REPORTS

— OF THE —

SUPREME COURT

— OF —

CANADA.

REPORTER

GEORGE DUVAL, Advocate.

ASSISTANT REPORTER

C. H. MASTERS, Barrister at Law.

PUBLISHED PURSUANT TO THE STATUTE BY

ROBERT CASSELS Q. C. Registrar of the Court.

Vol. 14.

OTTAWA
PRINTED BY THE QUEEN'S PRINTER.
1888.

ERRATA.

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

Page 135—n. (3).—For 31 U. C. C. P. read 31 U. C. Q. B.

" 144.—Transpose notes (1) and (2).

" 161—n. (1).—For 9 read 19.

" 163—n. (1).—For *Pigott* v. *Eastern Counties Ry. Co.* read *Vaughan* v. *Taff Vale Ry. Co.*

" 211—Line 13 from bottom. For 200,000 read 20,000.

" 414—n. (2).—For 116 read 115. N. (3) for 116 read 119 and for 100 read 55.

" 451—line 12.—For disminse read dismissing.

" 458—n. (7).—For L. R. 1 C. P. read 1 C. P. D.

JUDGES

OF THE

SUPREME COURT OF CANADA.

DURING THE PERIOD OF THESE REPORTS.

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

" " Samuel Henry Strong J.

" " Télesphore Fournier J.

" " William Alexander Henry J.*

" " Henri Elzéar Taschereau J.

" " John Wellington Gwynne J.

ATTORNEY-GENERAL OF THE DOMINION OF CANADA:

The Honorable Sir John S. D. Thompson, K.C.M.G., Q.C.

*Mr. Justice Henry died on May 4th, 1888.

A TABLE

OF THE

NAMES OF THE CASES REPORTED

IN THIS VOLUME.

M.

Mc.

N.

O.

P.

Q.

R.

S.

T.

V.

W.

TABLE OF CASES CITED.

A.

B.

C.

D.

E.

F.

M.

Y.

Cases in this volume which have been carried to the Privy Council :—

CASES

DETERMINED BY THE

SUPREME COURT OF CANADA

ON APPEAL

FROM

THE COURTS OF THE PROVINCES

AND FROM

THE EXCHEQUER COURT OF CANADA.

THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF SAINT JOHN (DEFENDANTS) ..... } APPELLANTS;

AND

RODERIC MACDONALD (PLAINTIFF) RESPONDENT.

1886
May 4, 5
June 8

APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Negligence—Management of ferry—Manner of mooring—Contract to carry—Ferry under control of corporation—Liability of corporation for injury to passenger—Contributory negligence.

The ticket issued to M a traveller by rail from Boston, Mass., to St. John, N. B., entitled him to cross the St. John harbour by ferry, and a coupon attached to the ticket was accepted in payment of his fare. The ferry was under the control and management of the corpor tion of St. John.

Held, that an action would lie against the corporation for injuries to M. caused by the negligence of the officers of the boat during the passage.

The approaches of the ferry to the wharf were guarded by a chain

---

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

1886

CITY OF SAINT JOHN v. MACDONALD.

extending from side to side of the boat at a distance of about 1½ feet from the end. On approaching the wharf the man whose duty it was to moor the boat unloosed the chain at one side, and when near enough jumped on the floats to bring the mooring chain aboard. A number of the passengers rushed towards the floats, and M., seeing the chain down and thinking it safe to land, followed them and fell through a space between the boat and the wharf and was injured. When this happened the boat was not moored.

Held, affirming the judgment of the court below, that the corporation of the City were liable to M. for the injuries sustained by the negligent manner of mooring the boat, and that he was not guilty of such contributory negligence as would avoid that liability.

APPEAL from a decision of the Supreme Court of New Brunswick (1), refusing to set aside a verdict for the plaintiff or to order a new trial.

The plaintiff MacDonald purchased a ticket in Boston, Mass., for Cape Breton, intending to go by the St. John & Maine Ry. to St. John, N. B., and thence by the Intercolonial. On arriving at St. John he went on board the ferry to cross the harbour, his fare being paid by a coupon attached to his railway ticket. This ferry is the property of the city, and is managed by an officer of the corporation. The boats are open at both ends, and there is a protection for teams and passengers by means of a guard chain at each end, extending from side to side, at a distance of about a foot and a half back. The trip by which the plaintiff passed was what is called the "train trip," when the passengers from the United States cross over on the arrival of the train.

On approaching the opposite side one of the deck hands of the boat took down the guard chain and when near enough leaped from the boat to the floats in order to get the mooring chain and bring it on the boat. When the chain was taken down a number of the passengers rushed forward and jumped on the

(1) 25 N. B. Rep. 318.

floats, and MacDonald, seeing no chain nor anything to intimate that it was not safe to land, followed them and fell down between the boat and the floats and was severely hurt. The boat had not then been moored.

In an action brought by MacDonald against the City it was contended that if any action would lie it would only be against the company in Boston who sold the ticket; or, if the defendants were liable, that the plaintiff had not exercised proper care and was himself guilty of such negligence that he could not recover. The declaration and the material portions of the evidence will be found in the report of the court below (1).

Certain questions and answers were submitted to the jury, among which were the following:—

2 Q. Was it necessary to let down the guard chain in order to get hold of the mooring chain and to fasten the boat?

A. It was not necessary.

3. Q. Was the guard let down for the purpose of getting hold of the mooring chain, or was it left down as an invitation to the passengers that they might safely land?

A. The guard chain appears to have been let down for the purpose of getting hold of the mooring chain but it is the opinion of the jury that it might be reasonably taken by the passengers to be an invitation that they might safely land.

4. Q. Is the end of the floats so constructed as to receive the end of the boat without leaving a space between them dangerous to passengers to and fro?

A. It is not.

7. Q. Was the taking down the guard chain an intimation to passengers that they might land?

A. It was.

(1) 25 N. B. Rep. 318.

1886

CITY OF SAINT JOHN v. MACDONALD.

Ritchie C.J.

The plaintiff obtained a verdict for $3000, which was sustained by the Supreme Court of New Brunswick on motion by the defendants for a new trial. The City then appealed to the Supreme Court of Canada.

Barker Q.C. for the appellants cited *Alton* v. *Midland Railway Co* (1).

Skinner Q.C. for the respondent.

SIR W. J. RITCHIE C.J.—I think this action was clearly sustainable against the defendants. Mr. Justice Fraser in his exhaustive judgment makes this abundantly clear. The question of contributory negligence, it is admitted, was properly left to the jury, and was, in my opinion, most properly found against the defendants.

The sole question then to be determined is: Was there evidence of negligence on the part of the defendants to go to the jury? I think there was abundant evidence as Mr. Justice Fraser most conclusively demonstrates.

The matter, then, being one unquestionably within the province of the jury it is not possible to say that the jury, viewing the whole evidence reasonably, could not properly have found this verdict, nor can this verdict, in my opinion, be said to be unsatisfactory, still less unreasonable and unjust, and therefore I think the court below was quite right in not disturbing it, and the appeal should be dismissed with costs in this court and in the court below.

STRONG J.—I am of opinion, and was at the close of the argument, that the judgment of the court below was entirely right for the reasons assigned therein.

FOURNIER J.—I am in favor of dismissing the appeal. I think this case very like the case of *G. T. R. Co.* v. *Boulanger* (2) decided a short time ago from the Bench.

(1) 19 C. B. N. S. 213. (2) Cass is's Dig. 441.

1886

CITY OF SAINT JOHN v. MACDONALD.

HENRY J.—I concur. I have no doubt that the evidence fully sustains the verdict in this case, and that negligence was sufficiently proved to enable the plaintiff to recover.

Henry J.

GWYNNE J.—The declaration in this case is abundantly sufficient to sustain the present action whether it be regarded as framed in tort for injuries caused to the plaintiff by the negligence of the defendants in breach of a duty arising out of their having a grant of the exclusive right of ferriage and carriage by water of cattle, goods and passengers from one part of the City of St. John, across the river and harbor of St. John, to other parts thereof, or in tort for breach of duty arising out of a contract to carry the plaintiff for hire and reward. The evidence that the plaintiff was only admitted as a passenger upon the defendants' ferry boat upon his producing a through ticket for passage by rail and ferry from Boston to St. John, for which the plaintiff had paid at Boston, and from which the defendants' servants detached a coupon, justified the inference that the defendants had been paid or secured in payment of plaintiff's fare and that they accepted the coupon from the plaintiff in payment of his fare. But the declaration alleges that the plaintiff was lawfully on board the ferry boat as a passenger and that it was the duty of the defendants, as grantees of the ferry and carriers by water of cattle, goods and passengers across the ferry, so to manage their ferry boats, and to fasten them to the landing stage in such a manner, that it would not be dangerous for passengers to pass from the ferry boats to the landing stage, and that it was by breach of this duty that the plaintiff suffered the injury of which he complained, so that the declaration would be good without the allegation of the plaintiff being a passenger, "for certain hire and

1886

CITY OF SAINT JOHN v. MACDONALD.

Gwynne J.

"reward paid to the defendant," and these words might be expunged from the declaration and the plaintiff's cause of action be sufficiently stated (1).

Then as to the merits the learned counsel for the defendants admitted that the case was presented to the jury with a charge both upon the question whether the defendants were guilty of any negligence and whether the plaintiff was guilty of contributory negligence, to which no objection was or could have been taken, and that the jury found for the plaintiff. But the contention is that besides submitting the case to the jury with such a charge the learned judge who tried the case submitted certain questions to the jury and that some of their answers are inconsistent with their verdict and others are against the evidence. As to the former—to a question:

Whether there was any unnecessary delay or negligence on the part of the boat hands in running the boat to the landing stage and so securing the boat to the landing stage as to allow passengers safely to pass from the boat to the landing stage?

the jury answer that:

—there appears to be no unnecessary negligence or delay on the part of the boat hands as far as the construction and appliances of the boat and landing stage would allow.

What the jury meant by this answer appears, from the other answers, to have been that in the construction of and in the absence of proper appliances to fasten the boat safely there was negligence. They found that the guard chain was let down before the boat was fastened to the landing stage, and that although it was so let down for the purpose of getting hold of the mooring chain it was not necessary to be let down for that purpose and that the letting it down might reasonably have been taken by the passengers as an invitation for them to land and that it was an intimation to them that they might land safely—They found also that the

(1) See *Marshall* v. *York, Newcastle & Berwick Railway Co.*, 11 C. B. 664.

landing floats were so constructed that the end of the ferry boat on which the plaintiff was did not fit close in to the landing stage and that a space was left between them which was dangerous to passengers—They found also that the gang plank which was put down before the boat was fastened was an intimation that the boat was secured.

Now all these findings were expressly upon the points of negligence charged in the declaration, which in substance were that the defendants did not run the ferry boat, on the occasion under consideration, close up to the landing stage, and did not so secure and fasten the said ferry boat and keep the same so secured and fastened to the said landing stage, as not to be dangerous for the plaintiff to step from the boat on the landing stage, and that the landing stage and the end of the ferry boat were so negligently constructed that they would not closely and properly fit the one with the other. And by reason of a space having been left between the boat and landing stage, the plaintiff while carefully going on to the landing stage fell between it and the boat and was very seriously injured. It is impossible, in my opinion, to say that the jury's findings are not supported by the evidence, or that they are at all inconsistent with their verdict for the plaintiff.

The appeal, therefore, must be dismissed with costs.

Appeal dismissed with costs.

Solicitor for appellants: *I. Allen Jack.*

Solicitor for respondent: *C. L. Richards.*

1887

*Feb. 17.

*May 2.

HENRIETTA CREWE-READ, ADMINISTRATRIX OF THE ESTATE OF CHARLES CREWE-READ, DECEASED, (PLAINTIFF) ..... APPELLANT;

AND

THE MUNICIPALITY OF THE COUNTY OF CAPE BRETON (DEFENDANTS) ..... RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Militia Act—31 *Vic. ch.* 40 *sec.* 27—36 *Vic. ch.* 46—42 *Vic. ch.* 35—*Disturbance anticipated or likely to occur—Requisition calling out Militia—Sufficiency of form of—Suit by commanding officer—Death of commanding officer pending suit - Right of administratrix to continue proceedings.*

The Act 31 Vic. ch. 40 sec. 27, as amended by 36 Vic. ch. 46 and 42 Vic. ch. 35, requires that a requisition calling out the militia in aid of the civil power to assist in suppressing a riot, &c., shall be signed by three magistrates, of whom the Warden, or other head officer of the municipality shall be one; and that it shall express on its face "the actual occurrence of a riot, disturbance or emergency, or the anticipation thereof, requiring such service."

Held, that a requisition in the following form is sufficient:—

CHARLES W. HILL, Esq.,
Captain No. 5 Company,
Cape Breton Militia.

SIR,—We, in compliance with ch. 46 sec. 27, Dominion Acts of 1873, it having been represented to us that a disturbance having occurred and is still anticipated at Lingan beyond the power of the civil power to suppress, You are therefore hereby ordered to proceed with your militia company immediately to Lingan, with their arms and ammunition, to aid the civil power in protecting life and property and restoring peace and order, and to remain until further instructed.

A. J. MCDONALD, Warden.
R. MCDONALD, J.P.
J. MCVARISH, "
ANGUS MCNEIL, "

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

1887

CREWE-READ v. COUNTY OF CAPE BRETON.

The statute also provides that the municipality shall pay the expenses of the service of the militia when so called out, and in case of refusal that an action may be brought by the officer commanding the corps, in his own name, to recover the amount of such expenses.

Held, Strong J. dissenting, that where the commanding officer died pending such action the proceedings could be continued by his personal representative.

APPEAL from a decision of the Supreme Court of Nova Scotia (1) setting aside a verdict for the plaintiff and ordering judgment to be entered for the defendant.

The facts upon which the appeal is founded are as follows:—

In March, 1883, a riot and disturbance occurred at Lingan in the county of Cape Breton beyond the power of the civil authorities to suppress or deal with. Thereupon three justices of the peace for the said county, of whom one was the Warden, by writing under their hands required the senior officer of the active militia present in the county to call out the active militia for the purpose of preventing and suppressing said riot and disturbance. Captain Charles W. Hill, to whom the requisition was addressed and who was then such senior officer, thereupon proceeded with his company to Lingan, on the 23rd of March, 1883.

The requisition was in the following form:—

"Charles W. Hill, Esq., Captain No 5 Company, Cape Breton Militia:

"Sir,—We, in compliance with chapter 46, section 27, Dominion Acts of 1873, it having been represented to us that a disturbance having occurred, and is still anticipated at Lingan, beyond the power of the civil power to suppress. You are therefore hereby ordered to proceed with your militia company immediately to Lingan, with their arms and ammunition, to aid the civil power in protecting life and property, and restor-

(1) 19 N. S. Rep. 260.

1887

CREWE-READ v. COUNTY OF CAPE BRETON.

ing peace and order, and to remain until further instructed."

(Signed by the Warden, &c.)

Subsequently, by a second requisition, an additional portion of the militia was called into active service and the entire force remained sometime at Lingan for the purpose of aiding the civil power in preventing riots and breaches of the peace.

The municipality having refused to pay for the maintenance of the militia during the time occupied in suppressing these riots, an action was commenced on the 12th of June, 1883, by Charles Crewe-Read commanding officer of the corps. In March, 1884, Lieutenant Colonel Crewe-Read died. On the 4th of November, 1884, a judge's order was obtained under the provisions of order xvii rule 4 of the rules of the Supreme Court of Nova Scotia, 1884, ordering that the proceedings in this action be continued between Henrietta Crewe-Read, administratrix of the estate of the said Charles Crewe-Read, as plaintiff, and the said Municipality of the County of Cape Breton as defendant.

The action was tried in November, 1885, before Mr. Justice Weatherbe without a jury who found all the issues in favor of the plaintiff and gave judgment for the plaintiff for the sum of $4,999.85.

The defendant appealed to the Supreme Court of Nova Scotia, who reversed the decision of Mr. Justice Weatherbe on the ground that the requisition to the senior officer to call out the militia did not, in the opinion of the court, express on the face thereof the actual occurrence or anticipation of a riot or disturbance beyond the power of the civil authorities to suppress.

The plaintiff then appealed to the Supreme Court of Canada.

Burbidge Q.C. and *Borden* for the appellant. The question is whether the directions in the statute are

directory or imperative, and that depends on whether or not it was the duty of the magistrates to issue the requisition. If so, the statute is directory. See *Maxwell* on Statutes (1).

As to the sufficiency of the form of the requisition. See *Halford* v. *Cameron's Coalbrook Steam Coal, &c., Ry. Co* (2); *Edwards* v. *Cameron's Coalbrook Steam Coal, &c., Ry. Co.* (3).

Drysdale for the respondents.

There is nothing in the requisition to show that the emergency contemplated by the act has arisen. The act requires that the actual existence of a riot or disturbance should be set forth, and that has not been done.

Then, what right has the administratix to continue the suit on the death of the commanding officer? The statute names the officer to bring the action, but he only sues in virtue of his position. If this money is paid to the administratrix all the creditors of the estate could claim to participate in its distribution.

Burbidge Q.C. in reply, as to survivorship of the action cited Lewin on Trusts (4); Williams on Executors (5); Imperial Statutes (6); *Webb* v. *Taylor* (7); *Barnewall* v. *Sutherland* (8); *Atkins* v. *Gardner* (9); *Howley* v. *Knight* (10); *The King* v. *Chamberlayne* (11).

Sir W. J. RITCHIE C.J.—I think the requisition in this case was quite sufficient. It is in these words:—

CHARLES W. HILL, ESQ.,

Captain No. 5 Company,

Cape Breton Militia:

Sir,—We, in compliance with ch. 46 sec. 27, Dominion Acts of 1873, it having been represented to us that a disturbance having occurred and is still anticipated at Lingan beyond the power of the civil power

(1) 2 Ed. pp. 452 and 459 to 470.
(2) 16 Q. B. 442.
(3) 6 Ex. 269.
(4) 8 Ed. p. 221.
(5) 8 Ed. p. 792.
(6) 7 Geo. 4 ch. 46 sec. 9.
(7) 1 D. & L. 676.
(8) 9 C. B. 380.
(9) 3 Cro. Jac. 159.
(10) 14 Q. B. 240.
(11) 1 T. R. 103.

1887

CREWE-READ v. COUNTY OF CAPE BRETON.

Ritchie C.J.

to suppress, You are therefore hereby ordered to proceed with your militia company immediately to Lingan, with their arms and ammunition, to aid the civil power in protecting life and property and restoring peace and order, and to remain until further instructed.

(Signed,) A. J. McDONALD, Warden.
R. McDONALD, J.P.
J. McVARISH, "
ANGUS McNEIL, "

The right to call out the militia in aid of the civil power arises in any case in which a riot, disturbance of the peace or other emergency requiring such service occurs, or is, in the opinion of the civil authorities mentioned in the act, anticipated as likely to occur, and in either case to be beyond the power of the civil authorities to suppress, or to prevent or deal with.

