Rupert's Land, who has given evidence in Logan's case) to send their children to public schools where the education is not superintended and directed by the authorities of their church, and that therefore Roman Catholics and members of the Church of England who are taxed for public schools, and at the same time feel themselves compelled to support their own schools, are in a less favourable position than those who can take advantage of the free education provided by the Act of 1890 ; that may be so, but what right or privilege is violated or prejudicially affected by the law? It is not the law that is in fault, it is owing to religious convictions which everybody must respect, and to the teaching of their church that Roman Catholics and the members of the Church of England find themselves unable to partake of advantages which the law offers to all alike.

The judgment then summarily rejects the contention that the public schools created by the acts of 1890 are in reality Protestant schools and concludes in declaring and adjudging that those acts do not prejudicially affect the rights and privileges enjoyed by Roman Catholics in the territory now constituting the province of Manitoba, prior to the passing of the Manitoba Act, taking those rights and privileges to have been as represented by the Archbishop of St. Boniface, and even assuming them to have been secured or conferred by positive law, and so that they are not enacted in violation of section 22 of the Manitoba Act, but are within the exclusive jurisdiction of the provincial legislature to enact.

Their Lordships of the Privy Council, in *Barrett* v. *Winnipeg* and *Logan* v. *Winnipeg* (1) put a construction upon this section 22 which, independently, is to my mind sufficiently apparent, but which I quote as a judicial enunciation of their Lordships' opinion. They say :—

> Their Lordships are convinced that it must have been the intention of the legislature to preserve every legal right or privilege with respect to denominational schools which any class of persons practically enjoyed at the time of the union.

The language of the section is, I think, sufficiently clear upon that point, and all its subsections are enacted

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for the purpose of securing the single object, namely, the preservation of existing rights. The section enacts:—

22. In and for the province the said legislature may exclusively make laws in relation to education, subject and according to the following provisions:—

1. Nothing in any such law shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons have by law or practice in the province at the union.

2. An appeal shall lie to the Governor General in Council from any act or decision of the legislature of the province or of any provincial authority affecting any right or privilege of the Protestant or Roman Catholic minority of the Queen's subjects in relation to education.

3. In case any such provincial law as from time to time seems to the Governor General in Council requisite for the due execution of the provisions of this section is not made, or in case any decision of the Governor General in Council, or any appeal under this section, is not duly executed by the proper provincial authority in that behalf, then and in every such case, and as far only as the circumstances of each case require, the Parliament of Canada may make remedial laws for the due execution of the provisions of this section and of any decision of the Governor General in Council under this section.

If any law should be passed in violation of the qualification contained in the first subsection upon the general jurisdiction conferred by the section, to make laws in relation to education, that is to say, in case any act should be passed by the provincial legislature prejudicially affecting any right or privilege with respect to denominational schools which any class of persons had by law or practice in the province at the union, such an act would be *ultra vires* of the provincial legislature to enact, and would therefore have no force; and as it was to preserve these rights and privileges with respect to denominational schools, whatsoever they were, which existed at the time of the union, that the 22nd section was enacted. It is obvious, I think, that it is against such an act of the legislature and against any decision of any provincial authority, acting in an ad-

ministrative capacity, prejudicially affecting any such right that the appeal is given by the 2nd subsection, and so likewise the remedies provided in the 3rd subsection relate to the same rights and privileges, and to the better securing the enjoyment of them. The 2nd and 3rd subsections are designed as means to redress any violation of the rights preserved by the section. To subject any act of the legislature to the appeal provided in the 2nd subsection, and to the remedies provided in the third subsection, it is obvious that such an act must be passed in violation of the condition subject to which any jurisdiction is conferred upon the provincial legislature to make laws in relation to education, and must therefore be *ultra vires* of the provincial legislature, for the language of the section expressly excludes from the provincial legislature all jurisdiction to pass such an act. The jurisdiction, whatever its extent may be, which the provincial legislature has over education being declared to be exclusive, there can be no appeal to any other authority against an act passed by the legislature under such jurisdiction, and any act of the legislature passed in violation of any of the provisions in section 22, subject to which the jurisdiction of the legislature is restricted, is not within their jurisdiction and is therefore *ultra vires*. The appeal, therefore, which is given by the 2nd subsection must be only concurrent with the right of all persons injuriously affected by such an act to raise in the ordinary courts of justice the question of its constitutionality. If any doubt could be entertained upon this point it is concluded, in my opinion, by their Lordships of the Privy Council in *Barrett* v. *Winnipeg* and *Logan* v. *Winnipeg* (1), in the following language:

> At the commencement of the argument a doubt was suggested as to the competency of the present appeal, in consequence of the so-called

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appeal to the Governor in Council provided by the act, but their Lordships are satisfied that the provisions of subsections 2 and 3 do not operate to withdraw such a question as that involved in the present case from the jurisdiction of the ordinary tribunals of the country.

If an act of the provincial legislature which is impeached upon the suggestion of its prejudicially affecting such rights and privileges as aforesaid is not made by the 2nd section of the Manitoba Act *ultra vires* of the provincial legislature it cannot be open to appeal under subsection 2 of that section. The section does not profess to confer, upon the executive of the Dominion or the Dominion Parliament, any power of interference whatever with any act in relation to education passed by the provincial legislature of Manitoba which is not open to the objection of prejudicially affecting some right or privilege with respect to denominational schools, which some class of persons had by law or practice in the province at the union; all acts of the provincial legislature not open to such objection are declared by the section to be within the exclusive jurisdiction of the provincial legislature; and as the acts of 1890 are declared by their Lordships not to be open to such objection, and to have therefore been within the jurisdiction of the provincial legislature to pass, those acts cannot, nor can either of them, be open to any appeal under the 2nd subsection of this section.

It has been suggested however that the rights and privileges, whether conferred or recognized by the acts of the legislature of Manitoba in force prior to and at the time of the passing of the acts of 1890 and which were thereby repealed, were within the protection of the 22nd section and that this was a matter not under consideration in *Barrett* v. *Winnipeg* and *Logan* v. *Winnipeg* (1); and that therefore the right of appeal under subsection 2 of section 22 against such repeal does exist notwithstanding the decision of the Privy Council

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in *Barrett* v. *Winnipeg* and *Logan* v. *Winnipeg* (1). This contention appears to have been first raised expressly in the petition presented in October 1892 although it is impliedly comprehended in the paragraphs of the petition of April 1890 which is repeated verbatim in that of October 1892, wherein the act of the provincial legislature of 1871 is relied upon as having had—

> the effect to continue to the Roman Catholics that separate condition with reference to education which they had enjoyed previous to the creation of the province, and in so far as Roman Catholics were concerned merely to organize the efforts which the Roman Catholics had previously voluntarily made for the education of their own children and for the continuance of schools under the sole control and management of Roman Catholics, and of the education of their children according to the methods by which alone they believe children should be instructed.

But this statute of 1871, and all the statutes passed by the legislature of Manitoba in relation to education prior to 1890, were specially brought under the notice of their Lordships of the Privy Council and were fully considered by them in their judgment as already pointed out, and if the repeal by the act of 1890 of the acts of the provincial legislature then in force in relation to education constituted a violation of the condition contained in section 22, subject to which alone the jurisdiction of the provincial legislature to make laws in relation to education was restricted, it is inconceivable to my mind that their lordships, having all these statutes before them, could have pronounced the acts of 1890 to be within the jurisdiction of the provincial legislature to pass. But however this may be there is nothing, in my opinion, in the Manitoba Act which imposed any obligation upon the legislature of Manitoba to pass the acts, which are repealed by the acts of 1890, or which placed those acts when passed in any different position from that of all acts of a legislature, which con-

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stitute the will of the legislature for the time being, and only until repealed,—and nothing which warrants the contention that the repeal of those acts by the acts of 1890 constituted a violation of the condition in the 22nd section subject to which the jurisdiction of the legislature was restricted; and nothing, therefore, which gives any appeal against such repeal.

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Whether or not the 3rd subsection of section 93 of the British North America Act of 1867, assuming that section to apply to the Province of Manitoba, would have the effect of restraining the powers of the provincial legislature in such manner as to deprive them of jurisdiction to repeal the said acts it is unnecessary to inquire, for that section does not, in my opinion, apply to the Province of Manitoba, special provision upon the subject of education being made by the 22nd section of the Manitoba Act. For the above reasons, therefore, the questions submitted in the case must, in my opinion, be answered as follows:—

The 1st, 2nd, 4th and 5th in the negative; the 3rd in the affirmative, and the 6th, which is a complex question, as follows:—

The acts of 1890 do not, nor does either of them, affect any right or privilege of a minority in relation to education within the meaning of subsection 2 of section 22 of the Manitoba Act in such manner that an appeal will lie thereunder to the Governor General in Council. The residue of the question is answered by the answer to question no. 4.

KING J.—It may be convenient first to regard the constitutional provisions respecting education as they affect the original provinces of the confederation. By section 93 of the British North America Act it is provided that in and for such province the legislature may exclusively make laws in relation to education,

subject and according to the provisions of four subsections. The first subsection provides that nothing in any such law shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons had by law in the province at the union.

The second subsection extends to the dissentient schools of the Queen's Protestant and Roman Catholic subjects in Quebec all the powers, privileges and duties which were at the union conferred and imposed by law in Upper Canada (Ontario) on the separate school trustees of the Queen's Roman Catholic subjects there.

The third subsection gives to the Governor General in Council the right on appeal to decide whether or not an act or decision of any provincial authority affects any right or privilege of the Protestant or Roman Catholic minority in relation to education enjoyed by them under a system of separate or dissentient schools in the province, whether such system of separate or dissentient schools shall have existed by law at the union or shall have been thereafter established by the legislature of the province.

The fourth subsection provides that if upon appeal the Governor General in Council shall decide that the educational right or privilege of the Protestant or Roman Catholic minority has been so affected, and if the provincial legislature shall not pass such laws as from time to time seem to the Governor General in Council requisite for the due execution of the provisions of the section, or if the proper provincial authority shall not duly execute the decision of the Governor General in Council on the appeal, then in every such case, but only so far as the circumstances of each case require, the Parliament of Canada may make remedial laws for the due execution of the provisions of this section and of any decision of the Governor General in Council

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under the section. In other words, if the requisite remedy, either by act of the legislature or act or decision of the proper provincial authority in that behalf, is not applied then concurrent legislative authority to the requisite extent is given to the Dominion Parliament; and to this extent the legislative authority of the provincial legislature ceases to be exclusive.

The terms "separate" and "dissentient" schools used in the above subsections were derived from the school systems of Upper and Lower Canada. At the union the two larger confederating provinces, Upper Canada (Ontario) and Lower Canada (Quebec) had each a system of separate or dissentient schools, the Canadian method of dealing with the question of religion (as between Protestants and Roman Catholics) in the public school system.

In Upper Canada the Roman Catholics were in the minority, and in Lower Canada the Protestants were in a still smaller minority. In Upper Canada there was a non-denominational public system, with a right in the Roman Catholics to a separate denominational system In Lower Canada the general public system was markedly Roman Catholic with a right to the Protestant minority to schools of their own. In Upper Canada the minority schools were called "separate" schools; in Lower Canada "dissentient" schools. It was because the powers and privileges of the Upper Canada minority in relation to their schools were greater than those of the Lower Canada minority that by the terms of union these were agreed to be assimilated by adopting for Quebec the more enlarged liberties of the Upper Canada law; and this was given effect to by subsection 2 of section 93 already cited.

In the case of the two other of the original confederating provinces, Nova Scotia and New Brunswick, there

was not in either a system of separate or dissentient schools.

The bounds of the Dominion have been since enlarged; in 1870, by the admission of the North-west Territory and Rupert's Land; in 1871, by the admission of British Columbia, and in 1872, by the admission of Prince Edward Island. In the case of British Columbia and Prince Edward Island (these being established and independent provinces) the terms of union were agreed upon by the governments and legislatures of Canada and the provinces respectively. In each case the above recited provisions of the British North America Act respecting education were adopted and made applicable without change. In neither of these newly added provinces was there a system of separate or dissentient schools.

With regard to the North-west Territories and Rupert's Land there was no established government and legislature representing the people, and after the acquisition of the North-west Territories and Rupert's Land the Parliament of Canada, after listening to representations of representative bodies of people, passed an act for the creation and establishment of the new Province of Manitoba out of and over a portion of the newly acquired territory; and it is with regard to this act, (33 Vict. c. 3) that the present questions arise.

By section 2 it is declared that:

> The provisions of the British North America Act shall, except those parts thereof which are in terms made, or by reasonable intendment may be held to be, specially applicable to or only to affect one or more, but not the whole, of the provinces now composing the Dominion, and except so far as the same may be varied by this Act, be applicable to the Province of Manitoba, in the same way and to the like extent as they apply to the several provinces of Canada, and as if the Province of Manitoba had been one of the provinces originally united by the said Act.

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The act then deals specially with a number of matters, as for instance the constitution of the executive and legislative authority, the use of both the English and French languages in legislative and judicial proceedings, financial arrangements and territorial revenue, etc., and by section 22 makes the following provision respecting education:—

22. In and for the province the said legislature may exclusively make laws in relation to education, subject and according to the following provisions:—

(1.) Nothing in any such law shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons have by law or practice at the union.

(2.) An appeal shall lie to the Governor General in Council from any act or decision of the legislature of the province or of any provincial authority affecting any right of privilege of the Protestant or Roman Catholic minority of the Queen's subjects in relation to education.

(3.) In case any such provincial law as from time to time seems to the Governor General in Council requisite for the due execution of the provisions of this section is not made, or in case any decision of the Governor General in Council on any appeal under this section is not duly executed by the proper provincial authority in that behalf, then and in every such case, and as far as the circumstances of each case require, the parliament of Canada may make remedial laws for the due execution of the provisions of this section and of any decision of the Governor General in Council under this section.

Subsection 1 of section 22 of the Manitoba Act differs from subsection 1 of section 93 of the British North America Act of 1867, in the addition of the words "or practice" after the words "which any class of persons have by law."

In *Winnipeg* v. *Barrett* (1) the Judicial Committee of the Privy Council held that the Manitoba Education Act of 1890 did not prejudicially affect any right or privilege with respect to denominational schools which the Roman Catholics practically enjoyed at the time of the establishment of the province.

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The 2nd subsection of section 93, British North America Act, has, of course, no counterpart in any of the subsections of section 22, Manitoba Act, because subsection 2, section 93, British North America Act, is a clause specially applicable to and affecting only the Province of Quebec.

The 3rd subsection of section 93, British North America Act, and the 2nd subsection of section 22, Manitoba Act, deal with the like subject, viz.: the right of the religious minority to appeal to the Governor-General in Council in case of their educational rights or privileges being affected; but here again there are differences.

One difference is, that whereas by the clause in the British North America Act the appeal lies from an "act or decision of any provincial authority" affecting any right or privilege of the Protestant or Roman Catholic minority in relation to education, in the Manitoba Act the appeal lies from "any act or decision of the legislature of the province" as well as from that of any provincial authority. This was either an extension of the right of appeal or the getting rid of an ambiguity, according as the words "any provincial authority" as used in the British North America Act did not or did extend to cover "acts of the provincial legislature."

The addition in the 1st subsection of the Manitoba Act of the words "or practice" and the addition in subsection 2 of the words "of the legislature of the province," would (so far as the context of these words is concerned) seem to show an intention on the part of Parliament to extend the constitutional protection accorded to minorities by the British North America Act, or at all events to make no abatement therein.

Then there is another difference between the language of the 3rd subsection of the British North America Act and that of the 2nd subsection of the

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Manitoba Act. The former begins as follows: "Where in any province a system of separate and dissentient schools exists by law at the union or is thereafter established by the legislature of the province, an appeal shall lie," etc., while in the Manitoba Act the introductory part is omitted, and the clause begins with the words "an appeal shall lie," &c., the two clauses being thereafter identical, with the exception that in the Manitoba Act (as already mentioned) the appeal in terms extends to complaints against the effect of acts of the legislature as well as of acts or decisions of any provincial authority.

After this reference to points of distinction I cite subsection 2 of the Manitoba Act again in full, for sake of clearness:

> An appeal shall lie to the Governor General in Council from any act or decision of the legislature of the province or of any provincial authority affecting any right or privilege of the Protestant or Roman Catholic minority of the Queen's subjects in relation to education.

On the one side it is contended that in order to give the appeal, the rights or privileges of the religious minority need to have been acquired and to have existed prior to and at the time of the passage of the act. On the other side it is contended that it is sufficient if the rights and privileges exist at the time of their alleged violation irrespective of the time when they were acquired.

In the argument before the judicial committee of *Winnipeg* v. *Barrett*, a shorthand report of which was submitted to parliament last session (No. 11 Sessional Papers), Sir Horace Davey, counsel for the city of Winnipeg, argued that subsection 2 does not relate to anything but what is *ultra vires* under subsection 1. He says (p. 43).

> I cannot for myself frame the proposition which would lead to the inference that subsection 2 was intended to deal with cases which were

intra vires, and I beg leave to observe that it would be contrary to the whole scope and spirit of this legislation to provide for parliament intervening, not where the provincial parliament has acted beyond its powers, that I could conceive, but to allow the Dominion parliament to intervene, not to correct mistakes where the provincial legislature had gone wrong and exceeded their power.