I do not think it is necessary either that the justices should have a personal knowledge of the riot or of the anticipation thereof, or that they should hold a judicial investigation to determine its existence, to require which would be practically to render, in many cases, the law entirely abortive. It is sufficient that the justices should be satisfied of the existence of a riot, or of the anticipation thereof. What is the fair reading of this order, but "that it having been represented to us, that is, made apparent to us, brought before our minds, that a disturbance had occurred and was still anticipated."

By acting on the representations made as expressed in the order, it must be assumed that they believed, and had reason to believe, that these representations were well founded, that the disturbance had occurred, and, in their opinion, was still further anticipated as likely to occur, because, unless such was the case, they had no right to make the order. The learned judge who tried the case says, "he had no difficulty as to the occurrence or anticipation of a riot," and, therefore, as to the necessity in this case of calling out the militia; and the Supreme Court could have had no difficulty on this point for the

1887

CREWE-READ v. COUNTY OF CAPE BRETON.

Ritchie C.J.

learned judge who delivered the judgment of the court, commences the judgment by saying:—

In March, 1883, a difficulty arose among the miners of Lingan which ended in a riot. Capt. Hill, of No. 5 Company, "Argyle Highlanders," who was then the senior officer of the active militia present in the county, on the requisition of the Warden of the municipality and three Justices of the Peace, ordered out his company of militia, and on the 22nd of March proceeded with it to Lingan in aid of the civil power.

The evidence clearly establishes that there was at the time a most serious riot with which the civil power was wholly inadequate to cope, and which, as a matter of fact, necessitated more men being sent to suppress it than at first were supposed necessary.

I think, it being established that a riot had actually occurred, and the evidence clearly showing that the aid of the militia was required for its suppression and for the preservation of the public peace, and the militia having been actually called out and having rendered the required aid in the interest of the municipality, it would be a very strained view of the law to say that the requisition, by reason of a mere technical informality, was illegal and of no effect and should not have been acted on by the militia authorities, and the municipality, though receiving the full benefit of the necessary aid thus afforded, should, by reason of such technical informality, be relieved from paying, and the burthen and consequences be cast either on the magistrates who issued the order, or the officer who called the men out, or the men who responded to the call.

Could it even have been contemplated by the Legislature that the officer to whom the order was transmitted was to obey or disobey as he might think it technically right, or the men to obey or disobey if, in their opinion, the requisition was not strictly right, and in the meantime was the riot to go on, and the civil force be overpowered, while the commanding officer and his men

1887

CREWE-READ v. COUNTY OF CAPE BRETON.

Ritchie C.J.

were either disobeying the order or settling this knotty technical objection? I think not; there being beyond all doubt a riot going on with which the civil power could not cope the necessity for an order calling in the aid of the military power existed and it was the duty of the justices to issue such an order; the militia authorities responded, so that the disturbances, through their instrumentality, were suppressed and further disturbances prevented; order was restored and the public peace preserved. And is the municipality to escape payment for such services, because, forsooth, on a hypercritical technical construction of the order issued it may be argued that the requisition was defective in not expressing with sufficient certainty the actual occurrence of a "riot, disturbance or emergency, or the anticipation thereof," requiring such service?

In my opinion, the administratrix was properly allowed to continue the proceedings in this action.

As to actions for or against executors, the rule *actio personalis moritur cum personâ* has never been extended to such personal actions as are founded upon any obligation, contract, debt, covenant or any other duty to be performed, because all such actions survived; the maxim is peculiarly applicable to actions *ex delicto*.

Actions on a contract made with the deceased, or for a debt due to him, were always maintainable by the executors. This was a statutory obligation to pay money, a debt due by statute and therefore *ex quasi contractu* to which the rule of the common law, *actio personalis moritur cum personâ* does not apply, and such a liability is, in general, held to be in the nature of a debt by specialty within the statute of limitations. This must, I think, be treated as a statutory contract with the deceased, broken in his lifetime, a statutory chose in action which, on his death, became parcel of his personal estate in respect of which the administra-

trix representing the person of the intestate is, in law, the intestate's assignee, and so the rights and liabilities of the deceased passed, in respect to this right, to the administratrix by operation of law, and the amount, when recovered, would not be distributable as ordinary assets of the intestate's estate, but would be held and disposed of by the administratrix in precisely the same manner as it would have been by the intestate had it been recovered by him in his lifetime. I cannot distinguish this case, in principle, from *Bafield* v. *Collard* (1), which is thus stated in 1 Williams on Executors (2):—

An action will lie for an executor or administrator upon a promise made to the deceased for the exclusive benefit of a third party. Thus, where A promised to B that if B would pay £50 to C. his son, who was married to D the daughter of A, that then he would pay £100 to D. his daughter at such a time. B. paid the £50 to C. and A failed in the payment of the £100. B. died intestate. E. his executor brought an action upon the case upon a sumpsit upon the promise made to B. the intestate, and it was adjudged that the action did well lie by the administrator although he should have no benefit from it if he did recover. Citing *Bafield* v. *Collard* (1).

Mr. Leake in his work on contracts (3) thus enunciates the same principle.

Where a contract was made between two parties that one of them should pay a sum of money to a third party, it was held that upon the death of the promisee his executor must sue, though for the benefit of the third party, who, being no party to the contract, was unable to sue in his own name. *Bafield* v. *Collard* (1).

It is very material to bear in mind in this case that if the present action is not maintainable, no other action could be sustained under the statute at the suit of any other person, for if the administratrix cannot maintain the action there would be no remedy, which the law will not suppose.

STRONG J.—The concluding part of the enactment

(1) Sty. 6 S. C. Aleyn 1. (2) 2 Ed. p. 574, 8 Ed. p. 815.
(3) P. 1251-2.

1887

CREWE-READ v. COUNTY OF CAPE BRETON.

Strong J.

under which this action is brought (31 Vic. ch. 40 sec. 27 as amended by 36 Vic. ch. 46 and by 42 Vic ch. 35) is as follows:—

> Provided that the said pay and allowances of the force called out, together with the reasonable cost of the transport mentioned in section one of the Act passed in the 40th year of Her Majesty's reign and entitled: "An Act to make further provision for the payment of the active militia when called out in certain cases in aid of the civil power," may, pending payment by the municipality, be advanced in the first instance by order of the Governor in Council out of the Consolidated Revenue Fund of Canada, but such advance shall not interfere with the liability of the municipality and the commanding officer shall at once, in his own name, proceed against the municipality for the recovery of such pay, allowance and cost of transport, and shall on receipt thereof pay over the amount to Her Majesty.

I am of opinion that this provision does not authorize an action by the personal representative of the commanding officer. It does not create any statutory liability in favour of the commanding officer, but merely authorizes that officer to maintain an action on behalf of the crown to whom the money to be recovered belongs. It is of course out of the question to say that any privity of contract exists between the municipality and the commanding officer, and the only question is whether the proper construction of the statute is to consider it as creating a liability to pay to the officer, or a liability to pay to the crown with authority to the officer to sue on behalf of the crown, and I am clearly of opinion that the latter is the proper interpretation. There can be no doubt but that the Attorney General could maintain an information on behalf of the crown, the usual common law remedy for the recovery of debts due to the crown, which shows that the liability is to pay to the crown, to whom, indeed, the statute declares that any money received by the commanding officer shall at once be paid over. It therefore follows, in my opinion, that the personal representative of the commanding officer cannot sue. The money received would not be assets even at law, and this is the usual test as

1887

CREWE-READ v. COUNTY OF CAPE BRETON.

to the right of the personal representative to maintain an action, and the statute does not confer any authority on the representative to sue on behalf of the crown.

Therefore the appeal should be dismissed with costs.

FOURNIER J.—I am in favor of allowing the appeal for the reasons given by the Chief Justice and Mr. Justice Gwynne.

Strong J.

HENRY J.—I would also adopt the view of the learned Chief Justice. He refers to the objection to the requisition as being technical. I am of opinion that the order was quite sufficient. The facts are to be decided by three magistrates, and when they give their order the commander of the troops is bound to obey. The law also provides that the commanding officer shall bring the action which he did in this case. He died pending the action and the statute in Nova Scotia provides that in all cases the personal representative can continue the proceedings. I agree with the learned Chief Justice that the suit was properly continued in the name of the administratrix.

I think it makes no difference where the money when recovered is to go. The effects of the estate are to be distributed according to law, and each person entitled to participate in the distribution has a right to ask the Court of Probate to award what is due to him. Under no circumstances could I imagine any difficulty in having the money applied to paying the men by the administratrix, and as the Government of the Dominion advanced the money the right to recover is, by the statute, transferred to it.

For these reasons I am of opinion that the appeal should be allowed with costs.

GWYNNE J.—This action was commenced and brought under the Dominion statute, 31st Vic. ch. 40

1887

CREWE-READ v. COUNTY OF CAPE BRETON.

Gwynne J

as amended by 36 Vic. ch. 46 and 42 Vic. ch. 35, by one Charles Crewe-Read in his life time, as having been the commanding officer of a body of active militia ordered out by the senior officer of militia in the neighbourhood to suppress a riot in the county of Cape Breton, in aid of the civil powers. The said Charles Crewe-Read having died pending the action, it has been continued by the present plaintiff as his personal representative under an order of the court in which the action was pending made for that purpose. Two objections have been taken to the plaintiff's right to recover in this action, neither of which is, in my judgment, entitled to prevail.

That a riot had taken place which was beyond the power of the civil authorities to suppress, and that the services of the militia were necessary in aid of the civil power in order to its suppression, and that a body of militia of which the original plaintiff was the commanding officer was ordered out by the senior officer of the active militia in the locality where the riot took place, are facts which are not now in dispute, but it is contended :—

1st. That the requisition in virtue of which the militia were so ordered out, although signed by the Warden and three Justices of the Peace of the county, did not in its form comply with the statute, and that, therefore, compensation for the services of the militia in suppressing the riot which could not otherwise have been suppressed cannot be recovered under the statute, and—

2nd. Assuming that the action could have been sustained by Charles Crewe-Read in his lifetime that it could not be continued by his personal representative, and that, therefore, for this reason the action cannot be sustained.

As to the first point, I am of opinion that the requisi-

1887

CREWE-READ v. COUNTY OF CAPE BRETON.

Gwynne J.

tion was in its form sufficient to authorize the officer in command of the militia to order out a sufficient force to suppress the riot, and that for the services so rendered the militia employed were entitled to be paid under the provisions of the statute and to recover for such services in an action at the suit of the officer in command of the force employed.

The statute enacts that:—

When the active militia or any corps thereof are so called out in aid of the civil power the municipality in which their services are required shall pay them when so employed the rates authorised to be paid for actual service to officers, non-commissioned officers and men, and one dollar per diem for each horse actually and necessarily used by them, together with an allowance of one dollar to each officer, fifty cents to each non-commissioned officer and man per diem, in lieu of subsistence, and fifty cents per diem in lieu of forage for each horse, and in addition shall provide them with proper lodging and with stabling for their horses; and the said pay and allowances for subsistence and forage, as also the value of lodging and stabling, unless furnished in kind by the municipality, may be recovered from it by the officer commanding the corps in his own name, and when so recovered shall be paid over to the persons entitled thereto.

Now it has long been settled that wherever a pecuniary benefit is given by a statute to an individual he may sue for it and recover (1).

In the old forms of action the suit might have been in assumpsit or in debt unless one or other form alone was specially given by the statute (2); and in Chitty on Pleading several forms of declarations in assumpsit in such cases are given. *Tilson* v. *Warwick Gas Light Co.* (3); *Carden* v. *General Cemetery Co.* (4); *Hopkins* v. *Mayor of Swansea* (5); *Miles* v. *Bough* (6); were actions in debt—and in *Reg.* v. *Hull & Selby Railway Co.* (7), it was held that as debt lay against

(1) Comyn Dig. — Action on Statute A. (2)—E. Debt A. (9.) Anon. 6 Mod. Rep. 27.

(2) 1 Chitty's Pleading, 7th Ed. p. 119; Bull. N. P. 129; *Rann* v. *Green*, Cowp. 474; *Peck* v. *Wood*, 5 T. R. 130.

(3) 4 B. & C. 962.

(4) 5 Bing. N. C. 253.

(5) 4 M. & W. 621.

(6) 3 Q. B. 845.

(7) 6 Q. B. 70.

1887

CREWE-READ v. COUNTY OF CAPE BRETON.

Gwynne J.

the company for an amount to which they were made liable by a statute a mandamus should not be granted.

Now upon the authority of the above cases an action would have lain against the defendants at the suit of the several persons in the militia force which was employed to recover the amount which by the statute is made payable to each, if the statute to avoid such multiplicity of suits had not given an action to the officer in command on behalf of all. In the action brought by him he was interested beneficially to the amount due to himself, and as to the remainder as a trustee for all the persons who were under his command on the occasion of the services being rendered. Under the old practice, the action, whether brought in assumpsit or in debt, was in its nature an action *ex contractu*; the statute created a contract between the municipality made liable to pay and the parties declared entitled to be paid. Of a like nature is the action still, although the forms of action have been done away with. The common law maxim therefore of *actio personalis moritur cum personâ* does not apply, and the statute certainly has not made that maxim applicable. I cannot, therefore, doubt that the action which was by the statute vested in Charles Crewe-Read, and which was brought by him for his own benefit as to the amount made by the statute due and payable to himself, and as to the residue as a trustee for the others, was such a chose in action as, upon his death, passed to his personal representative just as would a cause of action for any other debt due and payable to testator or intestate. Indeed, if the amount which the statute has imposed as a debt due by the municipality and payable to the several persons who rendered the services in compensation of which the debt was imposed can not be recovered in the present action it cannot be recovered at all. It has been suggested

that it might be recovered by mandamus, but a mandamus, if granted, could only command the municipality to pay the person who alone was entitled to receive the amount payable by the statute; and if that person could not be represented by his personal representative, so that the mandamus could order the payment to be made to such representative, no mandamus could be granted. The circumstance that the Dominion Government has advanced the amount and paid the militia makes no difference, for the statute expressly enacts that such advance shall not interfere with the liability of the municipality, and the commanding officer shall at once in his own name proceed against the municipality for the recovery of such pay, allowances and cost of transport, and shall on receipt thereof pay over the amount to Her Majesty. Neither the nature of the liability nor of the action is at all changed. The action is still to recover a debt due for services rendered by the intestate and others under his command, but when recovered it is, by reason of the advance, affected by the statutes with a trust for Her Majesty. The appeal must, in my opinion, be allowed with costs and judgment be ordered to be entered for the plaintiff in the court below for the amount of the verdict with costs.

Appeal allowed with costs.

Solicitor for appellant: *Wallace Graham.*
Solicitor for respondent: *Arthur Drysdale.*

1887

*Mar. 15, 17.

*June 20.

ARCHIBALD GEORGE McLEAN, (DEFENDANT) ..... } APPELLANT;

AND

FREDERIC SHIRLEY WILKINS (BY BILL) AND HUMPHREY LLOYD HIME (MADE A PARTY PLAINTIFF BY ORDER OF COURT) (PLAINTIFFS) ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Mortgagor and Mortgagee—Assignment of Mortgage—Purchase of equity of redemption by sub-mortgagee—Sale of same by him—Liability to account.

The assignee of a mortgage obtained a release of the equity of redemption which he sold for a sum considerably in excess of his claim against the assignor. In a suit to foreclose the latter's interest,—

Held, reversing the judgment of the Court of Appeal and restoring that of the Common Pleas Division, that he was bound to account for the proceeds of such sale.

APPEAL from the decision of the Court of Appeal for Ontario (1) reversing the judgment of the Common Pleas Division (2), whereby the plaintiff's action was dismissed and he was ordered to pay certain monies to the defendant.

The defendant, McLean, was the surviving executor of one Cameron, to whom the land in question in this suit had been mortgaged in 1856 by one Romaine.

In 1864 the mortgage was assigned to the respondent Hime, and in 1880 a second assignment was made to Selina Cameron who brought a suit to obtain possession of the mortgage from Hime. This suit was settled by Hime paying Mrs. Cameron $500.00 and her interest in the mortgage was assigned to him.

---

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

(1) 13 Ont. App. R. 467. (2) 10 O. R. 58.

The equity of redemption, in 1877, was in the executors of one Zimmerman to whom it had been assigned by Romaine. Hime, by representing that he was the holder of the mortgage which had originally been made to secure £550.00 and that the amount due on it was more than the value of the land, obtained from these executors, for the nominal consideration of $4.00, a release or quit claim to a trustee for himself of their equity of redemption and afterwards sold it for $6000.

A suit was then brought by Frederic Shirley Wilkins, as trustee for Hime, to foreclose the interest of McLean, surviving executor of the original mortgagee, and by a subsequent order in the suit Hime was added as a plaintiff.

At the hearing before Ferguson J. in the Chancery Division judgment was given in favor of the plaintiff and an order for foreclosure was made in default of the sum due on the mortgage being paid within a time specified. The case was afterwards transferred to the Common Pleas Division where the judgment of Ferguson J. was reversed, the action was dismissed, and the plaintiff ordered to pay the difference between the amount realised from the sale of the equity of redemption and the sum due on the assignments to himself and to Selina Cameron.

The Court of Appeal reversed the judgment of the Common Pleas Division and restored that of the court of first instance. The defendant then appealed to the Supreme Court of Canada.

S. H. Blake Q.C. and *W. Cassels* Q.C. for the appellant, argued that Hime could not take advantage of his position as mortgagee to secure the equity of redemption and make money by it. The following authorities were cited. *Grace* v. *MacDermott* (1); *Synod* v. *DeBlaquiere* (2); *Dalton* v. *Smith* (3); *Slee* v

(1) 13 Gr. 247. (2) 27 Gr. 536.
(3) 86 N. Y. 176.

1887

McLEAN v. WILKINS.

Strong J.

Manhattan Co. (1); *MacLean* v. *Hime* (2); *Lees* v. *Fisher* (3)

Moss Q.C. for the respondents referred to Williams on Executors (4).

The judgment of the court was delivered by:—

STRONG J.—On the 23rd of January, 1856, Charles Edward Romaine mortgaged certain lands in the city of Toronto described as lots 20, 21, 22 and 23, on the south side of Adelaide street, to one John D. Cameron, to secure £550 and interest. In 1857 Cameron died, having first made his will, duly executed, whereby he appointed the late Hon. Archibald McLean and the present appellant, Archibald George McLean, his executors and residuary legatees and devisees. The Hon. Archibald McLean and the appellant duly proved the will, and took upon themselves the duties of executors thereof. The Hon. Archibald McLean died in 1865. The appellant, through the agency of his brother Thomas McLean, on the 26th of April, 1864, deposited the mortgage deed before mentioned with the respondent, Humphrey Lloyd Hime, as security by way of a derivative or sub-mortgage to secure $401 and interest, being the amount of a loan then made by the respondent Hime to the appellant through the intervention of Thomas McLean. On the 8th of May, 1880, the appellant, Archibald McLean, then the surviving executor and residuary legatee under the will of Cameron, the original mortgagee, made an assignment of the same mortgage—also by way of derivative or sub-mortgage—to one Selina Cameron, as a security collateral to a covenant of even date for the payment of the sum of $2050 and interest.