In an interruption at this point by their lordships, Lord Macnaghten asks:

Supposing some rights were created after the union, and then legislation had taken those rights away?

This question is not directly answered, but afterwards (p. 44) Sir Horace thus continues:

It all comes back to the same point, that the Protestant and Roman Catholic minority have a right to come with a grievance to the Governor General. What is that grievance? Why, that they are deprived of some right or privilege which they ought to have and are entitled to enjoy. If they are not entitled by law to enjoy it they are not deprived of anything, and it would be an extraordinary system of legislation, having regard to the nature of this act, to say that the Dominion parliament has in certain cases to sit by way of a court of appeal from the provincial parliament, not to correct mistakes where the provincial parliament has erroneously legislated on matters not within its jurisdiction, but on matters of policy. If that be the effect to be given to these subsections, I venture to submit to your lordships that it will have rather startling consequences, and it will for the first time make the legislature of the Dominion parliament a court of appeal or give them an appeal from the exercise of the discretion of the provincial parliament, or in other words, it will place the provincial parliament in the position that it will be liable to have its decisions overruled by the Dominion parliament, and therefore in a position of inferiority.

I have quoted at great length because of the strong presentation by eminent counsel of that view, and to show that the attention of their lordships was powerfully drawn to the provisions of subsection 2. The full report shows that all the subsections of the two sections of the two acts were exhaustively discussed.

In the judgment their lordships say that:

Subsections 1, 2, and 3 of section 22 of the Manitoba Act, 1870, differ but slightly from the corresponding sections of section 93 of the

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British North America Act, 1867. The only important difference is that in the Manitoba Act in subsection 1 the words "by law" are followed by the words "or practice" which do not occur in the corresponding passage in the British North America Act, 1867.

There would be a marked and very considerable difference between the corresponding clauses, if in the one case rights and privileges of the religious minority were recognized as subjects of protection whenever acquired, while in the other case they were not recognized as subjects of protection unless they existed at the time of the passing of the constitutional act.

Not wanting to put undue stress upon this, let us look at the clauses for ourselves. In subsection 1, Manitoba Act, there is an express limitation as to time; the rights and privileges in denominational schools that are saved are such as existed, by law or practice, at the union. But in subsection 2 nothing is said about time at all; and the natural conclusion upon a reading of the two clauses together is that, with regard to the rights and privileges referred to in the latter clause, the time of their origin is immaterial. Such also is the ordinary and natural meaning of subsection 2, regarded by itself. Read by itself it extends to cover rights and privileges existent at the time of the act or thing complained of. The existence of the right, and not the time of its creation, is the operative and material fact. And this agrees with the corresponding provisions of the British North America Act, where subsection 1 refers to rights, etc., acquired before or at union, while subsection 3, in terms, covers rights, etc., acquired at any time. In any other view there was clearly no necessity to add the words "or any act of the legislature" in the remedial provision of the Manitoba Act, for such act would be wholly null and void under subsection 1.

There is, indeed, an undeniable objection to treating as an appealable thing the repeal by a legislature of an act passed by itself. Ordinarily all rights and privileges given by act of Parliament are to be enjoyed *sub modo*, and are subject to the implied right of the same legislature to repeal or alter if it chooses to do so. But the fundamental law may make it otherwise. An illustration of this is afforded by the constitution of the United States, which prohibits the States, but not Congress, from passing any law impairing the obligation of contract, and this has been held to prevent the state legislatures from repealing or materially altering their own acts conferring private rights, when such rights have been accepted. It does not extend to acts relating to government, as, for instance, to public officers, municipal incorporations, etc., but it extends to private and other corporations, educational or otherwise, and also to acts exempting incorporated bodies, by special act, from rates or taxes. These are irrepealable, and the constitutional provision has been found onerous.

It is certainly anomalous, under our system and theory of parliamentary power, that a legislature may not repeal or alter in any way an act passed by itself.

Still, weighty as this consideration is, I can give no other reasonable interpretation to the act in question than that, under the constitution of Manitoba, as under the constitution of the Dominion, the exercise by the provincial legislature of its undoubted powers in a way so as to give rights and privileges by law to the minority in respect of education, lets in the Dominion Parliament to concurrent legislative authority for the purpose of preserving and continuing such rights and privileges, if it sees fit to do so.

By the British North America Act it was not clear whether the words "act or decision of any provincial authority," covered the case of an act of the provincial

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legislature, or was confined to administrative acts, but in the Manitoba Act the words explicitly extend to an act of that legislature.

Any ambiguity in subsection 2 of the Manitoba Act is, I conceive, to be resolved in the light of the corresponding provisions of the British North America Act. As the provisions of the British North America Act are to be applicable, unless varied, I think it reasonable that ambiguous provisions in the special act should be construed in conformity with the general act.

Passing, however, from it as a matter of construction, it does not seem reasonable that Parliament, in forming, in 1870, a constitution for Manitoba, intended to disregard entirely constitutional limitations such as were three years before established as binding upon the original members of the confederation. On the contrary, by the addition of the words "or by practice" in 1st subsection, and of the words "or any act of the legislature" in 2nd subsection, and by the provision of section 23 providing for the use of the French and English languages in the courts and legislature, there is manifested a greater tenderness for racial and denominational differences. Further, unless subsection 2 has the meaning suggested, the entire series of limitations imposed by subsections 1, 2 and 3 are entirely inoperative. For the Judicial Committee has in effect declared that no right or privilege in respect of denominational schools existed prior to the union, either by law or practice, and therefore there was nothing on which subsection 1 could practically operate; and as there was clearly no system of separate or dissentient schools established in Manitoba by law prior to the union, the provisions of subsections 2 and 3 are inoperative if the rights and privileges in relation to education are to be limited to rights and privileges before the union.

There is no doubt that this construction limits the powers of the legislature and restrains the exercise of its discretion, but the same thing may be said of the effect of an appeal against "any act or decision of any provincial authority" in Nova Scotia or New Brunswick, in case either of such provinces were to adopt a system of separate schools. The legislature might not choose to pass the remedial legislation necessary to execute the decision of the Governor General in Council, and the Dominion Parliament could then exercise its concurrent power of legislation in effect overriding the legislative determination of the provincial legislature. The provision may be weak, one-sided, as giving finality to a chance legislative vote in favour of separate schools, inconsistent with a proper autonomy, and without elements of permanence, but if it is in the constitutional system it must receive recognition in a court of law.

Assuming then that clause 2 covers rights and privileges whensoever acquired, the next question is as to the meaning of the words "rights and privileges of the Protestant or Roman Catholic minority in relation to education?" Here again, I think, we are to go to clause 3 of section 93, British North America Act. I think that the reference is to minority rights under a system of separate schools, and that it is essential that the complaining minority should have had rights or privileges under a system of separate or dissentient schools existing by law at the union or thereafter established by the legislature of the province. The generality of the words under clause 2 of the Manitoba Act is to be explained by clause 3, section 93, British North America Act, and to have the same meaning as the corresponding words in it.

The two remaining questions then, are: Was a system of separate or dissentient schools established in Mani-

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toba prior to the passage of the Manitoba Education Act of 1890? And, have any rights or privileges of the Roman Catholic minority in relation thereto been prejudicially affected?

One of the learned judges of the Queen's Bench of Manitoba thus succinctly summarizes the school legislation of Manitoba in force at the time of the passing of the act of 1890:

> Under the school acts in force in the province previous to the passing of the Public School Act of 1890, there were two distinct sets of public or common schools, the one set Protestant and the other Roman Catholic. The board of education, which had the general management of the public schools, was divided into two sections, one composed of the Protestant members and one of the Roman Catholic members, and each section had its own superintendent. The school districts were designated Protestant or Roman Catholic, as the case might be. The Protestant schools were under the immediate control of trustees elected by the Protestant ratepayers of the district, and the Catholic schools in the same way were under the control of trustees elected by the Roman Catholic ratepayers; and it was provided that the ratepayers of a district should pay the assessments that were required to supplement the legislative grant to the schools of their own denomination, and that in no case should Protestant ratepayers be obliged to pay for a Roman Catholic school, or a Catholic ratepayer for a Protestant school.

I would only add that assessments were to be ordered by the ratepayers (Catholic or Protestant, as the case might be) of the school district, and that the trustees were empowered in many cases to collect the rates themselves, instead of making use of the public collectors. The trustees were empowered to employ teachers exclusively who should hold certificates from the section of the board of education of their own faith. By the act of 1871 the board of education was composed equally of Protestants and Roman Catholics, but by the act of 1881 the proportion was 12 Protestants to 9 Roman Catholics.