Subsequently, and on the 9th of October, 1880, Selina Cameron assigned this last mortgage and the

(1) 1 Paige Ch. 47.
(2) 27 U. C. C. P. 195.
(3) 22 Ch. D. 283.
(4) P. 941.

debt which it was given to secure to the respondent, Frederic Shirley Wilkins, who was, as is admitted, a mere trustee for the respondent, Hime.

On the 31st of December, 1856, the original mortgagor, Charles Edward Romaine, conveyed the equity of redemption in the mortgaged lands to Samuel Zimmerman. In March, 1857, Zimmerman died, having first duly executed his will, whereby he appointed Richard Miller, Richard Woodruff, Joseph A. Woodruff and John L. Ranney his executors, and whereby he also devised all his real and personal estate to his executors in trust. In 1877 Hime, being then a sub-mortgagee of the property under the derivative mortgage of the 26th April, 1864, applied to the executors of Zimmerman for a release to him of the equity of redemption, representing to them that he "controlled" the original mortgage and that the equity of redemption belonging to the estate of Zimmerman was worthless; and thereupon, on the 10 December, 1877, the executors of Zimmerman, for the nominal consideration of $4.00, executed a release of the equity of redemption in favor of one Arthur B. Harris, who, it is admitted, was a mere trustee for the respondent Hime.

On the 15th day of January, 1879, Harris, by the direction of Hime, conveyed to one Robert Quinn, who, it is admitted, was also a trustee for Hime. Subsequently to the execution of this last deed Hime contracted to sell the mortgaged lands to Ann Mackay for the price of $5,500, which was to be paid and satisfied by the conveyance by Mrs. Mackay to Hime of other property valued at that amount, and accordingly on the 6th day of May, 1879, Quinn, by the direction of Hime, conveyed the property to one William Hope, who, it is admitted, was a trustee for the purchaser, Mrs. Mackay; and Hope afterwards, on the 8th of January, 1880,

1887

McLEAN v. WILKINS.

Strong J.

conveyed the same lands absolutely to his *cestui que trust* Ann Mackay. The property, the conveyance of which was to form the consideration for the sale by Hime to Mrs. Mackay, was duly conveyed by the latter to Hime and was by him afterwards sold for the price of $6500 as I gather from Hime's own evidence. The conveyances were all duly registered and Mrs. McKay, so far as any equitable right of the present appellant is concerned, appears to have been a purchaser for valuable consideration without notice of the equity now asserted by the appellant and which will be hereafter explained. Previously to the assignment by Selina Cameron to the respondent Wilkins (as a trustee for Hime) of the 9th October 1880 already stated, Mrs. Cameron had filed her bill against Mrs. McKay, Romaine the original mortgagor, and the respondent Hime, alleging that she was an assignee of the mortgage of the 23rd of January 1856, and praying that the mortgaged lands might be sold for the satisfaction of her debt. To this bill Hime filed his answer put in under oath in which he swore as follows:—

2. I say that I have a lien upon the said mortgage in the bill mentioned and that the same was deposited with me on behalf of the late Chief Justice McLean, and of the said Archibald G. McLean, both in the bill mentioned, to secure the payment to me of the sum of four hundred and one dollars and twenty three cents, and interest thereon from the 26th day of April, in the year of Our Lord one thousand eight hundred and sixty four, the whole of which is still due to me.

3. The said mortgage was so deposited with me and pledged as aforesaid, on or about the said twenty sixth day of April one thousand eight hundred and sixty four.

4. The plaintiff had actual notice of such deposit and of my said claim and lien before the assignment to her of the said mortgage in the bill mentioned.

5. I submit that I am entitled to be paid the said sum and interest and the costs of this suit before I am called upon to deliver up the said mortgage to the plaintiff.

This suit was never brought to a hearing but was compromised by Hime who paid off Mrs. Cameron and

thereupon took the assignment of the 8th October, 1880, to the respondent Wilkins already stated. On the 5th of December, 1859, the Bank of Upper Canada having recovered a judgment against the executors of Zimmerman the sheriff, under a writ of *fi. fa.* issued thereon, assumed to sell the mortgaged lands, and the bank assumed to purchase the same and took from the sheriff a deed poll to carry out the sale, but such sale being wholly void and abortive according to the decisions of the Ontario courts, inasmuch as in the state of the statute law then existing an equity of redemption could not be sold under an execution against executors, the crown in whom all the estate and assets of the Bank of Upper Canada had become vested by statute, in order to waive any rights under the sheriff's deed on the 9th March, 1878, for the nominal consideration of one dollar, released the lands to Arthur B. Harris, as a trustee for the respondent Hime.

On the 28th of December, 1877, Catherine C. Heward, who it was supposed had some title to the mortgaged lands paramount to the mortgage by Romaine to Cameron, also by a deed of release of that date for the nominal consideration of one dollar released the same lands to Arthur B. Harris as a trustee for the respondent Hime.

In this state of facts and title the respondent Hime in the year 1881 commenced the present suit at first in the sole name of his trustee the respondent Wilkins (though Hime himself was afterward added as a plaintiff by amendment), as the assignee of the derivative mortgage made by the appellant to Mrs. Cameron on the 8th of May, 1880, already stated, praying a foreclosure in default of payment of the amount of the debt thereby secured and interest accrued thereon. The appellant filed an answer and supplemental answer in which he set up

1887

McLEAN v. WILKINS.

Strong J.

in substance the facts hereinbefore stated so far as the same are material, and claimed to be paid the sum produced by the sale of the property acquired by Hime from Mrs. Mackay. A replication having been filed, the cause came on to be heard before Mr. Justice Ferguson, when the fact that the release of the equity of redemption was obtained from the executors of Zimmerman in the manner hereinbefore mentioned was proved, and the other facts, deeds and documents before stated having also been clearly established, the learned judge, on the 9th December, 1882, pronounced the usual foreclosure judgment on the footing of the derivative mortgage of the 8th of May, 1880, made by the appellant to Selina Cameron, viz: that in default of payment within the usual period of the principal debt and interest originally due to Selina Cameron and assigned to respondent Hime, the appellant should be foreclosed as regarded his interest in the original mortgage and that in the event of redemption the respondents should re-assign to the appellant the original mortgage made by Romaine. The cause having been transferred from the Chancery to the Common Pleas Division, the appellant appealed to the latter Division sitting in banc, and on the 27th of June, 1883, a judgment was pronounced in that appeal allowing the same, and referring it to the official referee to take an account and ascertain how much of the value of the land received by Hime from Mrs. Mackay was to be attributed to the equity of redemption in these mortgaged lands, and that after deducting from such amount the sums due upon the mortgage by deposit made by the appellant to Hime in April, 1864, and that due upon the mortgage to Mrs. Cameron of the 8th of May, 1880, Hime should pay the balance to the appellant together with his costs.

From this judgment the respondent appealed to the

1887

McLEAN v. WILKINS.

Strong J.

Court of Appeal, which court on the 4th of November, 1886, pronounced an order whereby the appeal was allowed, the judgment of the Common Pleas Division reversed and that of Mr. Justice Ferguson restored with costs. The appellant has now appealed to this court.

There can be no doubt or question that Hime, when in 1877 he obtained the release of the equity of redemption from Zimmerman's executors, was a derivative mortgagee by deposit of the original mortgage made by Romaine. Hime's own evidence at the trial is amply sufficient to establish this,—moreover in the extract from his answer filed in the suit brought by Mrs. Cameron, before set out, he distinctly swears that the mortgage was deposited with him as a security for the money lent by him to Thomas McLean for the use of the present appellant. Further, in an action of detinue brought by the appellant against Hime in the Court of Common Pleas, *McLean* v. *Hime* (1), as far back as 1876, to recover the mortgage deed, it was determined by that court in banc, upon a motion to enter a verdict for the defendant in the action, that Hime was a mortgagee of the principal mortgage under the transaction with Thomas McLean and entitled to retain the mortgage deed against the present appellant as a security for the amount of his advance of $401 and interest from the 26th of April, 1864, the court holding that Thomas McLean acted in the transaction with the privity and assent and as the agent of the appellant.

The question is then resolved into a pure question of equity, namely, was the appellant, in addition to his clear right to redeem Hime in respect to both the two sub-mortgages, viz; that originally made to Hime himself by deposit, and that of the 8th of May, 1880, made to Mrs. Cameron and assigned by her to Hime,

(1) 27 U. C. C. P. 195.

1887

McLEAN v. WILKINS.

Strong J.

entitled to an account of the money which had come to his hands as the proceeds of the sale of the property received by him from Mrs. MacKay as the consideration for the sale to her of the mortgaged property. In consequence of the sale to Mrs. MacKay, a purchaser for value without notice, the recovery of the specific property obtained by the release of the equity of redemption by Zimmerman's executors had become impossible and the appellant was therefore, on well established principles, entitled to enforce any equity which he had against the monies which had come to the hands of Hime as its produce or rather to the money into which the property received from Mrs Mackay had been further converted by sale.

The Common Pleas Division based their judgment entirely upon the ground that Hime had obtained the release of the equity of redemption by asserting himself to have the control of the original mortgage, and by alleging that the equity of redemption was worthless. Although these representations no doubt greatly strengthened the case of the appellant and now constitute a good ground for giving him costs he might not otherwise have been entitled to, they were not, I think, essential to the relief which the judgment of the Common Pleas Division gave him, for irrespective of these representations his character of a derivative mortgagee was by itself sufficient to disentitle him to retain for his own benefit as against the appellant asking to redeem, any estate in the mortgaged lands which he had acquired whilst he held the mortgage made by deposit in April, 1864.

In order to entitle the appellant to redeem any acquisition in respect of the same land as that comprised in the mortgage as well as the mortgage itself, it was not incumbent on him to prove that Hime had made use of the advantage which his position of deriv-

ative mortgagee gave him to obtain such acquisitions or additions, for however innocent he may have been in his dealings with the owner of the equity of redemption his character of sub-mortgagee disabled him from obtaining by purchase or otherwise any interest in the equity of redemption which he could withhold from his mortgagor. A sub-mortgagee stands in a quasi fiduciary position as regards his mortgagor and the broad principle of equity first established in the leading case of *Keech* v. *Sandford* (1) applies to him in all its fulness. It is well established that a mortgagee of leaseholds who is not bound to renew, who may, after the right to renew has lapsed by effluxion of time, obtain with his own money and in his own name a renewal of the lease, holds it nevertheless subject to redemption by the mortgagor. As Lord Nottingham says in *Rushworth's Case* (2):

> The mortgagee here doth but graft upon his stock and it shall be for the mortgagor's benefit.

And see in notes to *Keech* v. *Sandford* (3) and cases there cited (4).

The converse of the same principle also applies, and if the mortgagor obtains a renewal that in like manner enures to the benefit of the mortgagee irrespective of any agreement to that effect (5). The case of a mortgagee of leaseholds obtaining a renewal is manifestly a stronger case than the present, though the principle on which it proceeds is the same, viz: that the mortgagee shall not intercept any advantage which the mortgagor might possibly have derived as the owner of the property mortgaged. In a case like the present it is obvious that the release of the equity of redemption by the executors of Zimmerman in order to avoid the

(1) 1 W. & T. L. C. 46.
(2) Free. Ch. 12.
(3) 1 W. & T. L. C. ed. 5 p. 54.
(4) See also Coote's Mortgages, ed. 1884, vol. 1, p. 267.
(5) *Smith* v. *Chichester*, 1. C. & L. 486.

1887

McLEAN v. WILKINS.

Strong J.

trouble and annoyance of a suit for foreclosure was an advantage which might have been obtained by the appellant had he retained the mortgage in his own hands. Not merely the original mortgage itself but everything incidental to it was taken by Hime subject to redemption, and if he chose to speculate with the owners of the equity of redemption on the strength of his position as mortgagee he must be considered as doing so for the benefit of his mortgagor and be held accountable to him for the profits he may have made.

I find no English case in which the doctrine of *Keech* v. *Sandford* has been applied in the actual case now before us of a derivative mortgagee obtaining a release of the equity of redemption, but in the American case of *Slee* v. *Manhattan Co.* (1) an equity judge of the highest eminence, Chancellor Walworth, unhesitatingly applied the doctrine to a case precisely similar to the present that of a derivative mortgagee purchasing the equity of redemption. The learned judge in that case says :

> Again the purchase of *Frear & Hallowell's* equity of redemption accrued to the benefit of Slee on the well known principle of equity that where the mortgagee has gotten the renewal of a lease or obtained any other advantage in consequence of his situation as such mortgagee the mortgagor coming to redeem is entitled to have the benefit thereof.

Nothing can be clearer or more apposite than this; it exactly applies to the facts of the present case, and confirms me in the conclusion which I should otherwise certainly have arrived at on the general principles enunciated in *Keech* v. *Sandford* and the numerous cases which have followed that authority.

I am of opinion that the appellant is entitled to a reversal of the order of the Court of Appeal and to have a judgment entered in the original court declaring him entitled to redeem Hime in respect of the purchase

(1) I Paige Ch. 80.

1887

McLEAN v. WILKINS.

Strong J.

of the equity of redemption, and directing an account of how much of the money derived by Hime on the sale or conversion of the land obtained by him from Mrs. Mackay is to be attributed to the sale by him of lands comprised in the mortgage from Romaine to Cameron with interest from the date of the receipt of such amount, and that from the amount so found due there be deducted what upon the proper accounts being taken may appear to be due to Hime for principal and interest upon the foot of his two mortgages, namely, the mortgage by deposit of the 26th April 1864, and that by the appellant to Mrs. Cameron of the 8th of May 1880, and that any residue which may remain after such deduction be paid to the appellant and that the appellant be paid his costs in this court and in all the courts below.

Appeal allowed with costs.

Solicitors for appellant: *Blake, Lash, Cassels & Holman.*

Solicitors for respondents: *Edgar & Malone.*

1886

* Feb. 17.

MARIA KEARNEY (PLAINTIFF),.....APPELLANT;

AND

THE HON. SAMUEL CREELMAN AND ALEXANDER P. REID (DEFENDANTS) ..... } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Will—Devisee under—Mortgage by testator—Foreclosure of—Suit to sell real estate for payment of debts—Decree under—Conveyance by purchaser at sale under decree—Assignment of mortgage—Statute confirming title.

A. M. died in 1838 and by his will left certain real estate to his wife, M. M., for her life, and after her death to their children. At the time of his death there were two small mortgages on the said real estate to one H. P. T. which were subsequently foreclosed, but no sale was made under the decree in such foreclosure suit.

---

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

1886

KEARNEY v. CREELMAN.

In 1841 the mortgages and the interest of the mortgagee in the foreclosure suit were assigned to one J. B. U. who, in 1849, assigned and released the same to M. M.

In 1841 M. M., the administrator with the will annexed of the said A. M., fyled a bill in Chancery under the Imperial Statute 5 Geo. 2 ch. 7, for the purpose of having this real estate sold to pay the debts of the estate, she having previously applied to the Governor in Council, under a statute of the Province, for leave to sell the same, which was refused. A decree was made in this suit and the lands sold, the said M. M. becoming the purchaser. She afterwards conveyed said lands to the Commissioners of the Lunatic Asylum, and the title therein passed, by various acts of the Legislature of Nova Scotia, to the present defendants.

M. K., devisee under the will of A. M., brought an action of ejectment for the recovery of the said lands, and in the course of the trial contended that the sale under the decree in the Chancery suit was void, inasmuch as the only way in which land of a deceased person can be sold in Nova Scotia is by petition to the Governor in Council. The validity of the mortgages and of the proceedings in the foreclosure sale were also attacked. The action was tried before a judge without a jury and a verdict was found for the defendants, which verdict the Supreme Court of Nova Scotia refused to disturb. On appeal to the Supreme Court of Canada:—

Held, affirming the judgment of the court below, that even if the sale under the decree in the Chancery suit was invalid, the title to the land would be outstanding in the mortgagee or those claiming under her, the assignment of the mortgages being merely a release of the debts and not passing the real estate, and the plaintiff, therefore, could not recover in an action of ejectment.

Semble, that such sale was not invalid but passed a good title, the Statute 5 Geo. 2 ch. 7 being in force in the province. Henry J. dubitante.

Held, also, that the statute cap. 36 sec. 47 R. S. 4th series (N. S.) vested the said land in the defendants if they had not a title to the same before. Henry J. dubitante.

APPEAL from a decision of the Supreme Court of Nova Scotia (1) sustaining a verdict in favor of the defendants.

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

T. J. Wallace for the appellants.

McLennan Q.C. and *Graham* Q.C. for the respondents.

(1) 6 *Russ.* v. *Geld.* 92.

1886

KEARNEY v. CREELMAN.

Ritchie C.J.

Sir W. J. RITCHIE C.J.—I can see no difficulty in this case. It is clear that there was a decree made by the Court of Chancery foreclosing the mortgage, and that the court decreed a sale of this property; it is clear that the sale was made professing to be a sale under the decree passed for the purpose of settling the estate and making this land available for payment of the mortgage. The sale was made and the property duly conveyed by the master's deed. After the property was so conveyed, that closed the transaction as to the devisor and those claiming under him.

The transfer to Mrs. McMinn from Uniacke was evidently for the purpose of preventing this mortgage from being, as it were, a blot upon the title.

After this property was conveyed to Mrs McMinn she conveyed to the Commissioners of the Lunatic Asylum, and by various acts of the legislature it passed to the board of works and then to the Commissioners of Public Works and Mines; and, in the course of legislation which took place, the title to this land was declared, not only to be confirmed in them, but vested in them in fee simple, so that the defendants now hold by a statutory title. But assuming this was not so, as pointed out in the argument, the ground on which the court below proceeded must prevail, for if the title was not in Mary McMinn when she conveyed to the Commissioners of the Lunatic Asylum it must be in Henrietta Phoebe Tremain or those claiming under her and so the plaintiff failed to show any title to the *locus in quo* to enable her to recover in this action of ejectment.

The appeal must be dismissed with costs.

STRONG J.—It is clear that there is no foundation for this appeal. The plaintiff makes out a *primâ facie* case by proving that Andrew McMinn was, at the time of his death, in possession of this land, which is presump-

1886

KEARNEY v. CREELMAN.

Strong J.

tive evidence of his seizin in fee, and by further proving the will of Andrew McMinn by which this property, subject to the widow's life estate, was devised to the plaintiff in fee. But this *primâ facie* case is met by the defendants as follows. It is proved that the legal estate passed to the mortgagee, Miss Tremaine, and it never passed out of her unless the master's deed was operative, for the deed of the 16th October, 1841, whereby the mortgagee Miss Tremaine, transferred the mortgages to James Boyle Uniacke, did not pass any estate in the land, being, apparently, merely intended as a release or extinguishment of the mortgage debt, and therefore, if the deed executed by the master (by which he assumed to convey the land to Mary McMinn as having been sold under the decree in the administration suit) is inoperative, the legal estate is still outstanding in the real representatives of the mortgagee. If, on the other hand, the sale was valid and effectual, then it is equally clear that the legal estate is not in the plaintiff, but in the defendants under the conveyance by master Nutting to Mary McMinn dated the 31st December 1842, made pursuant to the decree in the administration suit, and her subsequent conveyance of the 20th July 1853 to the Commissioners for the Asylum. Therefore, "*quacunque via datâ*," the legal estate is shown not to be in the plaintiff, who cannot therefore recover in ejectment; for, whatever rights she might have in a court of equity, no effect can be given to them in this action. I should add, however, that I have no doubt the sale under the decree was perfectly good; the Imperial statute 5 Geo. 2 cap. 7 authorises the sale of lands in equity for the payment of debts in all British colonies; no statute is shown to have been passed in Nova Scotia whereby the law so enacted was in any way altered: the sale having been regularly made, the master had power to convey the legal estate

in the lands sold under the decree, for such power is expressly conferred upon a master in equity by the statute 3–4 W. 4 cap. 52 sec. 8.

Further, the statute of 1874 is alone a sufficient defence to this ejectment, for it expressly vests the estate in the lands sought to be recovered in the defendants, in fee simple.

The appeal should be dismissed with costs.

FOURNIER J.—Concurred.

HENRY J.—The plaintiff having made a *primâ facie* case the difficulties are in connection with the defence.

The property in question was, at the time of the death of Andrew McMinn the testator who was the husband of Mary McMinn and father of the plaintiff, encumbered by two mortgages to Miss Tremaine; she subsequently assigned them to James Boyle Uniacke and he assigned them to Mary McMinn. I am of the opinion that thereby the legal estate passed to Mary McMinn. She then, in my opinion, took the title as a tenant for life under the will. There was, however, a decree of foreclosure made at the instance of the mortgagee, but no sale was made under it, and Mary McMinn became entitled, under the assignment from Uniacke, to the benefit of the decree, but never acted on it.

The property was, however, finally sold for the payment of debts under the provisions of the Imperial Statute 5 Geo. 2 cap. 7. It is contended that, inasmuch as the Legislature of Nova Scotia had passed an act which rendered it necessary to the valid sale of lands of a deceased person that an order for the same should be obtained from the Governor in Council, the Imperial statute ceased to have operation in Nova Scotia, and that an application for that purpose having been refused by the Governor in Council the decree for the

1886

KEARNEY v. CREELMAN.

Henry J.

sale made by the Court of Chancery was invalid. I am rather inclined to sustain the contention, but as the rest of the court take a different view I need give no decided opinion as to it. If, however, that contention can be sustained, then I am of opinion that, apart from the purchase by Mary McMinn at the sale by the master and the conveyance by him to her, she held as a tenant for life under the will. If not, then the plaintiff cannot succeed in an action at law, but might possibly succeed in a court of equity, and obtain a declaration of that court that Mary McMinn, under the peculiar circumstances, took as a tenant for life. As the rest of the court are of opinion that the statute passed by the Legislature of Nova Scotia in 1874 vests the title of the lands in question in the defendants in fee simple, any discussion of the question would be of no practical use, but I cannot arrive at the conclusion that an act of that kind can have the effect of transferring title from one party to another, and the act should be construed as intended only to transfer the title, such as it was, from one public body to another, or rather from one body of trustees to another. The appeal, however, will be dismissed, although, in my opinion, it should be allowed.

TASCHEREAU J.—Was of opinion that the appeal should be dismissed.

GWYNNE J.—To my mind this case is quite clear. The sale under the decree for the administration of the estate of McMinn appears to me to have been quite good. Then the statutes vest the land in the Commissioner of Works. But if there were anything defective in these proceedings, the mortgage would remain with a decree of foreclosure thereof made which is enrolled and unreversed. The contention that Mrs. McMinn took, as tenant for life, a release of the mort-

1886
KEARNEY
v.
CREELMAN.
Gwynne J.

gage, which extinguishes the mortgage and brings in again her tenancy for life and the estate in remainder, is fallacious, for the release was made to her, not as tenant for life nor while that tenancy existed, but after it had become extinguished by the sale in the administration suit, and to her as and when tenant in fee simple in virtue of that sale.

The present plaintiff has clearly no legal estate whatever in the premises to recover which the suit is brought, and the appeal must be dismissed.

Appeal dismissed with costs.

Solicitor for appellant: *Thomas J. Wallace.*

Solicitors for respondents: *Graham, Tupper, Borden & Parker.*

(NOTE)—In this case application was made to the Judicial Committee of the Privy Council for leave to appeal from the decision of this court, which leave was refused.

GILBERT JONES, WILLIAM VALENTINE, JOHN GARRATT, ADAM HENRY GARRATT, JOHN STANLEY WHITE, WALTER S. VARNEY, LEVI V. BOWERMAN, WILLIAM BRANSCOMBE, WILLARD GARRATT, LEVI VARNEY, WALTER LEAVENS, NATHANIEL SWEETMAN, A. M. OUTWATERS, RALPH P. JONES, AND AMOS BOWERMAN (DEFENDANTS) ..... } APPELLANTS;

AND

JOHN T. DORLAND, STEPHEN W. WHITE, ANTHONY T. HAIGHT AND ANTHONY HAIGHT, CORY B. CRONK, AND BENNETT BOWERMAN (PLAINTIFFS)..... } RESPONDENTS.

1886
*Nov. 17.
1887
*May 2.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Title to land—Society of Friends, or Quakers—Lands held in trust for—Authority of governing body.

The supreme or governing body of the Society of Friends, or

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

1886

JONES
v.
DORLAND.

Quakers, in Canada, as well in respect to matters of discipline as to the general government of the society, is the Canada yearly meeting.

The Canada yearly meeting having adopted a book of discipline which certain members of the society refused to accept these dissentient members, therefore, could not hold, nor exercise any right over, property granted to a subordinate branch of the society to which they had formerly belonged.

Judgment of the court below affirmed.

APPEAL from the decision of the Court of Appeal for Ontario (1); reversing the judgment of Proudfoot J. in the Chancery division (2) in favor of the defendants.

The material facts of the case, which are more fully set out in the report in the Chancery Division, are as follows—

The plaintiffs are the trustees of the West Lake Monthly Meeting of Friends duly appointed pursuant to R. S. O. ch 216 and sue on behalf of all the members of the said monthly meeting.

By deed dated the 14th May, 1821, and registered 18th February, 1829, Jonathan Bowerman and John Bull, in consideration of $60, bargained and sold to Jonathan Clark, Daniel Haight and Gilbert Jones, trustees of the said West Lake Monthly Meeting of Friends and to their successors in trust for said monthly meeting, all that certain parcel or tract of land situate lying and being in the township of Hallowell in the county of Prince Edward and province of Ontario, containing six acres (describing them), to have and to hold said lands to said trustees of said monthly meeting for the time being and to their successors in trust as said meeting shall from time to time see cause to appoint for the only use and benefit of said monthly meeting.

By a deed dated 14th December, 1835, which recites the deed of 1821 and the act 9 Geo. IV. Ch. 2 (which limits the quantity of land to be held in trust for the purposes mentioned in the act to five acres), Jonathan

(1) 12 Ont. App. R. 543. (2) 7 O. R. 17.

1886

JONES v. DORLAND.

Bowerman, one of the grantors named in the deed of 1821, purported to convey three acres (being half the land granted by the deed of 1821) to Jonathan Clark and Gilbert Dorland, trustees of the West Lake Monthly Meeting of Friends, and to their successors, in trust for the said Meeting "so long as the members constituting it shall remain and be from time to time continued in *religious unity* with the Yearly Meeting of Friends (called Quakers) as now established in London, Old England, and no longer."

The Society of Friends (called Quakers) is one body of Christians composed of Yearly Meetings with their subordinate branches in England, Ireland, the United States and Canada.

In 1821 and down to 1867 the West Lake Monthly Meeting was under the jurisdiction of the New York Yearly Meeting. In 1867 the New York Yearly Meeting, with the consent and approbation of the various other yearly Meetings of Friends, set off the Canada Yearly Meeting, to which, through the West Lake Quarterly Meeting, the West Lake Monthly Meeting has been since and is now subordinate.

In 1821 and down to 1859 the New York Discipline of 1810 as from time to time altered and amended by the Yearly Meeting was in force in the West Lake Monthly Meeting. In 1859 the New York Yearly Meeting revised their Discipline, and the said Discipline of 1859 was in force in Canada until the constitution of the Canada Yearly Meeting in 1867.

In 1867 the Canada Yearly Meeting on the 2nd day of its first session adopted the New York Discipline of 1859.

In 1877 the New York Yearly Meeting again revised their Discipline and the said Discipline so revised was adopted by the Canada Yearly Meeting in 1880.

The defendants and others members of the Westlake

1886
JONES
v.
DORLAND.

Monthly Meeting, claimed that the Discipline adopted by the Yearly Meeting in 1880 was not regularly adopted for want of unity among the members and other informalities, and also that it was an entire departure from the established doctrines and usages of the society, and they constituted themselves a separate society with its own yearly and subordinate meetings, and elected from among themselves trustees for the above described property. Eventually, the plaintiffs had to bring this suit to determine which body was, in law, the Westlake Monthly Meeting.

On the hearing before Mr. Justice Proudfoot judgment was given for the defendants the learned judge holding that as the right to property was in question he was obliged to inquire into the religious opinions of the opposing parties to see who were the beneficiaries, and he found that the defendants were, and the plaintiffs were not, in religious unity with the Yearly Meeting of Friends as established in London, England, when the trust was created. The Court of Appeal reversed this judgment, and held that the criterion as to the Monthly Meeting was only its continued existence as such, and that depended upon its adherence to the supreme body, the Yearly Meeting. The defendants then appealed to the Supreme Court of Canada.

MacLennan Q. C. and *Arnoldi* for the appellants cited *Attorney General* v. *Jeffrey* (1); *Attorney General* v *Pearson* (2).

S. H. Blake Q. C. and *Clarke* for the respondents referred to *Williams* v. *Bishop of Salisbury* (3); *Attorney General* v. *Gould* (4); *White lick Quar. Meeting* v. *White lick Quar. Meeting* (5); *White* v. *Nelles* (6).

SIR W. J. RITCHIE C.J.—I agree with the conclusion

(1) 10 Gr. 273.
(2) 3 Mer. 353; 7 Sim. 290.
(3) 2 Moo. P. C. (N. S.) 375.
(4) 28 Beav. 485.
(5) 89 Ind. R. 136.
(6) 11 Can. S. C. R. 587.

arrived at by the Court of Appeal, namely, that the adoption of the discipline of 1877 was matter with which it was competent for the yearly meeting to deal as having the final and controlling jurisdiction. So far as I can understand the yearly meeting is recognized as the tribunal of last resort; its decisions on all matters within its jurisdiction are conclusive, and all true Friends are bound by them; and the matter in question was properly and regularly dealt with and determined by that meeting, in accordance with the mode in which the doings of yearly meetings of Quakers are conducted and the results of them ascertained, and without objection declared and minuted by the clerk, the regular officer in that behalf, or refusal to acquiesce or submit, and so substantial unanimity was secured; no alterations were made in the practice and discipline which the yearly meeting was not competent to make and effect, and if it was not properly and regularly dealt with and adopted by that meeting, then, as suggested by Mr. Justice Patterson, if the adoption and promulgation of that book of discipline was not the act of the meeting matters, so far as the meeting was concerned, remained as they were. In this case I can discover, as Chief Justice Shaw expresses it:

> No such departure from the fundamental principles on which the society is founded on the part of the yearly meeting, the responsible head and representative of the whole body, in fact the society itself, so deep and radical as to destroy its identity with the Society of Friends who had been invested by law with the enjoyment of property and civil rights.

The attempt to set up a separate quarterly meeting at Pickering, ignoring the yearly meeting regularly appointed to meet the following year at Norwich, and not in the regular order of the society, was, so far as I can understand the case, wholly unwarranted and contrary to discipline and usage, and therefore irregu-

1887

JONES v. DORLAND.

Ritchie C.J.

lar and void, not having been formed according to discipline, but "to avoid the rightful authority and controlling action of the yearly meeting to which they were subordinate," and in doing so the defendants put themselves out of the society and so ceased to be in unity with the Society of Friends, and therefore cannot properly claim to be the Westlake Monthly Meeting for whose use and benefit this property was purchased.

I therefore think that the plaintiffs are the persons who now truly and lawfully answer the description of the Westlake Monthly Meeting of Friends, and as such represent the real Westlake Monthly Meeting, which is really the only point in controversy.

This case has been so fully and ably discussed in the judgment of the court below and in the authorities cited, particularly those decisions of the American courts which have so exhaustively and learnedly dealt with the history, constitution, doctrine, modes of proceeding, discipline and practice of this body known as the Society of Friends, or Quakers, and with all the principles by which this case must be governed, that I feel that I can throw no new light on the subject, and I therefore content myself with thus shortly stating the conclusions at which I have arrived. Therefore, I think this appeal should be dismissed.

STRONG J.—For the reasons given by the learned judges of the Court of Appeal, I am of opinion that this appeal should be dismissed.

FOURNIER J.—Concurred.

HENRY J.—I have arrived at the conclusion, not without a great deal of difficulty, that this appeal should be dismissed. I have failed to find any sufficient evidence of departure from the rules of the society to enable the parties to hold this property.

1887

JONES v. DORLAND.

I think, for the reasons given in the judgment of the court below, that the appeal should be dismissed.

Taschereau J.

TASCHEREAU J.—I am of opinion that the plaintiffs are entitled to the property referred to in their statement of claim, for the reasons given by Patterson J. in the Court of Appeal. I would dismiss the appeal.

GWYNNE J.—Concurred.

Appeal dismissed with costs.

Solicitor for appellants: *G. O. Alcorn.*

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

1886

THE WARDEN AND COUNCIL OF THE TOWN OF DARTMOUTH, (DEFENDANTS) ..... APPELLANTS;

*Feb. 22, 23.
*May 17.

AND

THE QUEEN, ON THE RELATION OF THE MUNICIPALITY OF THE COUNTY OF HALIFAX (PLAINTIFF) RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Rates and assessments—Municipality of County of Halifax—School rates in—Liability of Town of Dartmouth to contribute to—Assessing present ratepayers for rates of previous year—Mandamus—Jurisdiction to order writ of.

Held, Ritchie C. J. dissenting, that the Town of Dartmouth is not liable to contribute to the assessment for the support of schools in the municipality of the County of Halifax.

Held, also, that if so liable a writ of mandamus could not issue to enforce the payment of such contribution as the amount of the same would be uncertain and difficult to be ascertained.

Held, also that the ratepayers of 1886 could not be assessed for school rates leviable in previous years.

Held, per Ritchie C.J. dissenting, that only the City of Halifax is exempt from such contribution, and the Town of Dartmouth is liable.

---

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

1886

DARTMOUTH v. THE QUEEN.

APPEAL from a decision of the Supreme Court of Nova Scotia quashing a return to a writ of mandamus and ordering a preremptory writ of mandamus to issue.

This case has been three times before the court: First on an appeal from the decision of the Supreme Court of Nova Scotia making absolute a rule nisi for a mandamus, in which the majority of this court held that the issue of the writ was in the discretion of the court below. That is reported in 9 Can. S. C. R. 509. It next came before this court on a preliminary objection that a demurrer would not lie to the return to a writ of mandamus. That case is not reported in this court but will be found in the Nova Scotia Reports (1) and Cassels's Dig. (2). The Supreme Court of Canada overruled the preliminary objection and decided that the case must be heard on the merits.

There are two appeals in the present case before this court, in the one case a mandamus having issued to collect from the town of Dartmouth its proportion of the school rates of the County of Halifax for the years 1875 to 1878 inclusive, and the other to collect the rates from 1879 to 1883 inclusive. The two appeals are substantially the same, the first coming before the court on demurrer to the writ of mandamus and the other on a rule to quash the writ.

The facts of these appeals, and the several statutes on which the claim is set up on the one side and resisted on the other are fully set out in the judgment of the Chief Justice in the former report (3), and in the present judgments.

Henry Q.C. and *Graham Q.C.* for the appellants referred to the various Nova Scotia statutes bearing on the case and cited the following cases. *The Queen*

(1) 5 Russ. 8 Geld. 311. (2) P. 285.
(3) 9 Can. S. C. R. 509.

v. *Read* (1); *Rex* v. *Justices of Flintshire* (2); and *Newton* v. *Young* (3).

Sedgwick Q.C. and *Gormully* for the respondents cited the following: *The Queen* v. *Mayor of Maidenhead* (4); *The Queen* v. *Churchwardens of All Saints, Wigan* (5); and *Worthington* v. *Hulton* (6).

SIR W. J. RITCHIE C.J.—I may say in this case, that I have taken a great deal of pains to investigate this matter, and have come to the conclusion that the town of Dartmouth is liable to be assessed and that the city of Halifax is exempt.

I heard nothing on the argument which has altered my mind in this respect, and I think nothing has been shown in the return to the writ of mandamus which could do so.

I think the appeal should be dismissed.

STRONG J.—I concur in the judgment prepared by Mr. Justice Gwynne.

FOURNIER J.—I regret that I have not been able to come to the conclusion arrived at by the Chief Justice. I agree with Mr. Justice Gwynne, that the town was liable for this claim.

HENRY J.—This is an appeal from a judgment of the Supreme Court of Nova Scotia quashing the appellant's return to a writ of mandamus and awarding the issue of a peremptory writ of mandamus.

Two questions suggest themselves for consideration:

1st. Whether the Town of Dartmouth is or is not liable to the county assessment for the support of the schools in the County of Halifax outside of the City of Halifax; and

(1) 13 Q. B. 524.
(2) 5 B. & Al. 761.
(3) 1 B. & P. (N. R.) 187.
(4) 9 Q. B. D. 494.
(5) 1 App. Cas. 611.
(6) L. R. 1 Q. B. 63.

1886

DARTMOUTH v. THE QUEEN.

Henry J.

2nd. If so liable, will a writ of mandamus lie to enjoin the appellants to levy, collect, and pay over the same to the Treasurer of the Municipality of the County of Halifax.

I will deal with each in its order :—

The mandamus nisi is to enjoin the Council of the Town of Dartmouth to levy rates for the years 1874, 5, 6, 7 and 8.

When Dartmouth was incorporated the schools in Nova Scotia were supported :—

1st. By a legislative grant.