Now, the system of education established by the act of 1881 was not in terms and *eo nomine* a system of

separate or dissentient schools, and if the constitutional provision requires that they should be such in order to come within the act, then the minority did not have the requisite rights and privileges in respect of education. As to this, I have had doubts arising from the opinion that, where rights and privileges have no other foundation than the legislative authority whose subsequent acts in affecting them is impeached, the restraint upon the general grant of legislative authority should be applied only where the case is brought closely within the limitation. At the same time, we are to give a fair and reasonable construction to a remedial provision of the constitution, and are to regard the substance of the thing. Now the Roman Catholics were in the minority in 1881, and are still, and a system of schools was established by law, under which they had the right to their own schools—Catholic in name and fact—under the control of trustees selected by themselves, taught by teachers of their own faith, and supported, in part, by an assessment ordered by themselves upon the persons and property of Roman Catholics, and imposed, levied and collected as a portion of the public rates, the persons and property liable to such rate being at the same time exempt from contribution to the schools of the majority, *i.e.*, Protestant schools. This, although not such in name, seems to me to have been essentially a system of separate or dissentient schools, of the same general type as the separate school system of Ontario. and giving therefore to the minority rights and privileges in relation to education in the sense of subsection 2, section 22, Manitoba Act, and subsection 3, section 93, British North America Act.

It is true that the schools of the majority were Protestant schools, and that the majority had the same right as the minority, but I do not think that this ren-

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ders the minority schools any the less essentially separate schools of the Roman Catholics. In Quebec the majority schools are distinctly denominational.

Then, was the right and privilege of the Roman Catholic minority in this system of separate schools prejudicially affected by the act of 1890? And if so, to what extent?

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In the judgment of the judicial committee in the *City of Winnipeg* v. *Barrett* (1), speaking of the right there claimed on behalf of the Roman Catholics that the act of 1890 had prejudicially affected the rights and privileges which they had by practice at the time of the union, their Lordships say:—

> Now if the state of things which the Archbishop describes as existing before the union had been established by law, what would have been the rights and privileges of the Roman Catholics with respect to denominational schools? They would have had by law the right to establish schools at their own expense, to maintain their schools by school fees or voluntary contributions, and to conduct them in accordance with their own religious tenets. Every other religious body which was engaged in a similar work at the time of the union would have had precisely the same right with respect to their denominational schools. Possibly this right, if it had been defined or recognised by positive enactment, might have had attached to it, as a necessary or appropriate incident, the right of exemption from any contribution under any circumstances to schools of a different denomination. But, in their Lordship's opinion, it would be going much too far to hold that the establishment of a national system of education upon an unsectarian basis is so inconsistent with the right to set up and maintain denominational schools that the two things cannot exist together, or that the existence of one necessarily implies or involves immunity from taxation for the purpose of the other.

The rights and privileges of the denominational minority under the act of 1881 and amending acts, were different from the assumed rights in denominational schools which the same class had by practice at the time of union. It could not be said to be merely "the right to establish schools at their own expense,

(1) [1892] A. C. 445.

to maintain their schools by school fees or voluntary contributions and to conduct them in accordance with their own religious tenets"; it was a right as Roman Catholics by law, to establish schools and to maintain them through the exercise by them of the state power of taxation, by the imposition, levying and collecting of rates upon the persons and property of all Roman Catholics, such persons and property being at the same time exempted from liability to be rated for the support of the public schools of the majority, then denominated and being Protestant schools. By the act of 1890 the Protestant schools are abolished equally with the Roman Catholic schools, and a system of public schools set up which is neither Protestant nor Roman Catholic, but unsectarian. The question then is whether the language of their Lordships is applicable to this state of things, and whether or not it can be said (changing their Lordships' language to suit the facts) that the establishment of the national system of education upon an unsectarian basis is so inconsistent with the right to set up and maintain by the aid of public taxation upon the denominational minority, a system of denominational schools, that the two cannot co-exist; or that the existence of the system of denominational minority schools (supposing it still in existence) necessarily implies or involves immunity from taxation for the purpose of the other. It rather seems to me that no reasonable system of legislation could consistently seek to embrace these two things, viz: 1st, the support of a system of denominational schools for the minority, maintainable through compulsory rating of the persons and property of the minority; and 2nd, the support of a general system of unsectarian schools, through the compulsory rating of all persons and property, both of the majority and the minority. The effect of such a scheme would be to impose a double rate upon a part

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of the community for educational purposes. The logical result of this view would be that by the establishment of a general non-sectarian system (as well as by the abrogation of the separate school system) the rights and privileges as previously given by law to the denominational minority in respect of education were necessarily affected. Of course the minority would obtain equality by giving up their schools; but the present inquiry at this point is whether a right acquired by law to maintain a system of separate schools has been affected by an act which takes away the legal organization and status of such schools, and their means of maintenance, by the repeal of the law giving these things, and which subjects the persons and property of the denominational minority to an educational rate for general non-sectarian schools, instead of leaving them subjected to an educational rate for the support of the separate and denominational schools. It is true that by the act of 1881 and amending acts, the exemption was an exemption from contribution to the Protestant schools, and the schools under the act of 1890 are not Protestant schools; but the substantial thing involved in the exemption under the acts of 1881 and amending acts was, that the ratepayer to the support of the Catholic schools should not have to pay rates for the support of the schools established by the rest of the community, but should have their educational rates appropriated solely to the support of their own schools. This was an educational right or privilege accorded to them in relation to education under a system of separate schools established by law, which the legislature, if possessing absolute or exclusive authority to legislate on the subject of education, without limitation or restraint, might very well withdraw, abrogate or materially alter, but which, under the constitutional limitations of the Manitoba Act, can be done

only subject to the rights of the minority to seek the intervention of the Dominion parliament, through the exercise of the concurrent legislative authority that thereupon becomes vested in such parliament upon resort being first had to the tribunal of the Governor General in Council. Although there are points of difference between this case and what would have been the case if the prior legislation of Manitoba had established a system of separate schools following precisely the Ontario system, I cannot regard the difference as other than nominal, and I treat this case as though the act of 1881 and amending acts distinctly established a system of separate schools, giving for the general public a system of undenominational public schools, and to the Catholic minority the right to a system of separate schools. In such case I do not see how the passing of such an act as the act of 1890 could fail to be said (by abolishing the separate schools) to affect the rights and privileges of the minority in respect of education. With some change of phraseology, and some change of method, I think that what has been done in the case before us is essentially the same. If the clauses of the Manitoba Act are to have any meaning at all, they must apply to save rights and privileges which have no other foundation originally than a statute of the Manitoba legislature. The constitutional provision protects the separate educational status given by an act of the legislature to the denominational minority. The view that the effect of this is to restrain the proper exercise by the legislature of its power to alter its own legislation, is met by the opposite view that there is no improper restraint if it is a constitutional provision, and that in establishing a system of separate schools the legislature may well have borne in mind the possibly irrepealable character of its legislation in thereby creating rights and privileges in

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relation to education. I therefore answer the questions of the case as follows:—

1. Is the appeal referred to in the said memorials and petitions, and asserted thereby, such an appeal as is admissible by subsection 3 of section 93 of the British North America Act, 1867, or by subsection 2 of section 22 of the Manitoba Act, 33 Vic. (1870), chapter 3, Canada?—Yes.

2. Are the grounds set forth in the petitions and memorials such as may be the subject of appeal under the authority of the subsections above referred to, or either of them?—Yes.

3. Does the decision of the judicial committee of the Privy Council in the cases of *Barrett* v. *The City of Winnipeg* and *Logan* v. *The City of Winnipeg*, dispose of or conclude the application for redress based on the contention that the rights of the Roman Catholic minority which accrued to them after the union, under the statutes of the province, have been interfered with by the two statutes of 1890, complained of in the said petitions and memorials?—No.

4. Does subsection 3 of section 93 of the British North America Act, 1867, apply to Manitoba?—Yes, to the extent as explained by the above reasons for my opinion.

5. Has His Excellency the Governor General in Council power to make the declarations or remedial orders which are asked for in the said memorials and petitions, assuming the material facts to be as stated therein, or has His Excellency the Governor General in Council any other jurisdiction in the premises?—Yes.

6. Did the Acts of Manitoba relating to education, passed prior to the session of 1890, confer on or continue to the minority a "right or privilege in relation to education," within the meaning of subsection 2 of section 22 of the Manitoba Act, or establish a system

of separate or dissentient schools, within the meaning of subsection 3 of section 93 of the British North America Act, 1867, if said section 93 be found applicable to Manitoba; and if so, did the two acts of 1890 complained of, or either of them, affect any right or privilege of the minority in such a manner that an appeal will lie thereunder to the Governor General in Council?—Yes.

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THE CANADIAN PACIFIC RAILWAY COMPANY (DEFENDANTS)... } APPELLANTS;

AND

S. J. CHALIFOUX (PLAINTIFF).....RESPONDENT.

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*Mar 3, 7.

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*June 14.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA (APPEAL SIDE).