2nd. By a county rate sufficient to yield a sum equal to 30 cents a head of the inhabitants to be collected each year with the county rates ; and

3rd. A special rate to be imposed by the majority of the ratepayers in each school section.

The statute was passed in 1866 and specially exempts the City of Halifax from its operation as regards the imposition of county or sectional rates in regard to the schools therein, and this provision was made in the act, the act for its incorporation having been passed many years before.

The 2nd section of that act provides that :—

The Clerk of the Peace in each County, except as hereinafter provided in relation to the City of Halifax, shall add to the sum annually voted for general county purposes at the General Sessions, a sum sufficient after deducting costs of collection and probable loss to yield an amount equal to thirty cents for every inhabitant of the county according to the last census preceding the issue of the county rate-roll, and the sum so added shall form and be a portion of the County Rates. One half of the sum thus raised shall be paid semi-annually by the County Treasurer upon the order of the Board of School Commissioners for the county. One half the amount provided to be raised annually as aforesaid, shall at the close of each half-year be apportioned to the Trustees of Schools conducted in accordance with this act, and the Act hereby amended, to be applied to the payment of teachers salaries. And each school shall be entitled to participate therein according to the average number of pupils in attendance and the length of time in operation but shall receive no

allowance for being in session more than the prescribed number of days in any one half-year.

By the 19th section the City of Halifax is made one school section and under Commissioners and the city was required to provide all monies required for its schools in addition to the annual grant provided by the legislature.

The Town of Dartmouth was incorporated in 1873, and the provision for the support of its schools appears to me substantially the same as previously made for the City of Halifax.

By the 27th section of the act of incorporation it is provided that the Council of the Town shall have jurisdiction over the support and regulation of the public schools, the appointment of teachers and the regulating and collection of assessments.

By section 28 the council is to vote, assess, collect, receive, appropriate, and pay all monies required, amongst other things, for its schools; and to have all the powers relating thereto previously vested in the sessions, grand jury school meeting and town meeting. By the 36th section the town was made a separate school section and was to have for its schools the expenditure of all school rates raised within its limits. The 37th section connected with the town for school purposes two adjoining school districts, and it was provided that the proportion of the legislative grant to which they would be entitled should be paid to the town, and the town should have the right to impose and levy the county school assessments and all school taxes on such districts, and collect the same in the same manner as if such districts formed part of the town.

By the 41st section the council was declared to have the regulating and ordering of all monies to be paid out of funds in the hands of its treasurer.

Here then is provided the whole system for the sup-

1886

DARTMOUTH v. THE QUEEN.

Henry J.

port and management of the schools of the town. It is clear that in the provision for schools no part of the funds is stated to be derived from any participation of the county school funds raised by the rate of 30 cents a head. The provision as to the latter requires the county treasurer to pay semi-annually one half of the funds raised by the assessment of thirty cents, upon the order of the school commissioners, to be applied and appropriated by them. By the act of incorporation the town ceased to be within the jurisdiction of any board of school commissioners; and the council of the town, although exercising the same functions as school commissioners, are not known as or termed such; and besides, after payment on the order of the school commissioners by the county treasurer, the same section provides that at the close of each half year the moneys were to be apportioned by the school commissioners to the trustees of schools conducted in accordance with that act, and the act by it amended, to be applied to the payment of teachers' salaries. Now, by the act of incorporation a different system for schools in the town is provided, and the schools there cannot be said to be conducted according to the school act as applicable to counties and therefore are not within the category referred to as entitled to participate. As a matter of fact the town did not so participate. It has otherwise paid for and sustained its schools, and this, to my mind, was the intention of the legislature when enacting the incorporation of the town. The town has supported its own schools without asking for any participation in the county assessment, and it is now sought to make it contribute to the support of schools outside. If it assessed, collected and paid to the county treasurer the assessment of thirty cents a head justice would require that its proper proportion should be paid back in aid of its schools. According to the

provisions I have quoted from the school act the town could not participate for, amongst others, the reason that its schools are provided to be sustained in a manner not in accordance with that act, and that consideration is evidence that no such rate was intended to be levied on the inhabitants of the town.

Further the 28th section before referred to provides that the council should vote, assess, collect, receive, appropriate and pay all monies required for its schools. The only outside aid provided was its share of the legislative grant Beyond its share of such grant it was required, as in the case of the City of Halifax, to support its own schools, and by the 36th section it was made a separate school section and to have for its schools the expenditure of all school rates raised within its limits; and the 47th section gave the regulating and ordering of all monies to be paid by its Treasurer to the council of the town. If the council was to vote, assess, collect and appropriate all monies required for its school it could not participate in the funds raised by any county assessment, and the act having made it, not a school district but a separate school section to support its own schools, and as such, to have the expenditure of all school rates raised within its limits, why should the matter of the assessment of thirty cents be at all applicable to the town? The provisions of the incorporation act in regard to schools are essentially different from those in the general school act. And the former substantially repeals the provisions of the latter as to the town.

Had the town been incorporated when the general school act was framed and passed I have not the slightest doubt but in the section providing for the county assessment Dartmouth would have been excepted as well as Halifax. It is true that the fourth series of the revised statutes was in force during the

1886

DARTMOUTH v. THE QUEEN.

Henry J.

years for which it is claimed that the town was liable; and it might have been exempted like the City of Halifax; but if under the original school act the town was liable but under the terms of its incorporation act it would not be liable under the provision for county assessment, though that provision was continued in the fourth series (which may be construed as a re-enactment merely of the original act and not intended as a repeal of any of the provisions of the incorporation act) the latter act being a local act would not be assumed to be affected by a revision of the general and public statutes; but if any doubt existed on that point it would be at once removed by reference to a provision in the 4th series providing for its publication, which enacted that nothing therein contained should affect local acts. I am, in consideration of the legislation on the subject in question, of the opinion that the town was and is wholly exempt from the operation of the section of the school act which provides for county assessment, and that when the legislature by the provisions of its act of incorporation imposed upon it the whole burden for the support of its schools beyond the legislative grant it was so intended.

It has been contended that the words:

As also of all Government and school grants for such schools which grants shall be paid to the town—

following as they do the provision that:

The town shall have the expenditure of all school rates raised within its limits for the schools of the town—

control and effect the operation of the provision preceding them. I am, however, at a loss to discover that they have any effect except to extend the operation of the provision so as to include the expenditure of the Government grants. It is claimed that the words "and school grants" are to be construed as intended to apply to the funds raised by county assessments. In my opinion it would be torturing language

1886

DARTMOUTH v. THE QUEEN.

Henry J.

to do so. The difference between "grants" and "rates" or "assessments" is too well understood and appreciated for any one to assume that the Legislature should so misapply the word "grants," and particularly in the same section which gives to the council of the town the exclusive right of expenditure "of all "school rates raised within its limits." Unless it plainly and irresistibly appeared to be so we cannot think that the Legislature would so stultify itself. Besides, it being patent from the whole of the school act that the only "grants" mentioned were Government grants, I am brought to the conclusion that the word "and" between the words "Government" and "school grants" was unintentionally inserted and that the provision should be read "as also of all Government school grants." If, however, it be read even as including the county assessment of 30 cents, the previous provision is not thereby limited but on the contrary extended. The whole provision was made to confer upon the council the right of expenditure, and if the rate be raised, either as a county assessment or otherwise, within the limits of the town, the council had its expenditure and it was not therefore to go into the general school fund of the county to be applied under the provisions of the act. Reading the act of incorporation with the school act it is not difficult to reach the conclusion that it was fully the intention of the Legislature to apply to Dartmouth the same system for the support of its schools as was then in force with respect to the City of Halifax, and it appears to me difficult to resist that conclusion. I am therefore of opinion that Dartmouth is in no way liable to the municipality of the County of Halifax, and that our judgment should be accordingly.

In case, however, I should be wrong in my conclusion in that respect it is desirable to discuss the other point

1886

DARTMOUTH v. THE QUEEN.

Henry J.

in the case—that in case Dartmouth should be liable as contended for should a peremptory mandamus be adjudged.

It is a high prerogative writ and one of the first principles in regard to it is that it is only allowed when the complaining party has no other remedy, nor is it allowed where issues are necessary to be tried to ascertain the sum really due, if any. If Dartmouth is liable to the county assessment it will not be contended that it is not, as a result, entitled to a distributive share of the funds so raised. By no evidence is it shown, nor is it I presume now capable of being shown, what in each of the years in question that share would have amounted to. The schools in the county have been sustained, as also those in the town, independently of the funds now claimed from Dartmouth. What then is the destination of the money if assessed upon and collected in Dartmouth and paid over to the county treasurer? It cannot be appropriated under the school act, for the object no longer exists and the time for doing so has elapsed. The county school commissioners could not now appropriate it under the terms of the school act. Its legal disposition was required to be made semi-annually for the payment of the teachers employed and serving each year and that could not now be done for their services have been paid for already. Under such, and other circumstances not necessary to be stated, why should a peremptory mandamus be allowed to enforce the assessment for and collection of monies for purposes and objects no longer necessary? Had the municipality of the county been shown to have advanced and paid out under the provisions of the school act the monies now sought to be recovered the case would stand on a different footing, but it is quite clear that such was not done. Dartmouth received nothing during those years from

the county fund and it is not shown that the municipality of the county was called upon to pay or did pay one penny more on account of the default of Dartmouth to contribute its share of the funds to be raised by county assessments. Why then should Dartmouth pay the county anything?

There are, therefore, many nice legal and equitable questions to be adjudicated upon and decided, and if the liability of Dartmouth to the county was established the former would be liable only for the difference between the amount of its liability and the amount it would be entitled to as its distributive share of the funds. Such an adjustment could only be fairly made after a thorough investigation requiring much evidence, documentary and otherwise, and until such was made it would, under the circumstances, be unjust and oppressive to oblige Dartmouth to pay by assessment the whole amount and to trust to future proceedings to obtain its distributive share from the county. Courts never allow a peremptory mandamus to be issued where the interests of the parties are not provided for, and for the reasons given and many others that might be stated I think we would perpetrate a gross wrong to Dartmouth, under the circumstances, if we allowed the writ in this case. I am therefore of opinion that on all points our judgment should be to refuse it.

GWYNNE J.—The question in this case arises upon a demurrer to a return to a mandamus nisi addressed to the municipality of the Town of Dartmouth commanding them, unless they should shew good cause to the contrary, to assess and levy upon and from their ratepayers and to pay over to the treasurer of the municipality of the County of Halifax the sum of $15,976.00, being the aggregate of several sums said to have been apportioned upon the inhabitants of the town by the

1886

DARTMOUTH v. THE QUEEN.

Gwynne J.

clerk of the peace of the County of Halifax in the years 1874, 5, 6, 7 and 1878 respectively, calculated at the rate of thirty cents for every inhabitant of the town, and for which several sums, as is said, the ratepayers of the Town of Dartmouth were in those several years respectively liable according to law to have been assessed to assist in the support of common schools in the County of Halifax, and which several sums so annually apportioned it was the duty, as is said, of the municipality of the town to have assessed upon, and levied from, the ratepayers of the town in each of those years and to have paid over to the treasurer of the County of Halifax when collected, but that they neglected so to do. The points to be determined are two, namely:—

1st. Whether the ratepayers of the municipality of the Town of Dartmouth were, or their property was, liable to contribute to the support of the common schools of the County of Halifax outside of the Town of Dartmouth, during the above years, the 30 cents per head of the inhabitants which is mentioned in the 52nd section of chap. 32 of the 4th series of the revised Statutes of Nova Scotia as is claimed, and

2nd. Apart from the question whether such ratepayers were or not liable to have been rated and assessed in each of the above years for the above purpose, as claimed, whether in view of the matters pleaded in the return to the mandamus nisi, or of any of those matters, a peremptory mandamus should be now granted commanding the municipality to assess their present ratepayers and to levy from them the above sum of $15,976.00 dollars and to pay the same to the treasurer of the County of Halifax.

On the 30th day of April, 1873, when the act incorporating the Town of Dartmouth was passed the provision made for the support of common schools in

the Province of Nova Scotia consisted of three funds:—

1st. A Provincial or Government grant.

2nd. A rate or assessment called the county school rate or assessment which consisted of a rate calculated on the basis of 30 cents for every inhabitant of the respective counties and collected together with the ordinary general county rates, except in the City of Halifax which was a distinct municipality in itself for which special provision was made, and

3rd. A special rate which the majority of the ratepayers in each school section present at a regularly called school meeting were authorised to impose upon the ratepayers of their section. This rate in default of payment was also collected together with the general county rates and the assessment was returned to the general sessions of the county in which the school section in which the special rate was imposed was situate. The statute then in existence in relation to the Provincial or Government grant was 28 Vic. ch. 29, entituled "an Act for the better encouragement of education" and passed on the 2nd of May, 1865, by which act the sum of $6807.00 per annum was granted to the District of the City of Halifax, $3929.00 to the District of Halifax West, $1263.00 to the District of Halifax Shore and $1279.00 to the Rural District of Halifax.

The statute then in existence in relation to the county school rate was 29 Vic. ch. 30, entituled "An "Act to amend the Act for the better encouragement "of education," and passed on the 7th day of May, 1866. By the 2nd section of that act it was enacted as follows:—

2nd. The Clerk of the Peace in each county, except as hereinafter provided in relation to the City of Halifax, shall add to the sum annually voted for general county purposes at the general sessions, a sum sufficient, after deducting costs of collection and probable loss, to yield an amount equal to thirty cents for every in-

1886

DARTMOUTH v. THE QUEEN.

Gwynne J.

habitant of the county, according to the last census preceding the issue of the county rate roll; and the sum so added shall form and be a portion of the county rates, and one-half of the sum thus raised shall be paid semi-annually by the County Treasurer upon the order of the Board or Boards of School Commissioners for the county.

One half of the amount provided to be raised annually as aforesaid shall, at the close of each half year, be apportioned to the trustees of schools conducted in accordance with this act and the act hereby amended to be applied to the payment of teachers' salaries; and each school shall be entitled to participate therein according to the average number of pupils in attendance and the length of time in operation but shall receive no allowance for being in session more than the prescribed number of days in any one half year.

The provision in relation to the special school section rate was contained in the third section of this act but it is unnecessary to set out at large the provisions of this section.

The provision in respect of the City of Halifax was contained in the 19th section and, in short substance, was that the city was as one school section placed under the jurisdiction of a board of commisioners appointed by the Governor in Council, composed of twelve persons, two being residents of each ward in the city; and upon the council of the city was imposed the burden of providing all monies necessary for the support of the schools in addition to the amount provided by the provincial grant. Now, on the 30th of April, 1873, the act 36 Vic. ch. 17 was passed, by which a portion of the County of Halifax was incorporated as the Municipality of the Town of Dartmouth, and the question now is, whether the provisions of that act do not, in equally clear language as is used in the above act 29 Vic., ch. 30 in relation to the City of Halifax, exempt the ratepayers of the Town of Dartmouth from all liability to contribute to the support of common schools in the County of Halifax outside of the town.

1886

DARTMOUTH v. THE QUEEN.

Gwynne J.

The first section of the above act of incorporation defines the limits of the town.

By the 27th section it is enacted that the council of the town, consisting of a warden and six councillors as provided in a previous section, shall have jurisdiction over all the property of the town and over the support and regulation of the public schools and the appointment of teachers, and also over the support of the poor, and regulating and collecting the assessments, and making all contracts relative to matters under their control.

By the 28th section it was enacted that they should vote, assess, collect, receive, appropriate and pay whatever monies should be required for county assessments, poor, school and other rates and assessments, and should have within the town all the powers relating thereto vested in the sessions, grand jury, school meeting and town meeting, and should have and exercise within the town all the powers and authority which within the district previous to the passing of the act were exercised by the sessions, grand jury or town or school meeting or trustees of schools and public property.

By the 36th section it was enacted that the town should constitute a separate school section and that it should have for the schools of the town the expenditure of all school rates raised within its limits.

By the 37th section it was enacted that for all school purposes the district lying between the northern boundary of the town and the lands of the British Government, and the district lying between the southern boundary of the town and Herbert's brook, should form part of the Town of Dartmouth, and that the town should be entitled to receive and be paid the proportion of the Government school grants payable in respect of such districts, and to impose and levy the county

1886

DARTMOUTH v. THE QUEEN.

Gwynne J.

school assessments and all school taxes on such districts and collect the same in the same manner as if such districts formed part of such town. By the 41st section it was enacted that the council should have the regulating and ordering of all monies to be paid out of funds in the hands of the treasurer of the town, and by the 35th section that the school house and all property real and personal which, at the time of the passing of the act, should be public property or should have been held in trust for the Town of Dartmouth should, on the passing of the act, vest in and become the property of the town.

Now the language of this act, as it appears to me, in the plainest possible terms detaches the Town of Dartmouth wholly from the County of Halifax for school purposes and from the control of the boards of school commissioners for the county, and exempts the ratepayers of the town from all liability to contribute the thirty cents for every inhabitant of the town, constituting the county school rate, or any part thereof to the treasurer of the county. The school property situate in the town is transferred to, and made part of, the property of the town, over which absolute jurisdiction and control is given to the town council. To the town council is also given absolute jurisdiction over the support and regulation of the public schools and the appointment of teachers and the assessment and collection and expenditure for the schools of the town of all school rates raised within its limits, comprehending therefore the expenditure of the thirty cents for every inhabitant of the town, if that be a rate which after the passing of the act of incorporation of the town remained imposed upon the ratepayers; all these rates so collected, in the absence of any express provision to the contrary, must naturally be payable into the hands of the treasurer of the town, out of whose

hands no monies can be paid without the authority of the town council, who, having absolute jurisdiction over the support and regulation of public schools and the appointment of teachers are also invested with all the authority, powers and duties which, in relation to that portion of the County of Halifax which is constituted the town of Dartmouth, were, previously to the passing of the act incorporating the town, vested in the boards of school commissioners for the county and the trustees of the public schools of the county. For all school purposes the districts mentioned in the act which abut on the northern and southern limits of the town as defined in the act are made part of the town corporation, which is declared to be entitled to receive and be paid the proportion of the Government school grants payable in respect of such districts and to impose and levy the county school assessments and all school taxes on such districts in the same manner as if such districts formed part of such town. Can any language be plainer than this? It is not that the town hall receive and be paid the proportion of the Government school grants and of the county school assessments payable in respect of such districts, but with the same sentence in which it is said that the town council shall receive and be paid the proportion of the government school grants payable in respect of such districts is coupled the provision that they shall also receive the county school assessment, that is to say, they shall receive the thirty cents for every inhabitant of the districts.

Now, that the Government school grants are received by the town for the support of the schools of the town there can be no doubt; upon what principle then can this other fund, which by the same sentence the town council are authorized to receive, be received by them for a different purpose without express

1886

DARTMOUTH v. THE QUEEN.

Gwynne J.

language clearly defining such different purpose? But instead of such language the section says that the town is entitled to impose and levy this county school assessment (consisting of thirty cents per head for every inhabitant of the districts) and all school taxes in such districts, in the same manner as if the districts were for all purposes, as for school purposes they are, by the act made to form part of the town; that is to say, as it appears to me, that they shall impose and collect these taxes for the support of the schools of the town, and in their character of a board of school commissioners for, and trustees of the common schools of the town, having absolute jurisdiction over the support and management of those schools, and that they shall collect them by the hands of their own collectors, and receive them into the hands of their own treasurer, and be accountable to no one in respect of them but their own constituency, as a separate municipality.

Now, against the above apparently plain construction of express provisions in the statute it is argued that under the 28th section of the act the town of Dartmouth had as clear a right of exemption from liability to the county rate for general purposes, as to which they had not claimed exemption, as of exemption from liability for the county school rate of 30 cents per head, as to which they do claim exemption; and so it was argued that they were liable for both. But the answer to this argument is very simple, namely, that the two rates are very different and are treated as being so in the act, and that the exemption from liability to pay over the school rate to the county treasurer is not claimed solely in virtue of the provisions of section 28 of the act, but in virtue also of the provisions of sections 36 and 37 which give to the Town Council, in the exercise of their absolute jurisdiction over the support and regulation of the public schools of the town vested

1886

DARTMOUTH v. THE QUEEN.

Gwynne J.

in them by the 27th section, the expenditure for the schools of the town of all school rates raised within the limits of the town. But while the act thus gives to the town council absolute jurisdiction and control over all school rates raised within the town, it provides equally clearly (by sections 28 and 42) that the town shall contribute to the sum required for county rates for general purposes, the expenditure of which is not given to the town but is left with the county authorities just as it was before the incorporation of the town; and for this reason the contribution of the town to the sum required for general purposes of the county, when levied, becomes payable to the county treasurer; although, inasmuch as the powers of the general sessions as affecting county assessments are vested in the town council, the latter very probably have the right of defining what the town's share or contribution to the county rate for general purposes shall be; but with this we are not concerned. For the present purposes it is sufficient to say that it is quite a fallacy to hold that of two funds, one of which, when collected, is appropriated to purposes of the county as distinct from the town, and the other to the purposes of the town as distinct from the county, because the former is properly payable into the county treasury therefore the latter must be also.

Moreover, it is to be observed that the act 29 Vic. ch. 30, which imposed the rate of 30 cents for every inhabitant of the county, provides that the rate shall be paid when collected into the hands of the county treasurer and that one half of the sum thus raised shall be paid by him semi-annually upon the order of the board or boards of school commissioners for the county, and that the one half shall semi-annually be apportioned to the trustees of schools conducted in accordance with the act, to be applied to the payment of teachers' salaries. But as the town council have

1886

DARTMOUTH v. THE QUEEN.

Gwynne J.

absolute jurisdiction over the support and management of the common schools of the town and the appointment of teachers, whose salaries therefore they must agree upon and provide, and as they are thus put in the place of a board of school commissioners and trustees of the schools of the town, they could not claim to be nor be recognized as being a board of school commissioners for the county so as to entitle them to demand and receive from the county treasurer, for the schools of the town, any part of the county school rate come to his hands for the support of the common schools of the county, nor can the schools of the town which are conducted by authority of the act of incorporation of the town under the exclusive regulation of the town council as the board of school commissioners for, and as trustees of, the schools of the town, be said to be schools conducted in accordance with the act which regulates the management of the common schools of the county so as to warrant the payment of any portion of the rate received by the county treasurer for support of the schools of the county to the teachers of the common schools of the town who, being appointed by the town council with whom they contract for their services, must look alone to the town council who appoint them for their pay. But it is contended, and this is the chief argument upon which the right of the municipalty of the County of Halifax to the peremptory mandamus asked for is rested, that all these express provisions for the support and regulation of the schools of the town under the control, conduct and management of the town council, as board of school commissioners and trustees of the common schools of the town, and notably the provision that the town council shall have, for the schools of the town, the expenditure of all school rates raised within its limits, are over ruled by a sentence in the 36th section of the act, the considera-

tion of which I have purposely postponed until now for the purpose of first drawing attention to those clauses of the act which, as is contended, are over ruled by the language of the sentence relied upon, and of thus pointing out with greater force what appears to me to be the fallacy of the argument, which is, that a liability by implication is created, which subjects the town council of Dartmouth to the burthen of collecting within the limits of the town the thirty cents for every inhabitant of the town for the purpose of paying over the rate when collected to the county treasurer to be distributed under the provisions of the general act among the schools of the county, and that the only interest which the town council of the town of Dartmouth have in that rate is to receive for the schools of the town a proportion of the whole amount constituted of the thirty cents for every inhabitant of the county, including the inhabitants of the town of Dartmouth, such proportion being calculated, as in the case of the schools of the county outside of the town, upon the average attendance of the pupils at the schools. The sentence relied upon comes immediately after that part of section 86, which says that:—

> The town shall have the expenditure of all school rates raised within its limits, for the schools of the town, as follows: as also of all Government and school grants for such schools, which grants shall be paid to the town.

Now, apart from the improbability of the Legislature imposing on the town and its ratepayers such a burthen as is contended for by the municipality of the County of Halifax, not in express terms but as arising by implication merely, it is to be observed that (coupled as the sentence is with the previous part by the words "as also of") what is intended to be given by the latter part of the clause is the expenditure for the schools of the town of something additional to what by the previous part is given for the same purpose. I have already shown that what

1886

DARTMOUTH v. THE QUEEN.

Gwynne J.

is given by the previous part is the expenditure for the schools of the town of all school rates raised within the limits of the town; the ratepayers of the town can, therefore, be no longer liable to have levied upon them a rate raised within the limits of the town, not for the schools of the town, but as a contribution to the county school rate, to be received by the county treasurer for the support of the common schools of the county, and to be distributed by the board of school commissioners for the county and the trustees of the common schools of the county. The words "school grants," therefore, in the 35th section, can by no possibility be construed as meaning that proportion of the county school rate calculated according to the average attendance of pupils and which would have come to the schools of that portion of the county set apart for the town if the town had never been incorporated; and it is wholly upon the assumption that this is what the words "school grants" as used in the section do mean that the liability by implication which is contended for is rested. The inference and conclusion which in fact do follow from what is expressly said in the section is directly the reverse of what is contended for, namely, that as the town council are beyond all doubt given the control and expenditure of all school rates of every description raised within the limits of the town, they cannot claim (as in point of fact they do not claim and never have claimed) any right to receive for the support of the schools of the town any part of the county school rate coming into the hands of the treasurer of the county, nor can the town or its ratepayers be made liable to contribute to that fund, and this is the construction which, as I think I have shewn, is consistently supported by the other provisions of the act which withdraw the town schools from all supervision and control of the board of school commissioners for the county and places them wholly under the

town council as the board of school commissioners for the town. It is impossible, therefore, to give to the words "school grants" as used in the 36th section the meaning contended for. Moreover the term "grant" is a very inappropriate term to apply to a portion of a rate levied upon several ratepayers for the purpose of distribution in varying proportions among the several contributors. Nowhere is the term so applied. The appropriate designation "school rates" is given in the 36th section to cover the whole of that portion of "school rates" which is raised within the limits of the town. In the 37th section what the town is given in respect of the outlying districts which are made part of the town for school purposes is—the proportion of the Government school grants payable in respect of such districts and the county school assessment. Here also the appropriate designation is given—nowhere is that rate or a part of it spoken of as a "grant" to the parties upon whom the rate is levied. It is asked however: What then can have been intended by the use of the words "school grants" in the 36th section of the act? To answer that question accurately I am not concerned; it is sufficient if it be, as I think it is, plain beyond all question that they could not have been used to mean a portion of the county school rate in the hands of the county school treasurer as is contended for, for no part of any school rate raised within the limits of the town can be applied as a contribution to that fund, the town itself having the expenditure of all school rates raised within its limits I do not think that we are bound to find a precisely accurate and grammatical construction for every minute word used in an act of Parliament. It is sufficient if we can arrive at a proper construction of the act from its general provisions and from what is therein expressed with sufficient certainty. But to my mind the use of the words in the section can receive an explanation

1886

DARTMOUTH v. THE QUEEN.

Gwynne J.

in perfect consistency with the construction I have given to the act, by regarding the words as intended to be used, as I must say I have little doubt is the fact, in precisely the same sense as it is clear they are used in the 37th section—the only difference being the inversion of the order in which the "Government school grants" and "the county school rate or assessment" are spoken of in these sections, and the inadvertent misuse and insertion of the very minute word "and" where it ought not to be. Thus the 36th section will read that the town shall have the expenditure of all school rates raised within its limits, for the schools of of the town, and also of all Government school grants for such schools—and the 37th that the town shall be entitled to receive and be paid the proportion of "the Government school grants" and to impose and levy on all the districts named the county school assessments, and collect the same in the same manner as if such districts formed part of such town. In this manner, the words "school grants" being in both cases coupled with the word "Government" receive their appropriate designation, namely, "Government school grants." Another argument has been used founded on the fact that the provision which exempts the city of Halifax from contribution to this county school rate is found in ch. 32 of the 4th series of the Consolidated statutes, and the question is asked: If it had been intended that the Town of Dartmouth and its ratepayers should be in like manner exempt why does not a provision to that effect appear in this same 32nd chapter? The answer is, however, very plain and is: Because the 4th series is but a consolidation of the public general statutes, and as to this particular act the provisions which appear in the 32nd ch. of the 4th series are taken *verbatim* from 29 Vic. ch. 30, the statute in force on the subject when the act by which Dartmouth was incorporated was passed. The City of

1886

DARTMOUTH v. THE QUEEN.

Gwynne J.

Halifax was incorporated as a separate municipality in 1864 before the passing of the Public General Statute 29 Vic. ch. 30, which authorized the levying of the rate of 30 cents for every inhabitant of the county which is the county school rate. The Public General Statute 28 Vic. ch. 29, passed in 1865, first made the city a separate school section and gave to it for the support of the city schools a large sum by way of Government grant and conferred upon the city council the power, and imposed upon them the burthen, of levying by assessment on the ratepayers of the city all further monies necessary for the support of city schools. When, then, the county school rate of 30 cents per head was first constituted by the Public General Statute 29 Vic. ch. 30, which was a statute in amendment of 28 Vic. ch. 29, it was natural that the provisions in this latter act as to the city of Halifax supporting its own schools should be continued and if required amended in 29 Vic. ch. 30, and this was what was done, and when the 4th series of the Public General Statutes came to be published as a consolidation of those statutes the provisions as to the city of Halifax retained their original place in the Public General Statutes so consolidated. But the portion of the county of Halifax which in 1873 was incorporated as the Town of Dartmouth having been ever since 1866 subject to the county school assessment under the provisions of 29 Vic. ch. 30 as part of the county it was natural that, in the act incorporating the town as a separate municipality and as a separate school section, should be inserted provisions imposing on the town corporation the like burthen of supporting their own schools and exempting the ratepayers of the town from further contribution to the support of the schools of the county outside of the limits of the town, in like manner as appears in the public statutes in relation to the city of Halifax. The act incorporating the town of

1886

DARTMOUTH v. THE QUEEN.

Gwynne J.

Dartmouth being a local act its provisions could not appear in chapter 32 of the 4th series of the consolidated Statutes, those statutes being only the Public General Statutes, but in an act passed on the same day as the act incorporating the town was passed, and which is the act which provides for the publication of the 4th series of the Consolidated Statutes and prescribes the time and manner at and in which that series should come into operation, it is enacted that nothing therein contained should affect local or private acts, so that, as I stated at the outset, the only question is, whether the provisions of the act incorporating the Town as a separate municipality and school section are or not as effectual for exempting the ratepayers of the town in all time thereafter from liability to contribution to the county school rate coming to the hands of the county treasurer for the support of the schools of the county, that is to say schools outside the limits of the town, as the provisions of the Public Statutes relating to the City of Halifax and which exempt the ratepayers of that city from a like burthen. And in my opinion, for the reasons above given, the provisions of the act incorporating the town are abundantly sufficient to exempt and do exempt the ratepayers of the town from all liability to contribute to the support of any schools outside the limits of the town, and they are not therefore liable to be rated for the sum now demanded or any part thereof.

Now, as to the 2nd question: The town council, in their return to the mandamus nisi, besides insisting upon their absolute exemption from liability to contribute to the county school rate for the support of the schools of the county, raise two objections to the issuing of the peremptory mandamus:—1st. They rely upon an act of the Legislature passed in 1877, whereby it was enacted that in no year should a sum in excess

1886

DARTMOUTH v. THE QUEEN.

Gwynne J.

of $15,000 for all ordinary and extraordinary expenses be levied upon the ratepayers of the town; and 2nd. They say that the rate payers of the town are now quite different persons from those who were ratepayers of the years 1874, 5, 6, 7 and 8, upon whom the burden, if any, was imposed of providing a fund to pay for the education of the children of the ratepayers of those years, and they insist upon the injustice of calling upon the present ratepayers for what the ratepayers of the above years should alone have paid.

In consideration of these points insuperable objections to our granting this exceptional process present themselves; for assuming the liability of the ratepayers of the town in the above years, and the rate when collected to have been payable to the county school fund in the hands of the county treasurer, under the provisions of ch. 32 of the 4th series of the revised statutes, it was leviable and payable for a special purpose occurring only in those years respectively, namely, the support of common schools and the payment of teachers' salaries in those years, in which special purpose, according to the contention of the applicants for the mandamus, the schools of the town were equally interested with those of the county. But all those schools have been supported and all their teachers paid in those years; in the town, at the sole expense of the town, without any assistance whatever from the county, and in the county at the sole expense of the county. The purpose then for which the levy on the ratepayers of the town, if authorized, was authorized, was satisfied in each year without any contribution by the town to the county school fund. The levy, therefore, if now made, assuming it to have been leviable by authority of the county upon the rate payers of the town, cannot be required for the purpose of being applied to the purpose for which it was originally established and the town

1886

DARTMOUTH v. THE QUEEN.

Gwynne J.

would have been entitled to receive a share of the whole fund in proportion to the attendance of pupils at their schools; so that in no event could the county receive the whole amount demanded. But as the monies, if levied now, could not be applied to the purpose to which, if leviable in the above years respectively, they were applicable, for what purpose can they be now recovered? To no purpose, as it appears to me, could they when levied be now applied unless it be to reimburse the county for such amount, if any, as they may have been compelled to pay, in each of the above years, in support of their own schools in excess of what would have fallen upon them if the town had contributed the amounts now claimed to have been the proportions which in each of the above years they should have contributed to the common fund. But as the town schools, according to the contention of the county, would have been entitled to share in the fund in proportion to the attendance of pupils at their schools; a proportion which has never been ascertained and probably cannot now be, and if ascertainable, the fund cannot now be applied to the purpose for which it was established; the amount if any there be which the county could claim by way of re-imbursement never has been, and probably cannot now be, ascertained. Certain however it is that they are not entitled as they claim to be, to demand and recover now the whole of the rate which they say the town should have contributed in each year to the fund, deducting nothing for the amount the town schools would have been entitled to receive from the fund in each year. Moreover there is nothing to show that the county incurred and paid any greater sum in the support of their schools, or that those schools received in the above years, from general county funds, a greater sum, or that they were entitled to receive in proportion to

the attendance of pupils at their schools any greater sum, than the county school fund, as actually received by the county treasurer in those years, was sufficient to pay. We have no means now of knowing what amount of the common fund if the town had contributed to it in those years would have been applicable to distribution among the county schools and for their support and how much for distribution among the town schools if distri buted under ch. 32 of the 4th series, and the town having received nothing in those years from the fund, we are furnished with no information, and we cannot tell whether the amount received by the county schools in those years from the fund actually received by the county treasurer as the common school fund of those years was greater or less, and if less how much less, than would have been the share of those schools respectively if the contribution of the town had been added to the fund and the share which the town schools would have been entitled to receive in proportion to the average attendance of pupils had been drawn from it also. What sum, therefore, if any there be, which the county should now receive by way of reimbursement is unknown and can only be ascertained in an action properly framed and adequate to establish the amount to be due, if anything be due, as a debt from the town to the county. It is, however, clear that the amount, if any, which the county could establish a right to recover would not be the amount of the whole of the town's proportion of contribution to the fund in each year assuming the town to have been liable to contribute at all to it. If the county can establish a claim against the town, as for a debt, by way of reimbursement or otherwise, it is by action and not by mandamus that they should proceed. If entitled to recover in such an action the town may be able by the issue of debentures or otherwise to pay the debt without violating the provisions of the act of 1877.

1886

DARTMOUTH v. THE QUEEN.

Gwynne J.

This court, in my opinion, has no jurisdiction to compel, by the prerogative writ of mandamus, the levying of an amount in one year in excess of what the law permits to be levied in one year; nor in a case within its jurisdiction should it by such a summary and exceptional process order this large sum now claimed to be levied on the present ratepayers, which sum is not required for the purpose of being, and which in the nature of things cannot be, applied to the purposes for which in each of the above years the rate was authorized to be levied, and which can only be wanted and recovered for the purpose of re-imbursing the county for some advance made by it to supply the place of the monies not contributed by the town in the respective years named to the county school rate, the amount of which advance, if any was ever in fact made, being unknown. In such a case it would, in my opinion, be the duty of the court to abstain from enforcing a doubtful demand by this exceptional prerogative process and it should leave the county to establish their right to recover by an action brought for the purpose of determining their right and ascertaining the amount if right there be.

The court must be satisfied that there is a legal duty imposed upon the defendants to comply with all that is commanded by the writ. * * * It is quite settled that if any part of what is commanded by a peremptory mandamus goes beyond the legal obligation the whole must be set aside.

This is the language of Lord Campbell C.J. in *Regina* v. *Caledonian Railway* (1).

Bailey J. in *Rex* v. *Lincolns Inn* (2) says

The right to the thing demanded and an obligation to do it must concur.

As to the point of levying upon the present ratepayers what should have been levied if at all upon the several ratepayers of the years 1874-5-6-7-and-8. Lord Abinger says in *Woods* v. *Reid* (3)

(1) 16 Q. B. 30.

(2) 4 B. & C. 859.

(3) 2 M. & W. 784.

1886

DARTMOUTH v. THE QUEEN.

Gwynne J.

The general inconvenience of retrospective rates has been long known and recognized in the courts of law on the ground that succeeding inhabitants cannot legitimately be made to pay for services of which their predecessors had the full benefit.