Railway Companies—Carriers of passengers—Breaking of rail—Injury to passengers—Latent defects—Arts. 1053, 1673, 1675, *C. C. (P. Q.)*

Held, reversing the judgments of the Superior Court and Court of Queen's Bench for Lower Canada (appeal side), that where the breaking of a rail is shown to be due to the severity of the climate, and the suddenly great variation of the degrees of temperature and not to any want of care or skill upon the part of the railway company in the selection, testing, laying and use of such rail, the company is not liable in damages to a passenger injured by the derailment of a train through the breaking of such rail.

Fournier J. dissented, and was of opinion that the accident was caused by a latent defect in the rail, and that a railway company is responsible under the Civil Code, for injuries resulting from such a defect.

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*PRESENT:—Sir W. J. Ritchie C.J. and Strong, Fournier, and Gwynne JJ. [Henry J. was present at the argument but died before judgment was delivered.]

[This case the reporters were unable to publish when decided.]

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APPEAL from a judgment of the Court of Queen's Bench for Lower Canada (appeal side) (1) confirming the judgment of the Superior Court (2) by which the appellants were condemned to pay four hundred dollars damages for injuries resulting to the respondent caused by the derailment of a train on the appellants' railway through the breaking of a rail.

In January 1884 the respondent was a passenger on a regular passenger train of the Canadian Pacific Railway running between Ottawa and Montreal, and when the train was approaching Calumet Station the train through the breaking of a rail was wrecked and the respondent was seriously injured.

The action was for damages in consequence of the injuries received by the respondent through the appellants' fault and negligence. The appellants pleaded that the accident was caused by the breaking of a rail, which formed part of a consignment of steel rails of the best procurable description, purchased from competent manufacturers by the Government of the Province of Quebec which was, at the time of the purchase, the proprietor of the line of railway; that the rails were made specially for the purposes for which they were required, in accordance with specifications made by a skilled engineer then in the employ of the Government who was specially entrusted with the preparing of the specifications; that all due skill and care were used by the agents of the Government in the selection, inspection and testing of the whole of the consignment of rails; that at the time of the accident the roadway and rails were in good order and condition; that in accordance with the practice of railway companies generally the same had always been kept under regular and careful supervision, and proper and

(1) M. L. R. 3 Q. B. 324.

(2) M. L. R. 2 S. C. 171; 14 R. L. 149.

careful examination had been made of the roadway and rails immediately previous to the accident; that the rail in question appeared to be strong enough for the purpose for which it was required, and that its breaking was unavoidable, and was due to no defect either in the manufacture, purchase, or use of the rails; and that the accident in question was not caused by any want of care or diligence on the part of the appellants.

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At the trial it was proved that on the days preceding the accident the weather had been very cold but that the day on which the accident happened there had been a sudden change of temperature and it was much warmer; that the insufficiency of the rail was not manifested by any exterior sign, and that it presented all the appearances of good manufacture having formed part of a consignment of rails ordered by the Quebec Government Railways and had been accepted and used by the Company after the ordinary tests and it was also proved that the portion of the road in question had been inspected carefully previous to the accident; and that in fact Muldoon, the section-foreman had passed over the very spot where the accident occurred twenty minutes before, and found the rails and roadbed in perfect order.

The broken rail, although examined by two or three employees of the company immediately after the accident, was not produced at the trial.

H. Abbott Q. C. for the appellants:

The principal question which arises on this appeal is whether or not a railway company is responsible for damages caused to a passenger through the breaking of a rail without fault on its part, and this question depends upon the interpretation to be placed upon articles 1053 and 1675 of the Civil Code. We contend that the appellants, as carriers of passengers, are only

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liable for damages caused by their fault or neglect, while the respondent, whose contention was maintained by the judgment of the courts below, contends that they are absolutely liable, at all events under the latter article, unless they prove that the damage was caused by a fortuitous event or irresistible force. In other words, that railway companies are responsible as carriers of passengers in the same degree that they are responsible as carriers of goods.

The evidence conclusively shows that the accident has been the result of a sudden change in the temperature and that there has been no fault or negligence shown against the appellants.

We submit therefore on behalf of the appellants that not only is there no fault or negligence shown against them but, on the contrary, it is affirmatively proved that there was none and that in fact every possible care and skill was used in the manufacture, selection, testing and laying of these rails, and all possible care and diligence in their inspection. That under such circumstances the company was not liable see the following authorities: Bédarride des chemins de fer (1); Sourdat, De la Responsabilité (2); *Readhead* v. *Midland Railway Co.* (3); *Wright* v. *Midland Railway Co.* (4); *Stokes* v. *Eastern Counties Railway Co.* (5); *Christie* v. *Griggs* (6); Taylor on Evidence (7); *Quarez chemin du Nord* (8); *Huston* v. *Grand Trunk Railway* (9); Dalloz (10).

A. Dorion for the respondent:

I admit the law of England is contrary to the decision of the courts below but this case must be decided by the civil law of the province of Quebec.

(1) Vol. 2. nos. 437, 440.
(2) Vol. 1. nos. 587, 645, s. 50.
(3) L. R. 2 Q.B. 412; 4 Q.B. 379.
(4) L. R. 8 Ex. 140.
(5) 2. F. & F. 691.
(6) 2 Camp. 79.
(7) Vol. 2. § 1172.
(8) S. V. 67, 2, 320.
(9) 3 L. C. Jur. 269.
(10) 82, 2, 163.

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Under our civil law carriers of passengers are virtually insurers of life except if the accident is caused by fortuitous event or irresistible force as provided in art. 1675 C. C. All the French cases decided and the opinion of French authors warrant the conclusion I contend for, that the liability is the same whether for carriage of goods or passengers.

The following cases and authorities were cited and relied on: *Chemin de fer du midi* v. *Chambrelent* (1); *Veuve Raymond* v. *Burnet* (2); Demolombe (3); *Grand Trunk Railway Co.* v. *Meegan* (4).

The case in Dalloz 82-2-163 cited by appelants is not applicable; the author in a note says the law on this point in France is regulated by another law.

But even if the liability should depend upon the question of fact whether there has or has not been negligence on the part of the company, I contend that the *primâ facie* evidence of negligence by the fact of the accident having occurred has not been satisfactorily rebutted. In this case the rail was not produced at the trial and it was impossible to ascertain whether it had or had not any defect which ordinary skill, care or foresight could have detected. Under art. 1053 C. C. the respondent is entitled to succeed.

Sir W. J. RITCHIE C.J.—In this case it seems to me that the utmost care and skill were exercised which prudent men are accustomed to use under similar circumstances. The road was examined by a proper person from time to time and within twenty minutes of the time of the accident, and found to be in good order, and more than this I do not think the law exacts from carriers of passengers for hire. I think this was a pure accident against which the railway could not have

(1) S. V. 60-2-42.
(2) Dalloz 55-2-86.
(3) Vol. 31, nos. 484, 638.
(4) 4 Dor. Q. B. 228.

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provided and a risk incident to the mode of travel which passengers take.

In *Readhead* v. *Midland Railway Co.* (1) it was distinctly decided that the defendants were not liable for an accident owing to a latent defect in the tire not attributable to any fault on the part of the manufacturer and which could not be detected previously to the breaking, and that there was no contract either of general warranty or insurance (such as in the case of a common carrier of goods) or of limited warranty or insurance (as to the vehicle being sufficient) entered into by the carriers of passengers, and that the contract of such a carrier, and the obligation undertaken by him, are to take due care (including in that term the use of skill and foresight) to carry passengers safely. I do not at all wish to be understood as impugning the position that in every contract for the conveyance of passengers by rail there is an implied undertaking for the safe condition of the road as well as the vehicle, so far as the carrier can insure it by the utmost care and diligence. The servants of the company must examine it and make sure that the rails are in good order and properly secured. But no recovery is allowed for damage done by a defective rail or rotten bridge where negligence is not proved. In *McPadden* v. *New York Central Railway Co.* (2) reversing the decision of the general term of the Supreme Court, (3) Earl C. said:

> There is a certain amount of risk incident to railroad travel, which the traveller knowingly assumes; and public policy is fully satisfied when railroad companies are held to the most rigid responsibility for the utmost care and vigilance for the safety of travellers.
>
> If, therefore, the jury had found that the rail was broken by the eastward bound train, it would still have been a case of mere accident, caused without any want of proper care and vigilance on the part of the defendant, and the defendant would not have been liable.

(1) L. R. 2 Q. B. 412; 4 Q. B. 379.

(2) 44 N. Y. 478.

(3) 47 Barb. 247.

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Lott Ch. C.