I can conceive no case to which this language is more applicable than to an attempt to levy on the ratepayers of 1886 sums of money which were only required in 1874, 5, 6, 7, and 8 to support the schools where the children of the ratepayers of those years were educated and which sums were wanted for no other purpose. If any persons suffered by the educational power of the schools having been impaired in those years it must have been the ratepayers of those years; and if the school fund of those years, without any contribution from the ratepapers of the town, was sufficient to maintain the schools for the school going population of the county in those years no damage would seem to have been suffered by anyone to warrant the levying now, retrospectively, of rates on the ratepayers of the town (1). And in *The County of Frontenac* v. *The City of Kingston* (2), where the county sued the city in debt for monies which it was alleged the city should have levied on their ratepayers in previous years as their contribution to the jury fund, Wilson J. at pp. 595–6 says :—

> If this were a motion for a mandamus on the city to levy a rate to satisfy the claims now sued for, the argument that the claims were of that nature and standing that they could not be lawfully levied from the present ratepayers would be a conclusive answer,
>
> * * * * * *
>
> for the debt claimed would not be the debt of those who are now the ratepayers any more than the baker's or butcher's bill against the former occupant of a house is the debt of the present occupant.

I am of opinion, therefore, that the defendants here are entitled to judgment upon both grounds urged, namely, that the court has no jurisdiction to order a rate to be

(1) *Regina* v. *Read* 13 Q.B. 524; *Rex* v. *Bradford* 12 East 556; *Rex* v. *Lancashire* 12 East 366; *Johnson* v. *School Trustees* 30 U. C. R. 264.

(2) 30 U. C. R. 584.

1886

DARTMOUTH v. THE QUEEN.

Gwynne J.

levied which it would not be lawful to levy as being in excess of what is permitted to be levied in any one year by the statute of 1877 and also because of the retrospective character of the rate sought to be levied and the impossibility of applying it to the purposes for which if levied in the years 1874–5–6–7–and–8, it would have been applied in those years, namely, the support of the schools of those years. As, however, the question of the liability of the ratepayers of the town in these years to contribute at all to the county school fund has been raised, and as it is important to all the parties interested that this point should be finally determined as a guide for the action of the town in future years, and as it is competent for us to decide it upon the present proceedings, I think we ought to do so; and being of opinion for the reasons already given that the ratepayers of the town were not in the above years, and are not, liable to contribute to the common school fund for the support of the schools of the county and that therefore the county has no right to recover the amount demanded or any part thereof by action or otherwise I think we ought to rest our judgment upon this ground and allow the appeal and order judgment to be entered for the defendants on the demurrer. The judgment in the other case will be the same in substance but in form it will be to allow the appeal and to order the rule nisi for quashing the mandamus to be made absolute.

Appeal allowed with costs.

Solicitor for Appellants: *B. Russell.*

Solicitor for Respondents: *J. N. & T. Ritchie.*

WILLIAM KINLOCH AND OTHERS, (DEFENDANTS) ..... } APPELLANTS.

AND

JOHN M SCRIBNER (PLAINTIFF).....RESPONDENT.

1886

* March 24.

* May 17.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Vendor and Purchaser—Open and notorious sale—Actual and continued change of possession—R. S. O. cap. 119 *sec.* 5—*Hiring of former owner as clerk.*

The purchaser of the stock of a trader, where the change of ownership is open and notorious, may employ the former owner as a clerk in carrying on the business, and notwithstanding such hiring there may still be "an actual and continued change of possession," as required by R. S. O. cap. 119 sec. 5. *Ontario Bank* v. *Wilcox* (1) distinguished.

APPEAL from a decision of the Court of Appeal for Ontario (2) affirming a judgment of the Divisional Court (3) in favor of the respondent.

The facts of the case are sufficiently set out in the judgments of the court.

McCarthy Q.C. and *Dougall* Q.C. for the appellants. The question of change of possession is one of fact which has been found in our favor on the trial, and this court should be governed by that finding. The act requires an actual and continued change of possession. Here the seller remains in possession and puts the buyer in possession also. There was no actual change of possession; if there was, there was no continued change of possession The statute is not satisfied by the seller giving up possession for a short time and then resuming it again.

Lingard v. *Messiter* (4) shows what the law, as between creditors and purchasers, was prior to any statute defining it.

---

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

(1) 43 U. C. R. 460.
(2) 12 Ont. App. R. 367.
(3) 2 O. R. 265.
(4) 1 B & C. 308.

1886

KINLOCH v. SCRIBNER.

If a person sells goods and still remains in possession, the presumption in law is, that he is still the owner. *Doyle* v. *Lasher* (1).

The following authorities were relied on: *Carscallen* v. *Moodie* (2); *McLeod* v. *Hamilton* (3); *Ontario Bank* v. *Wilcox* (4); *Ex parte Hooman. In re Vining* (5); *Ancona* v. *Rogers* (6); *Whiting* v. *Hovey* (7); *Ex parte Lewis. In re Henderson* (8); *Ex parte Jay. In re Blenkhorn* (9); *Edwards* v. *Edwards* (10); *Carter* v. *Grasset* (11).

W. Cassels Q. C. and *Holman* for the respondent. All the judges in the court below have found that the sale was *bonâ fide* and valid, and this court is asked, after three courts have pronounced on the question of fact, to grope through the evidence to find a fraud on the part of Morton.

The argument for the appellants, and the judgment of Mr. Justice Patterson, virtually is that where a purchaser employs the seller as his clerk the sale may be set aside. But that is creating a statute.

The following cases were cited: *Vicarino* v. *Hollingsworth* (12); *Hale* v. *Kennedy* (13); *Smith* v. *Wall* (14); *Heward v. Mitchell* (15).

McCarthy Q. C., in reply, cited: *Snarr v. Smith* (16); *Burnham* v. *Waddell* (17).

Sir W. J. RITCHIE C.J.—This is an interpleader proceeding. The judgment creditor claims to have a right to the goods, because, though there was a transfer of the goods he alleges there was no continued change of possession and no registration. The learned judge who tried

(1) 16 U. C. C. P. 263.
(2) 15 U. C. Q. B. 92.
(3) 15 U. C. Q. B. 111.
(4) 43 U. C. Q. B. 460.
(5) L. R. 10 Eq. 63.
(6) 1 Ex. D. 285.
(7) 9 O. R. 314.
(8) 6 Ch. App. 626.
(9) 9 Ch. App. 697.
(10) 2 Ch. D. 291.
(11) 10 Can. S. C. R. 105.
(12) 20 L. T. N. S. 362.
(13) 8 Ont. App. R. 157.
(14) 18 L. T. N. S. 182.
(15) 10 U. C. R. 535.
(16) 45 U. C. Q. B. 156.
(17) 28 U. C. C. P. 263.

the case found, and the Court of Appeal entertained the same opinion, that this was a fair and *bonâ fide* transaction.

Then it is said that there was no change of possession after the transfer. The purchaser went into possession and employed the clerk of the seller who locked the store in the middle of the day for which the new owner dismissed him. He then, not having a person competent to take charge of the business, employed the seller to act as his clerk for a certain time, which he did. The respondent went on purchasing goods, added to his stock and the change of business was advertised in the local papers, and it was known to everybody in the neighborhood that the purchaser was in the store as proprietor and that the goods had been transferred by the seller who ceased to have any interest in them. "But" says the appellant, "that may be very true but you had no right to employ this man, even admitting the *bonâ fides* of the transaction." Why such an employment *per se* should be treated as fraud I cannot see; in connection with other circumstances it might be evidence of want of *bonâ fides* in the transaction but I think all the circumstances very clearly show that the transaction was a *bonâ fide* one and that there was a perfect and continuous change in the possession.

Gibbons v. *Hickson* (1), which I was not aware of at the time of the argument, appears to me to be this case exactly.

In that case Huddlestone B. says:

In this case the rule must be discharged.

It is clear that the goods in question were sold *bonâ fide* by Harrison to Gibbons, and the transaction was carried out by a deed of assignment, which provided that Harrison should remain as manager of the shop—that is, as a servant of the defendant. Now, this being a transfer of personal chattels comes within the definition of a "bill of sale" contained in the Bills of Sale Act, 1878, s. 4, and, therefore ought *primâ facie* to have been registered under section

(1) 34 W. R. 140.

1886

KINLOCH v. SCRIBNER.

Ritchie C.J.

8 of the same Act. But it is contended on behalf of the plaintiff that the goods in question were not in the "apparent possession" of Harrison at the time of the execution, and consequently, the deed of assignment is exempted from the operation of the statute. Let us examine the facts. The plaintiff took possession of everything in the shop, going round with an inventory to check the articles in stock; he took this deed of assignment from Harrison, whom he retained in the shop, but only as his paid servant. He changed the name over the shop from Harrison to Harrison & Co; he sent circulars to all Harrison's customers, and others besides, telling them that the business had changed hands. Not content with this, he advertised the fact three times in the newspapers, and finally wrote a letter to the defendants themselves on the subject, which they answered. I think that, with these facts before him, the county court judge was justified in directing the jury that there was evidence of a general knowledge of the change of ownership of the goods. As to the case of *Pickard* v. *Marriage*, there notice of the change of ownership was not given to the public as here. In *Gough* v. *Everard*, which was a case under the old Bills of Sale Act (the interpretation clause of which, 17 & 18 Vic, ch. 36, sec. 7, is in identical terms with that of the act now in force, as far as regards the meaning of the phrase "apparent possession," Bramwell B. says

> I construe this clause to mean that the goods shall be deemed to 'be in the "apparent possession" of the vendor as long as they are 'on premises occupied by him, if nothing more has been done than "the mere formal taking possession; but that where, as in the pre-"sent case, far more than mere formal possession has been taken, the "clause does not apply."

In this case, also, I am of opinion that "far more than mere formal possession has been taken," and that, therefore, the county court judge was right, and this appeal must be dismissed.

The present case seems to me a much stronger case of actual continuous and notorious change of possession than that of *Gibbons* v. *Hickson*. I think the appeal in this case should be dismissed.

STRONG J.—Possession is a question of fact, not of law. Certain legal results, such as acquisition of title under the statute of limitations, and the right to defend possession and re-acquire it after loss or forcible taking away, are legal consequences of possession; but, in itself, it is a pure question of fact, consisting as it does of the power of physical disposition of the thing which

1886
KINLOCH
v.
SCRIBNER.
Strong J.

is the subject of it coupled with the intention to possess as owner. These considerations are material here as showing that the question we have to determine in the present case is entirely one of evidence, and consequently that decided cases can have little or no bearing upon the decision of this appeal. Facts which, in other cases, have been held to warrant certain inferences, may, in the present case, lead to no such conclusion. The voluminous evidence before us, taken in conjunction with the finding of the learned judge who presided at the trial, and who saw and heard the witnesses give their testimony, that the sale was *bonâ fide*, can, in my opinion, only lead to the conclusion that the respondent was actually put in possession of these goods as the owner, and retained such possession continuously up to the date of the seizure. From the date of the sale the respondent, exclusive of all other persons, had full control and dominion over the goods, and they were subject to his disposition, and such as were sold were actually disposed of by him. There was, therefore, that actual and continued change from the prior possession of the assignor which the statute requires.

Again, the publicity and notoriety of this sale the *bonâ fides* of which, in view of the facts established and found by the learned judge at the trial, cannot be questioned, is almost conclusive to show that there was an actual change of possession, since, if the sale itself was bonâ fide and was really and honestly intended to effect a transfer of the property, there could be no object in making a merely fictitious or colorable change in the possession; and I am of opinion that this is in no way contradicted by any presumption arising from the employment of the former owner as a clerk, under the circumstances detailed in the evidence. The goods were not in the possession of the clerk in this case, any

1886

KINLOCH v. SCRIBNER.

Strong J.

more than goods exposed for sale in a shop can, in any sense, be said to be in the possession of a clerk or servant of the proprietor employed to sell them, and it calls for no demonstration to show that in such a case the relation of the clerk or salesman to the goods which he is employed to sell is not that of possession.

If the words of the act had been stronger than they are, and had required, not merely an actual, but an open and notorious change of possession, the proof would have been quite sufficient to have established it.

Although decided cases are not controlling authorities on a mere question of fact like the present, yet it is satisfactory to find, that under circumstances precisely similar to those before us in this case it has been held in England that the apparent possession was not to be considered as remaining in the assignor, but as having passed to the assignee. This appears from the case of *Gibbons* v. *Hickson* (1) to which I have been referred by the Chief Justice who has cited it in his judgment.

The evil which the statute of Ontario was intended to remedy was that which arose in the case of a transfer of property of goods in which a mere formal possession was delivered but which were allowed to remain in the house or building, or upon the premises, in the occupation of the assignor, and so in his apparent possession, which is not the case here, inasmuch as the possession of the store in which the goods were was contemporaneous with the sale acquired by the respondent.

This appeal is, in my opinion, entirely without foundation, and should be dismissed with costs.

FOURNIER J. concurred.

HENRY J.—One William Morton, who had a general store of merchandise at Campbellford, Ontario, in 1881,

(1) 34 W. R. 140.

1886

KINLOCH v. SCRIBNER.

Henry J.

on the 25th of August in that year sold out his stock in trade for a valuable consideration to the respondent, delivered the goods to him and gave him two keys of the shop, one of which the respondent gave to Mr. Ray, a former clerk of Morton's, retaining the other himself. Mr. Ray opened the shop the next morning, but locked it up in the afternoon, whereupon a dispute arose, and the respondent discharged him, paying him $5.00 for his services. The respondent thereupon requested and obtained the services of Morton and agreed to pay him $1.50 a day as wages and a sum sufficient to pay his wife's board. The local paper of the village of the first of September, contained a notice of the change of the business and its transfer to the respondent, and it was generally known in the village on the 26th August. On the 15th September the respondent procured further aid in the shop, and Morton was frequently absent attending to business of his own. He, however, ceased to act for the respondent about the first week in October, when one Ingersoll was retained by the respondent in his place.

The learned judge of first instance found that the sale was *bonâ fide* and his finding on that point has been sustained by the courts before whom the case has been considered, and there is, in my opinion, no reason to doubt its correctness. The same learned judge, however, also found that there was no such actual and continued change of the possession of the goods as required by the statute, and gave judgment for the appellants. He seems to have arrived at that conclusion from decisions which he cited and remarked upon. I have carefully looked at those cases, and find they are not at all applicable to the facts of this case, and that, if the transaction, as we must hold it, was in good faith, the decision in the cases referred to does

1886

KINLOCH v. SCRIBNER.

Henry J.

not affect the question under consideration.

If the evidence given by the witnesses for the respondent is to be relied on, and it is not only uncontradicted but of such a character as to entitle it to credence, I am at a loss to find that the possession of the goods by the respondent was not actual and continued. He was given the actual possession and the keys of the store. He, and he alone, by himself and those in his service, had the continued control of the shop and the sales made in it after the delivery of the goods and the keys to him. How, then, can it be said that anyone else participated as owner or claiming any right to the goods in that possession? The evidence establishes the fact that Morton did not participate in that possession except as the paid employee of the respondent and only to the extent necessary to perform the services to the respondent that he was hired for. His acting in the shop as salesman where there is a question of *bonâ fides* as to the sale might be an element in the evidence to establish a fraudulent sale; but where the sale is admitted to have been *bonâ fide*, the mere fact of his acting as the clerk or assistant of the respondent cannot in the slightest degree affect the question of possession.

I do not consider it necessary to say more than that I fully concur in the views of the majority of the learned judges of the Divisional Court, of Chief Justice Cameron and the learned judges of the Appeal Court who concurred with him, and think the appeal herein should be dismissed with costs.

GWYNNE J.—These are interpleader issues in which the above respondent was plaintiff and the appellants were defendants. The learned judge before whom the issues were tried found as matters of fact that the goods which consisted of the

stock in trade in a general store in the village of Campbellford belonging to one William Morton were, on the 25th day of August, 1881, *bonâ fide* sold for valuable consideration paid therefor to the plaintiff into whose actual possession the goods were then delivered by Morton; that the plaintiff having received from Morton the keys of the store, on that 25th of August in the evening delivered one set of the keys to one Mckay who had been Morton's clerk and between whom and the plaintiff a partnership was contemplated directing him to open the store in the morning and took the other set away himself which he took home with him; no one slept in the building where the store was; that on the following day McKay opened the store in the morning but that in the afternoon a quarrel occurred between him and the plaintiff and the latter dismissed him paying him $5.00; that not being able at the moment to procure another clerk the plaintiff proposed to Morton to remain in the store and to take charge of it for the plaintiff in selling the goods, keeping the books, &c., until the plaintiff could get a clerk; that Morton being about to enter into some other employment at first expressed himself unwilling to do as the plaintiff requested but finally yielded to the plaintiff's solicitation and agreed to remain at $1.50 per day and a sum sufficient for his wife's board to be paid by the plaintiff; that the change was advertised in the papers on the 1st September and became generally known in the village after it occurred; that on the 15th of September the plaintiff hired a lad to assist him; that from the time that Morton was hired by the plaintiff he was occasionally absent on his own business but continued in the plaintiff's service until the 1st of October when the plaintiff hired one Ingersoll as a salesman and Morton oocasionally attended for a day or two afterwards explaining the

1886

KINLOCH v. SCRIBNER.

Gwynne J.

business to Ingersoll and assisting in sales; that the plaintiff himself was in the store a good part of the time, and to this it may be added that a large mass of evidence showed that he appeared to be the owner and was so understood to be by persons frequenting the store and the inhabitants of the village generally; that the sales were regularly entered in a new set of books which the plaintiff on purchasing the stock had opened. The goods were taken under executions on the 5th October.

Upon this state of facts the learned judge, while he found as matter of fact that the sale to the plaintiff was made in good faith on the part of both parties and for valuable consideration and that the plaintiff was not aware that any of the securities transferred in payment of the price was defective in character or deficient in value, and while he also held that upon the sale there had been an actual immediate transfer of the goods by the vendor into the possession of the plaintiff, he nevertheless held that he was *compelled to the conclusion* that upon the facts as found by him, and above stated, there was no such actual and continued change of possession as the statute requires and for this reason, and this reason only, he rendered his verdict for the defendants. What the learned judge plainly conveys by saying in his judgment: "I am compelled to the conclusion," &c., &c., &c., is that this conclusion, namely, that no such actual and continued change of possession had followed the actual delivery of the goods to the plaintiff, as the statute requires, was forced upon him by the judicial decisions in the cases which he had just enumerated and reviewed.

Now, when the motion to set aside this verdict and to enter judgment for the plaintiff upon the facts appearing in evidence and the finding of the learned judge as to the *bonâ fides* of the transaction and the

actual delivery of the goods to the plaintiff, was made in the court above what was, or were, the question or questions, raised before the Divisional Court in which the motion was made?

Plainly, as it appears to me, the following and only those:—.

1st. Did the learned judge form a correct conception of the decided cases, when he held that they compelled him to arrive at the conclusion that, as matter of fact, the actual delivery of the goods which he found to have been made to the plaintiff upon a *bonâ fide* sale for valuable consideration was not followed by such an actual and continued change of possession as was contemplated by the statute?