It was shown by undisputed evidence, of witnesses competent to judge, that the rail in question was, previous to its being broken, a sound rail of the usual and a good size and of good, sound and solid iron, and that the breaks were new and perfectly, bright, and no fracture or crack was discovered in the pieces that were broken off, that the end of the rail made a good joint, was perfect, not battered down, and in good order, that the chair was good, that the ties were good, sufficiently thick to support the rail, that there was a sufficient number of them, that they were sufficiently close together to give a good bearing for the rail, that the road was well ballasted with gravel around the ties.

This accident occurred early on the morning of the 5th day of January, 1864, about half a mile west of Brockport, and it was shown that the morning was very cold, that good and perfectly sound rails will break in cold weather when the track is in perfect order, and it was testified, by several witnesses having experience as engineers on railroads, that they knew of no way of preventing it.

The night watchman on that section of the road testified, that he had, on the morning of the accident, left the depot at the Brockport station and went west about three o'clock, that a train followed him west about four o'clock, that he went three miles west and came back over the place of the accident a little before six o'clock; that he went over the track, carrying a lamp with him, to see if everything was clear and to see if any rails were broken or misplaced; that he walked in the middle of the track, looking at both tracks, examined the rails and found the track all right.

* * * * *

No testimony was introduced to contradict or impeach the evidence to which I referred, and after the testimony was given, the case states that thereupon the counsel for the defendant moved for a nonsuit.

Leonard C.:—

There was no defect in the iron of the track in the case under consideration. There was no dispute on this point. The iron was good, and no crack or flaw appeared. The break was caused by the exceeding cold weather. This was the result of a *vis major*, against which no prudence could have guarded.

* * * * *

In the present case no defect existed, or if it did exist for a few minutes no human diligence or foresight could have discovered or prevented it. An impossibility is not demanded by the law. * * *

The carrier is not liable for an injury to a passenger by the action of the elements, where no care or foresight, skill or science, could have guarded against the accident which occasioned it.

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And in *Pittsburg, &c., Railway Co.* v. *Thompson* (1). Chief Justice Lawrence delivered the opinion of the court as follows:

The instruction, in its strict sense, is open to this objection, the true rule being, as said by this court *Tuller* v. *Talbott* (2), that the carrier shall do all that human care, vigilance and foresight can reasonably do, consistently with the mode of conveyance and the practical operation of the road. A company cannot be required, for the sake of making travel upon their road absolutely free from peril, to incur a degree of expense which would render the operation of the road impracticable. It would be unreasonable, for example, to hold that a road bed should be laid with ties of iron or cut stone, because in that way the danger arising from wooden ties subject to decay would be avoided, but on the other hand, it is by no means unreasonable to hold that although a railway company may use ties of wood, such ties shall be absolutely sound and road-worthy.

Heazle v. *Indianapolis, &c., Railway Co.* (3).

Mr. Justice Scott, delivering the opinion of the court, said:

On the night of the 20th February, 1872, the passengers cars on defendant's road were thrown from the track, at a point a short distance from east of Mahomet station, by which plaintiff was severely injured. The accident was caused by a broken rail.

The proof is: the track was in good repair. No negligence in this regard is shown. On the contrary, it is proven the track inspector or walker had just been over the road. It was found to be all in order and the track safe, so far as anything could be discovered,

Although plaintiff has suffered very great injury we see no ground on which to base a recovery. It was through no fault of defendant, or its agents or servants. They omitted no duty imposed upon them by law, or by a due regard for the safety of passengers. Everything connected with the train was in good order, and it was managed by skilful and prudent operatives. The track had been constructed with skill and care, and, in the opinion of a competent engineer, the road was as safe as it could reasonably be constructed. It was patrolled, at frequent intervals, by a careful inspector, and found to be in order, with no defects discoverable. The injury to plaintiff must, therefore, be attributed, if not to his own want of care for his personal safety, to one of those accidents that sometimes occur in extremely cold weather,

(1) 56 Ill. 142. (2) 23 Ill. 357.
(3) 76 Ill. 502.

which no engineering, however skilful, and no management, however observant, could foresee or guard against.

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Ingalls v. *Bills & others* (1).

Hubbard J. says:

The result to which we have arrived, from the examination of the case before us, is this; that carriers of passengers for hire are bound to use the utmost care and diligence in the providing of safe, sufficient and suitable coaches, harnesses, horses and coachman, in order to prevent those injuries which human care and foresight can guard against; and that if an accident happens from a defect in the coach, which might have been discovered and remedied upon the most careful and thorough examination of the coach, such accident must be ascribed to negligence, for which the owner is liable in case of injury to a passenger happening by reason of such accident. On the other hand, where the accident arises from a hidden and internal defect, which a careful and thorough examination would not disclose, and which could not be guarded against by the exercise of a sound judgment and the most vigilant oversight, then the proprietor is not liable for the injury, but the misfortune must be borne by the sufferer, as one of that class of injuries for which the law can afford no redress in the form of a pecuniary recompense.

Negligence is the ground of liability on the part of a carrier of passengers. In the breaking of this rail by the action of frost or a changing temperature I can discover no want of the utmost care and attention by the exercise of which the accident could have been avoided.

The court of first instance found "that this breaking of the rail appeared to have been caused by the sudden change of the temperature, the days preceding the accident being very cold, and the day of the accident being more soft (*doux*)" and the evidence amply supports that finding. To hold, as the court below did, that the defendants could and ought to foresee this change of temperature and were bound to procure rails sufficient to resist the action of the climate, is to require the defendants to do what it is clear is practically impossible.

(1) 9 Met. 15.

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No doubt if an accident happens to a passenger in a carriage on a line of railway either by the carriage breaking down or running off the rails, that is *primâ facie* evidence from which the jury may infer negligence on the part of the railway company and must be rebutted by evidence on the part of the defendants. On this point see Pollock C. B. in the case of *Dawson* v. *Manchester, &c. Railway Co.* (1). To exact all that plaintiff's counsel claims should have been done in this case would simply make railway transportation impracticable. Assuming the rule does require that the highest degree of practical care and diligence consistent with the mode of transportation should be used, was it not shown in this case that such was adopted? For as said by C. J. Cockburn in *Pym* v. *Great Northern Railway Co* (2): "Railway Companies are not insurers of the passenger's lives. They are only bound to use care and caution which may be reasonably expected by reasonable men."

In conclusion, on the facts and the law of this case, I will merely add: Was not the accident occasioned not by a latent defect in the railway, that no care or skill on the part of the defendants could detect, but by reason of atmospheric changes which could not be foreseen, and against which no care or skill on the part of the railway could provide? The carrier of passengers is not an insurer and there was no contract of general warranty or insurance as in the case of a common carrier of goods.

For these reasons I am of opinion the appeal should be allowed.

STRONG J.—I am of the same opinion. It is clear that there was no proof of negligence. The judgment of the court below proceeded upon the ground that the responsibility of railway companies as carriers

(1) 5 L. T. N. S. 682.

(2) 2 F. & F. 621.

of passengers is, under the law of the Province of Quebec, co-extensive with their liability as carriers of goods, which, subject to certain well-known exceptions, makes them liable as insurers of property entrusted to them for carriage. In other words, the Court of Queen's Bench applies to the carriage of passengers the liability of common carriers of goods under article 1675 C. C. I do not think that article applies to passengers at all; it is confined to the carriage of goods. The liability of carriers of passengers for hire depends entirely, in my opinion, on article 1053 C. C., and therefore proof of negligence is required as in the English law. This appears to be the modern French law also. The arrêt reported in Dalloz in 83, 2, 164, shews that the article of the French Code 1784, corresponding to article 1675 C. C., Quebec, does not apply to carriers of passengers, but that the responsibility of a railway company in such cases depends upon the general law embodied in article 1382 C. N., corresponding to article 1053 C. C. of the Province of Quebec. The law of England is now the same, though it does not seem to have been finally so settled until the decision of *Readhead* v. *The Midland Railway Company*. (1) That case was carried to appeal, (2) and the decision of the Exchequer Chamber distinctly settled the law as it now stands, viz: that, as carriers of passengers, railway companies are only responsible for negligence or breach of duty. The only authority which throws the least shadow of doubt upon the point is the decision of the Privy Council in an appeal from Upper Canada. (3). Some of the language there used seems to imply that there is liability apart from negligence, and that a railway company is to some extent to be considered a guarantor to pas-

(1) L. R. 2 Q. B. 412.
(2) L. R. 4 Q. B. 379.
(3) Great Western Railway Co. *v.* Braid 1 Moo. P.C. N.S. 101.

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sengers carried by it of the safety of its roadway, rolling stock and appliances used in their transportation. But the language of the judgment does not clearly show that it was intended so to decide, and the decision can be supported on other grounds and is probably to be referred to the rule of evidence relating to the *onus probandi;* but be this as it may, the later authorities are so clear that there can be no doubt now that the case of *Readhead* v. *The Midland Railway Company* (1) contains a correct exposition of the law, and it has been followed without question. In a case in the New York Court of Appeals, *McPadden* v. *The New York Central* (2) the facts of which resembled those of the present case, the court held the law to be precisely the same as in England. The case of *Meier* v. *The Pennsylvania Railroad Company*, (3) where the decision was to the same effect, may also be mentioned. There being no evidence to show, or from which it could be inferred, that the accident in this case was the result of any want of care upon the part of the defendant company I am of opinion that we must reverse the decision of the Court of Queen's Bench and allow the appeal.

FOURNIER, J.—L'appelante allègue qu'elle a agi avec toute la diligence et le soin possibles, et que l'accident dont a souffert l'intimé n'est arrivé que par suite de la rupture d'un rail, causé par un vice caché.

L'honorable juge Mathieu, dont le jugement a été confirmé en appel, s'est appuyé, pour la décision de cette cause, sur le principe incontestable du droit français qui, en cela, est conforme au nôtre, que les compagnies de chemins de fer sont responsables des vices de leur matériel, qu'elles le connaissent ou non.

Après avoir plaidé que l'accident était dû à un vice caché qui avait causé la rupture du rail, l'appelante a

(1) L. R. 4 Q. B. 379. (2) 44 N. Y. 478.
(3) 64 Penn. 225.

essayé de changer sa position en faisant motion (art. 320 C. P. C.) pour faire coïncider sa défense avec les faits prouvés, en retranchant son admission que l'accident était dû à un vice caché, et en invoquant comme excuse le changement subit de température et son effet sur les rails.

Quelle que soit la cause de la rupture du rail, la compagnie appelante est responsable de la suffisance de son matériel, à moins qu'elle ne prouve que l'accident est arrivé par cas fortuit ou force majeure.

L'article du code qui règle la responsabilité des voituriers, n'est pas l'article 1053, mais bien l'article 1675. Le premier est d'une application générale à quiconque cause du dommage par sa faute, soit par son fait, soit par imprudence, négligence ou autrement. Le second ne s'applique qu'aux voituriers qui ne sont exempts de responsabilité que par le cas fortuit et la force majeure.

Nul doute que dans les cas qui s'élèvent au sujet de l'article 1053, c'est à la partie qui se plaint à prouver la faute ou négligence ou inhabilité de celui qui a causé le dommage. Il en est autrement pour les voituriers, et c'est l'article 1675 dont la Cour du Banc de la Reine a fait application dans le cas actuel. Cet article se lit comme suit :

"Ils sont," dit cet article, " responsables de la perte et des avaries des choses qui leur sont confiées, à moins qu'ils ne prouvent que la perte ou les avaries ont été causées par cas fortuit ou force majeure, ou proviennent des défauts de la chose même."

L'appelante a prétendu que cet article ne s'applique pas aux passagers, et que son effet doit être restreint au transport des marchandises. Mais cette prétention est insoutenable en présence de l'article 1673, déclarant que :

Ils sont tenus de recevoir et transporter, aux temps marqués dans les avis publics, toute personne qui demande passage, si le transport des voyageurs fait partie de leur trafic accoutumé, à moins que dans l'un ou l'autre cas il n'y ait cause raisonnable et suffisante de refus.

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L'article 1676, concernant les avis des voituriers, limitant leur responsabilité, fait aussi voir que toute la section III sur les voituriers s'applique aussi bien aux personnes qu'aux marchandises. La responsabilité des voituriers est donc définie par cette section, et la preuve de négligence pour les rendre responsables n'est pas nécessaire :

> Ils répondent de la perte, à moins qu'ils ne prouvent qu'elle a été causée par cas fortuit ou force majeure.

Le 28 février 1865, un train partant de Paris pour la Belgique a éprouvé un grave accident. Le bandage d'une roue s'étant rompu, puis les chaînes qui reliaient aux autres wagons le wagon traîné sur la voie se sont brisées au bout d'un certain temps, amenant la dislocation du train en deux parties et un déraillement qui ont fait appeler la compagnie du Nord devant le tribunal de la Seine, Cotelle, Législation des chemins de fer. (1)

Quatre voyageurs blessés ont formé des demandes en dommages et intérêts. Quatre jugements rendus contre eux et la compagnie ont été réformés sur leur appel par la Cour Impériale de Paris.

En première instance il avait été jugé que l'accident n'était pas le résultat d'une faute quelconque dont la compagnie du chemin de fer du Nord devait être tenue responsable. Deux faits ont été discutés : la rupture du bandage d'une roue, et l'absence d'une corde de communication qui doit réunir la voiture de queue avec le sifflet de la machine.

Le principe d'où partait le tribunal consistait à admettre que les demandeurs avaient à établir une faute de la compagnie pour la rendre responsable.

Il y avait une défectuosité dans la fabrication du fer de ce bandage ; mais il était certain que cette défectuosité n'était pas visible extérieurement, ce qui excluait

(1) 2 vol. p. 135, et séq.

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le reproche possible d'un défaut d'attention et de précaution lors de la ruption et dans l'emploi de ce matériel.

Il ne fut attaché aucune importance à l'absence de la corde de communication.

En résultat, l'accident ne pouvait être considéré que comme un cas de force majeure, dont la compagnie n'était pas responsable.

Sur l'appel, la cour a complètement changé le point de départ de l'application des faits de la cause.

En principe, suivant elle, le voiturier répond de l'avarie des choses à lui confiées, à moins qu'elles ne prouvent qu'elles ne sont arrivées par cas fortuit ou force majeure. *Ce principe*, dit la cour, *s'applique à plus forte raison au transport de personnes et protège la sécurité des voyageurs*. Mais c'est à la compagnie qu'incombe l'obligation de prouver les faits qui la déchargerait de sa responsabilité.

Maintenant, le déraillement du 18 février a été causé par la rupture du bandage d'une roue ; et cette rupture a été occasionnée par une défectuosité dans la fabrication du fer de ce bandage. Or, il résulte des documents produits par la compagnie que les spires dont ce bandage était formé n'avait pas intérieurement toute l'adhérence nécessaire, que leur soudure n'était qu'à la surface et masquait le vice intérieur de la pièce ; l'accident a donc eu pour cause un vice du matériel dont le voiturier devenait responsable. En effet, bien que cette défectuosité ne fut manifestée par aucun signe extérieur, bien que le bandage, présentant toutes les apparences d'une bonne fabrication, eût été reçu à la suite des épreuves d'usage ; les circonstances ne constituent ni cas fortuit, ni cas de force majeure : c'est un simple vice du matériel à la charge du voiturier. L'absence du cordeau reliant la dernière voiture à la machine fut considérée comme une importante infraction au règle-

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ment. Il a en conséquence été jugé que la compagnie était responsable envers les appelants, non seulement de la confection vicieuse de son appareil, mais, en outre, d'une faute résultant de l'inobservation du règlement.

Voici les motifs qu'invoquait la cour de Paris dans son arrêt du 27 novembre 1866 :

Fournier J.

Considérant que le voiturier répond de l'avarie des choses à lui confiées, à moins qu'il ne prouve qu'elles ont été avariées par cas fortuit ou force majeure;

Considérant que ce principe s'applique à plus forte raison au transport des personnes et protège la sécurité des voyageurs ; qu'ainsi dans l'espèce le voyageur blessé n'est pas tenu de prouver la faute de la compagnie du chemin de fer ; que c'est au contraire à la compagnie qu'incombe l'obligation de prouver les faits qui la déchargent de sa responsabilité.

Tous les considérants de ce jugement sont cités au long dans le rapport de cette cause au 14ème volume de la Revue légale, dans les notes, p. 151.

Ainsi qu'on le voit, le principe de la responsabilité des voituriers, d'après l'article du code Napoléon, n° 1784, correspondant à l'article 1675 de notre code, rend les voituriers responsables de l'avarie ou de la perte des objets qu'ils transportent, à moins qu'ils ne prouvent le cas fortuit ou la force majeure ; ce principe s'applique au transport des marchandises tout aussi bien qu'aux personnes, si le transport des voyageurs fait partie de leur trafic accoutumé, comme dit l'article 1673. L'appelante fait évidemment ce trafic et le principe doit s'appliquer à elle pour le transport des personnes.

L'appelante, comme on l'a vu plus haut, a essayé de modifier son admission au sujet du vice caché du rail et cherché a prouver que le rail qui avait causé l'accident s'était rompu à raison du changement de température.

Feu l'honorable Sir A. A. Dorion, juge en chef, fait au sujet de cette preuve les observations suivantes :

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Les témoins de la compagnie disent qu'il avait fait très froid quelques jours avant l'accident, mais que le jour de l'accident la température était plus douce, et ils attribuent à ce changement la rupture du rail. Si c'est là la cause de l'accident, il est évident que le rail avait dû être cassé depuis plusieurs jours, puisque le fer se casse en se refroidissant et non en s'échauffant, et la compagnie a commis une négligence en ne remplaçant pas de suite ce rail. Si ce n'est pas la gelée qui a fait casser ce rail, c'est qu'il était défectueux, et la compagnie était également en faute.

L'honorable juge en chef a considéré cette preuve comme insuffisante pour établir qu'il y avait eu force majeure. Car si c'est le froid qui a causé l'accident, il est évident, d'après lui, que le rail avait dû être cassé depuis quelques jours, et que la compagnie avait commis une négligence en ne remplaçant pas ce rail. Cette négligence la rend responsable.

Au sujet de la force majeure,—

La loi, dit Laurent, (1) ne définit pas la force majeure, ni le cas fortuit. De là les difficultés dans l'application du principe. La jurisprudence s'en tient à la définition des lois Romaines : un événement que l'on ne peut prévoir et auquel on ne saurait résister, quand même il serait prévu. Il nous semble que mieux vaut s'en rapporter à la prudence du juge. L'article 1147 lui donne une règle, c'est que le débiteur n'est déchargé de la responsabilité qui lui incombe que s'il justifie que l'inexécution de l'obligation provient d'une cause étrangère qui ne peut lui être imputée. Tout dépend donc du point de savoir si l'événement allégué par le débiteur a ou n'a pas eu pour effet de détruire l'imputabilité, ce qui est une question de fait. La jurisprudence se montre très sévère dans l'appréciation des faits.

La preuve ne constate pas qu'il ait fait un froid excessif la veille ni dans la nuit précédente. Le jour de l'accident le temps s'était considérablement adouci. L'inspecteur de section Muldoon prétend avoir inspecté les rails vingt minutes avant l'accident et ils étaient en bon ordre. Bien que le temps était doux alors, ce n'est donc pas le froid qui a causé l'accident, mais plutôt la qualité cassante du fer de cette espèce de rails. Muldoon dit que les rails E. V. sont plus cassants que

(1) T. 16 n° 264, p. 325.

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les autres espèces. La compagnie serait alors responsable de la défectuosité de son matériel.

Il n'y a pas eu une preuve complète de l'inspection des rails, et ceux qui ont donné lieu à l'accident en question n'ont jamais été produits. Il était du plus simple devoir de la compagnie d'appeler la partie intéressée à un examen contradictoire de ces rails. Au lieu de cela, elle a préféré, dans son intérêt, sans doute, d'en faire faire un examen *ex parte* par ses employés, dont elle a tiré un témoignage qui, toutefois, ne la justifie pas de l'inexécution de son obligation. La preuve n'a nullement établi le cas de force majeure. L'accident, au contraire, est dû à l'insuffisance du matériel de la compagnie et elle doit en porter la responsabilité. Cette cause doit être décidée non d'après le droit anglais, mais d'après notre droit qui en diffère sous ce rapport.

Je suis d'avis de confirmer le jugement de la Cour du Banc de la Reine.

GWYNNE, J.—I am of opinion that this appeal must be allowed. The accident which has unfortunately caused so much damage to the plaintiff appears to have been due rather to the severity of our climate and the sudden and great variations in the degrees of temperature in winter than to any want of care upon the part of the defendants.

The damage to the rail which caused the train to leave the track cannot upon the evidence be said to have been something which the defendants should have foreseen, and their not having foreseen and provided against it cannot be imputed to them as negligence; the evidence failed to shew any negligence in the defendants, and in the absence of negligence the action cannot be sustained.

Appeal allowed with costs.

Solicitors for appellants: *Abbotts & Campbell.*

Solicitors for respondent: *Geoffrion, Rinfret & Dorion.*

HORTON *v.* CASEY.

HORTON *v.* HUMPHRIES.

1893

*May 10, 12.

*June 24.

Title to land—Boundaries—Evidence—Title by possession—Acts of ownership.

APPEAL from a decision of the Court of Appeal for Ontario affirming the judgment at the trial in favour of the respondent in each case.

The respective respondents in these appeals brought actions against the appellant for trespass to land which were defended on the ground of want of title in the plaintiffs and title by possession in the defendant. At the trial evidence was given by plaintiff of a survey of the lands, and defendant's land adjoining, made in 1809, by one Burwell, a provincial land surveyor, in which, as he reported to the Crown Land Department, he had made a mistake owing to a bend in the circumference of his compass and which he corrected by moving the posts he had planted as the line was traced. The defendant claimed that the line as first run by Brunwell was the true line. As to possession the evidence was that defendant had cut timber on the land in dispute for many years and also tapped maple trees for sugar, but had not fenced the land until some six or seven years prior to the action.

The trial judge found that plaintiffs had respectively proved title to their land and that the acts of ownership shown by defendant were mere acts of trespass committed either wilfully or in ignorance as to boundaries and not such as would enable his possession to ripen into a title.

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

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The Supreme Court affirmed the decision of the Court of Appeal in both cases and dismissed the appeals.

Appeals dismissed with costs.

Glenn & Tremear for appellant *Horton.*

J. A. Robinson for appellant *Warner.*

Macdougall Q. C., *& Robertson* for respondents.

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NORTHCOTE *v.* VIGEON.

*Nov. 3, 4, 6. 1894 *Feb. 20.

Specific performance—Agreement to convey land—Defect of title—Will—Devise of fee with restriction against selling—Special legislation—Compliance with provisions of.

APPEAL from a decision of the Court of Appeal for Ontario, affirming the judgment of the Queen's Bench Division in favour of the plaintiff.

Land was devised to Northcote with a provision in the will that he should not sell or mortgage it during his life but might devise it to his children. Northcote agreed in writing to sell the land to Vigeon, who was not satisfied as to Northcote's power to give a good title, and the latter petitioned under the Vendors and Purchasers Act for a declaration of the court thereon. The court held that the will gave Northcote the land in fee with a valid restriction against selling or mortgaging. (1) Northcote then asked Vigeon to wait until he could apply for special legislation to enable him to sell, to which Vigeon agreed and thenceforth paid interest on the proposed purchase money. Northcote applied for a special act which was passed giving him power, notwithstanding the restriction in the will, to sell the

*PRESENT :—Fournier, Taschereau, Gwynne, Sedgewick and King JJ.

(1) *In re* Northcote, 18 O. R. 107.

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land and directing that the purchase money should be paid to a trust company. Prior to the passing of this act Northcote, in order to obtain a loan on the land, had leased it to a third party and the lease was mortgaged, and Northcote afterwards assigned his reversion of the land.

In an action by Vigeon for specific performance of the contract with her defendant claimed that the contract was at an end when the judgment on the petition was given and that if performance were decreed the amount due on the mortgage should be paid to him and only the balance to the trust company.

The Supreme Court held, affirming the decision of the Court of Appeal. that it was not open to Northcote to attack the decision of the Chancellor on the petition under the Vendors and Purchasers Act; that if it were, and that decision should be overruled, Vigeon would be all the more entitled to specific performance; that the evidence showed the lease granted by Northcote to have been merely colorable and an attempt to raise money on the land by indirect means; and that the decree should go for specific performance the whole purchase money to be paid into a trust company.

Appeal dismissed with costs.

Marsh Q. C. *& Roaf* for the appellant.

McPherson & Clarke for the respondent.

1893

BOULTON *v.* SHEA.

*Nov. 7, 8.

1894

*Mar. 13.

Lessor and lessee—Crown lands—Arbitration and award—Use and occupation—Action for possession—Condition precedent.

APPEAL from a decision of the Court of Appeal for Ontario affirming the judgment of the Queen's Bench Division which dismissed the appellant's action.

The Algoma Trading Co., one of the appellants and plaintiffs, leased certain crown lands to the respondent Shea, the lease containing a covenant by Shea not to remove gravel or sand from the premises. Shea afterwards ascertained that no patent for the land had been issued to the company and applied to the Crown Lands Department for a patent thereof to himself and also sold gravel off the premises to the Canadian Pacific Railway Co. The plaintiff Co. then pressed the claim they had previously made to the Department and the Commissioner of Crown Lands ruled that it should issue to them on payment to Shea for his improvements. Shea refusing to agree to any terms of compensation the company served him with a notice of arbitration and an award was eventually made which was not taken up as Shea refused to pay his share of the arbitrators' fees. The company having assigned their patent to the plaintiff Boulton, an action was brought by him and the company against Shea claiming arrears of rent, payment for use and occupation, damages for breach of the covenant not to remove gravel and delivery of possession.

The Supreme Court, Gwynne J. dissenting, affirmed the decision of the Court of Appeal that plaintiffs were not in a position to bring the action until Shea had been paid for his improvements.

Appeal dismissed with costs.

MacGregor for the appellants.

Watson Q. C., for the respondents.

*PRESENT:—Fournier, Taschereau, Gwynne, Sedgewick and King JJ.

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