And if the court should be of opinion that the decided cases did not necessitate such a conclusion then the duty was cast upon the court of determining as matter of fact

2nd. Whether, assuming the transaction to have been a *bonâ fide* sale and an immediate delivery made thereon, as found by the learned judge, the evidence did or not show that such delivery was followed by an actual and continued change of possession, as required by the statute? and

3rd. Was the finding of the learned judge as to the *bonâ fides* of the transaction so clearly erroneous as to require the Divisional Court to set aside the learned judge's finding upon that point and to render a verdict and judgment for the defendant upon that ground?

As to the first of the above questions I entirely concur with the judgment of the majority of the Divisional Court that the decided cases did not necessitate the conclusion the learned judge arrived at and upon this point I should not say anything in addition to the observations made by Chief Justice Cameron and the learned judges of the Court of Appeal for Ontario, who

1886

KINLOCH v. SCRIBNER.

Gwynne J.

have concurred with him, if language of my own in the case of the *Ontario Bank* v. *Wilcox* (1) was not given an interpretation very different from what I intended the language to bear and from what I think it does bear and which was relied upon in support of the contention in this case, namely, that a *bonâ fide* purchaser of goods for valuable consideration paid can in no case be protected in his purchase if he employs the vendor as his clerk after the sale and delivery of the goods. In that case the mortgagor of chattels which consisted of a quantity of lumber in his own yard, remained in actual possession, dealing with the lumber as owner just as he had been before the mortgage was executed. Upon an assignment of the mortgage having been made to the Ontario Bank it was agreed between the mortgagor and the bank that the former should continue in possession precisely as before and should continue selling the lumber, but that he should render weekly accounts to the bank of all sales. The bank, finding that the promised weekly returns of sales were not regularly made, put one Wharton into the lumber yard, in charge for the bank, under and subject to special instructions not to interfere with the mortgagor selling the lumber, nor to exercise control in any way further than to see that the mortgagor should make due returns to the bank of his sales ; and to enable Wharton to conform to these instructions, the mortgagor pointed out to him what lumber in his yard was that which was covered by the chattel mortgage and over which his control was limited. The mortgagor had never been divested of his possession of the lumber, which remained always in his possession as it had originally been, unaffected in any way save as his sales were made subject to the control of Wharton, under the above special instructions given to him. It

(1) 43 U. C. R. 460.

1886

KINLOCH v. SCRIBNER.

Gwynne J.

is to this state of facts that the language which is relied upon relates, and by it I meant to convey, as I thought at the time and still think that the language simply does convey, that the possession or control, such as it was, that Wharton had, never having excluded the original possession of the mortgagor, the right of his creditors had not been excluded. This case I cannot think open to the construction put upon it by the learned counsel for the defendants.

Now, the decided cases not necessitating the conclusion which, upon their assumed authority, the learned judge arrived at, the question of fact as to the actual and continued change of possession remained undecided and open for the Divisional Court to decide; and they being of opinion that the finding of the learned judge who tried the issues as to the *bonâ fides* of the transaction could not successfully be questioned, came to the conclusion that the evidence did, to their satisfaction, establish that the delivery of the goods to the plaintiff upon the sale had been followed by such an actual and continued change of possession as excluded the claim of the creditors of the vendor; and they, therefore, rendered a verdict and judgment for the plaintiffs, which, in my opinion, should be sustained. Whatever force there is in the objection taken by the defendants, and so strongly urged on their behalf, namely, that the delivery of the goods had not been followed by an actual and continued change of possession, seems to me to point to and to affect rather the question of the *bonâ fides* of the transaction than the question of whose was the possession after the sale and after the delivery, continuously, until the seizure. The finding of a person who had been the open and notorious owner of chattels, still selling the goods, but calling himself the clerk of a person claiming to be the purchaser of the goods from him, may be a badge of fraud requiring explanation;

1886

KINLOCH v. SCRIBNER.

Gwynne J.

but if a satisfactory explanation be given and the sale is shown to have taken place in good faith and that the vendor was actually and in good faith hired and employed by the purchaser as his clerk or salesman, the possession which such a person in such case has is not the original possession which he had as owner, but is a wholly new possession which is that of his employer the purchaser; and when, as here, the change in the character in which the original owner is found dealing with the goods and the fact of the sale are found to have been notorious, to hold that the *bonâ fide* delivery of the goods had not been followed by such an actual and continued possession as the statute requires would be, as it seems to me, to make the statute operate to commit rather than to redress a fraud. The appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitor for appellant: *A. P. Dougall.*

Solicitor for respondents: *Sidney Smith.*

1887

*Mar. 15, 16.

*June 8.

SAMUEL BURGESS AND HAMMEL MADDEN DEROCHE (PLAINTIFFS) APPELLANTS;

AND

MICHAEL J. CONWAY (DEFENDANT)....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Sale of land—Subject to mortgage—Absolute sale—Sale of Equity of redemption—Consideration in deed.

B. sold to C. land mortgaged to a loan society. The consideration in the deed was $1,400 and the sum of $104 was paid to B. C. afterwards paid $1,081 and obtained a discharge of the mortgage. B. brought an action to recover the balance of the difference between the amount paid the society and said sum of $1,400, and on the trial he testified that he intended to sell the land for a fixed price; that he had been informed by W., father-in-law of C., that there would be about $300 coming to him; that he had

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

1887

BURGESS v. CONWAY.

demurred to the acceptance of the sum offered $104, but was informed by C., and the lawyer's clerk, who drew the deed, that they had figured it out and that was all that would be due him after paying the mortgage; that he was incapable of figuring it himself and accepted it on this representation. C. claimed that the transaction was only a purchase by him of the equity of redemption, and that B. had accepted $104 in full for the same.

Held, reversing the judgment of the Court of Appeal, Taschereau and Gwynne JJ. dissenting, that the weight of evidence was in favor of the claim made by B., that the transaction was an absolute sale of the land for $1,400; and independently of that, the deed itself would be sufficient evidence to support such claim in the absence of satisfactory proof of fraud or mistake.

APPEAL from a decision of the Court of Appeal for Ontario, reversing the judgment of the Divisional Court and restoring the verdict at the trial in favor of the defendant.

The plaintiff, Burgess, was the owner of a lot of land mortgaged to a Loan Society, and being in arrears with his payments he determined to sell it. He had been notified that the Society would accept $1,068 to discharge the mortgage, and he effected a sale to the defendant Conway. The parties went to a lawyer's office and a conveyance was drawn up in which $1,400 was declared to be the consideration for the sale. The sum of $104.50 was paid to the plaintiff, the defendant and the clerk who prepared the conveyance stating that this would be the balance coming to him, and the deed was executed. The defendant, a few months afterwards, paid off the mortgage for $1,081.

Burgess afterwards assigned to one Deroche a claim against the defendant for a balance on this transaction, and a suit was brought by him and Deroche to recover it. On the trial he testified that it had been represented to him before the sale that there would be some $300 coming to him; that when the $104 was tendered to him he demurred about taking it, but the defendant stated that he and the clerk had figured it out and that was all that was coming, and that Whelan, defendant's

1887

BURGESS v. CONWAY.

Ritchie C.J.

father-in-law, who had told him he would get $300, had figured it wrongly; that he was incapable of figuring it himself and took the amount offered, supposing that it was the proper amount He claimed that the sale was for a fixed price, $1,400, for the land, and that he was entitled to the difference between that amount and the sum paid by the defendant to discharge the mortgage.

The defendant, on the other hand, claimed that there was no price fixed, but that the transaction was merely a sale by Burgess of his equity of redemption in the land, and that was sold for the sum accepted when the deed was executed, namely, $104.50.

At the trial a verdict was given for the defendant, the learned judge finding, as matters of fact, that there was a fixed price of $1,400 on the land, but that Burgess had accepted $104.50 in payment of the same. The Divisional Court reversed this verdict and gave judgment for the plaintiff for $215, with interest. The Court of Appeal restored the judgment of the judge at the trial. The plaintiffs then appealed to the Supreme Court of Canada.

Moss Q. C. for the appellant, referred to *Gamble* v. *Gummerson* (1); *Cameron* v. *Carter* (2); Sugden on Vendors (3); *Foakes* v. *Beer* (4).

Robinson Q. C. for the respondent cited *Grasset* v. *Carter* (5).

Sir W. J. Ritchie C. J. and Fournier J. concurred in the judgment prepared by Mr. Justice Henry and were of opinion that the appeal should be allowed.

STRONG J.—This is an action to enforce a vendor's lien for an unpaid residue of the purchase money of a

(1) 9 Gr. 193.
(2) 9 O. R. 426.
(3) Am. ed., vol. 2; p. 578.
(4) 9 App. Cas. 605.
(5) 10 Can. S. C. R. 105.

parcel of land sold by the appellant Burgess to the respondent. The other plaintiff Deroche is the assignee of Burgess. The learned judge who tried the action, Mr. Justice Rose, expressly finds that the sale was a sale not of the mere equity of redemption subject to a mortgage, but of the land, at the price of $1,400. The learned judge's own words are as follows:—

> The facts, as it appears to me, stand somewhat in the following order. It is admitted the plaintiff and defendant contracted that the sale of the property should be for $1,400, and that the plaintiff Burgess should have the difference between the amount of the mortgage upon the land and $1,400.

That this was the true character of the purchase is, also, demonstrated by the statement of the consideration money in the conveyance by which it was carried out. The price is there stated to have been $1,400. Further, two at least of the learned judges in the Court of Appeal, the Chief Justice and Mr. Justice Patterson, agree in this view of the evidence. The learned Chief Justice says:—

> The judge considered, and I fully agree, that the contract was to sell the land at the price of $1,400.

Mr. Justice Patterson says:—

> Two facts are clear and both parties agree about them, the price agreed on was $1,400, and a sum to be paid as that which the defendant was to pay the plaintiff besides assuming the mortgage was agreed on and paid.

Had the facts that the sale was one of the land itself for $1,400, and not a sale of the equity of redemption for $104, not been thus, according to all the findings of all the courts below, incontrovertibly established by the extrinsic evidence, the purchase deed would in itself, in the absence of any allegation in the defendant's pleading that by error and mistake it incorrectly stated terms of the sale, have been conclusive. The sale having been carried into execution by conveyance the terms of the deed by which it was so carried out must be considered as binding on the parties,

1887

BURGESS v. CONWAY.

Strong J.

until displaced upon some equitable grounds of mistake or fraud; none such having been alleged, and the evidence being insufficient to establish such a defence even if it had been pleaded, we must take the contract as it is stated to have been in the instrument by which the parties have completed the purchase. Then, the deed shows that the price was $1,400, and in the face of the absolute covenant against incumbrances contained in it, it is impossible to admit the respondent's pretension that the sale was one of the equity of redemption subject to the mortgage.

This being the state of the case as to the two facts upon which the decision of the case must turn, it appears to me that the appellant does not subject himself to the objection that he is asking the court to vary the findings of fact which have been arrived at by the court which saw and heard the witnesses, and so to resile from the rule laid down in the case of "The Picton" (1) and other cases. So far from doing this the very basis of the appellants' case is that the facts are as they have been expressly found by the three courts which have already had the case under their consideration. If the rule in question has any application to this appeal, it ought to be applied against the respondent who is seeking to alter the findings of all the courts which have passed upon the evidence by contending that the sale was one of the vendor's equity of redemption merely, for the price of $104.50 the payment of which was, therefore, a full discharge of the purchase money.

Starting then from these facts that the sale was one of an estate in mortgage for the price of $1400 the rights of the parties are easily determinable by applying rules well settled and understood in the practice of conveyancing, rules not founded on any

(1) 4 Can. S. C. R. 648.

1887

BURGESS v. CONWAY.

Strong J.

technical or arbitrary principles, but resting on grounds of practical convenience and justice. The vendor was clearly entitled to the benefit of the whole price at which he sold his land, but the purchaser was entitled so to apply his purchase money as to protect himself against the incumbrance of which he had notice at the time of his purchase. The strictly regular mode of doing this, according to the practice laid down in the English books, is to require that the mortgagee shall become a party to the conveyance if his mortgage is overdue, or if he is willing to receive his money. In either of these cases the purchaser is therefore entitled to apply so much of the purchase money as may be required to the discharge of the incumbrance. In case the mortgage money should not have become payable and the mortgagee should not be willing to anticipate the date fixed for payment the purchaser is entitled to retain in his own hands an amount equivalent to that which will be required to discharge the incumbrance at its maturity, and the sum so reserved must be invested for the benefit of the vendor so as to produce a reasonable rate of interest—the rule being that whenever the purchaser gets into possession and receives rents and profits from that date the vendor is entitled to interest on unpaid purchase money. The amount to be paid for the incumbrance is a matter with which the purchaser has nothing whatever to do ; the money so applied is considered as being applied for the benefit of the vendor, and he is at liberty to enter into any arrangement he may be able to effect with the mortgagee. If he can get the mortgagee to discharge his mortgage, trusting to personal security or taking other real security, or if he can procure the mortgagee to make an abatement in the amount of his debt, he is at liberty to do so, and any such arrangement enures for

1887

BURGESS v. CONWAY.

Strong J.

his benefit. The purchaser is bound to pay or account to the vendor for the whole price stipulated for, and all he can insist upon is his right so to pay it as to protect himself against the incumbrance. These are the strict rights of vendor and purchaser as administered by the court when a sale is carried out under a judgment for specific performance and also in completing the sale of an estate made under the decree or judgment of the court itself, and I am not aware that they are in any way different when the court has to determine them for any other purpose. In this country, where a mortgage can be more readily discharged by the registration of a statutory certificate of payment, it is not usual in completing a purchase to make the mortgagee a party to the conveyance, but the same purpose is more inexpensively and conveniently effected by discharging the incumbrance under the registry act. In all other respects it is the strict right of either vendor or purchaser to require that the practice, as laid down by the most esteemed writers on the law of vendor and purchaser, and as I have briefly stated it, should be followed.

The question in the present case is therefore reduced to this simple one: Has the $1400, which it is admitted on all hands was the price for which the appellant sold his land, been paid by the vendee? It is out of the question to say, and indeed it has not been suggested, that the bargain to buy and sell for $1400 dollars was superseded by any subsequent and different contract, and the only matter to be determined can therefore be: Has this admitted price been paid or satisfied?

It is matter of elementary law that an obligation for the payment of money arising upon a contract whether the money so to be paid is due under a contract for the sale of land, or by virtue of any other agreement, can only be discharged by release, accord and satisfaction, or

1887

BURGESS v. CONWAY.

Strong J.

the payment of the full amount which the creditor has stipulated for and not by the payment of any less sum though accepted expressly in discharge. Here there is no suggestion of any collateral accord and satisfaction nor is any release set up; therefore, before the debt can be held to have been discharged payment must be proved, according to the general rule applicable to all payments, of the full amount to which the creditor was originally entitled. When we arrive at this stage and see, as I think it must plainly be seen, that the question between the parties is in reality one, not as to the terms of a contract (for that question is concluded by findings which all the courts have acquiesced in), but one concerning only the payment of an admitted price, all difficulty vanishes for then it cannot, in the face of the recent decision in the House of Lords *Foakes* v. *Beer* (1), be pretended that the appellant was bound by his acceptance of $104.50 if more was actually due to him even though he accepted it absolutely as in satisfaction and discharge. Then it is not insisted that in addition to the $104.50 paid to the appellant on the 9th January, 1885, the respondent has paid more than $1081—the amount of the draft for $1073, forwarded by Whelan on the 27th of February, 1885, and the $8 additional claimed by Mr. Cameron and sent by Whelan on the 5th of March 1885, making in all $1,081 paid to the mortgagees. The consequence is inevitable that the purchase money has not been paid in full. The aggregate amount of the two sums so paid to the appellant himself and to the mortgagees being deducted from the $1400 leaves a balance still due to the appellants of 214.50 on which they are entitled to interest from the 9th January, 1885, the date of the conveyance.

I have thought it sufficient to rest my opinion on the ground that the $104.50 could not be payment of the

(1) 9 App. Cas. 605.

1887

BURGESS v. CONWAY.

Strong J.

larger amount remaining due as the residue o the purchase money after deducting the amount paid to the mortgagees. But even if there had been an actual release, or if there had been some collateral satisfaction, I should have thought the error in calculation fatal to the respondent's contention.

I need scarcely say that the debt was clearly a proper subject of assignment, and I am of opinion that the assignee and assignor were properly conjoined as plaintiffs; neither of these questions seem to have given rise to any doubt in the courts below and therefore call for no further observation,

I am of opinion that the appeal should be allowed with costs in all the courts.

HENRY J.—The appellants in their declaration claim to recover from the respondent a sum of about $215 and interest as the balance of the purchase money of a lot of land, and of the consideration of a deed of conveyance thereof made by Burgess to the respondent, which claim was assigned by Burgess to his co-appellant for the benefit of creditors with a resulting trust to himself. It is alleged by the appellants that the land was sold for $1,400, subject to a mortgage held by the Hamilton Provident and Loan Society upon which, at the time of the sale in question, there was due $1,068, and for which sum the society had communicated to the parties its readiness to release it.

The respondent denies by his pleading that the price of the land as agreed on was $1,400, and alleges:

That said Burgess offered to sell said equity of redemption to defendant for the price or sum of $104 50. The defendant accepted said offer and paid said Burgess said last mentioned sum, and no further or other sum was due.

Upon these counter allegations issue was joined and, to come to a proper conclusion, it is necessary to consult the evidence on both sides.

1887

BURGESS v. CONWAY.

Henry J.

About the time of the sale of the land, and shortly previous thereto, Burgess, being in default for two instalments, was called upon by the society for payment. Being unable to pay the instalments due he determined to sell the land, which he did to a man named Wagar for $1,500. The sale was not perfected and he (Burgess) having met the respondent at the office of his father-in-law (Whelan) at Centreville, alleges that he offered the land to the respondent at $50 less than the amount he had bargained for with Wagar—that after some figuring by the respondent a bargain was concluded for $1,400. This took place at Centreville, and it was agreed that the respondent and Burgess and the wife of the latter should go next morning (Friday) to Napanee to have the bargain consummated by the necessary conveyances for that purpose, to be made out by a solicitor. This is fully corroborated and sustained by a disinterested witness who was present. It is shown too that Burgess himself, although one of the appellants, has but a trifling, if any, interest in the result. It is further shown that it was the respondent who retained the professional services of the conveyancer, and gave him instructions as to the writing of the deed and that it was executed, as so written, by Burgess and his wife, and the evidence shows that it was written and signed before the alleged purchase by the respondent of what he alleges to be the right of the equity of redemption. The respondent in his evidence takes the position that no bargain or agreement had been made or entered into, except at the office of the conveyancer; and that that made there was for the equity of redemption for the sum of $104.50. The whole of the facts which are not disputed are, to my mind, conclusive against sustaining that position. In the first place it may be fairly asked why the parties went a distance of about fifteen miles away from their homes to negotiate a

1887

BURGESS v. CONWAY.

Henry J.

bargain? And why was the wife of Burgess taken there? And if no bargain had been previously made, how was it that the consideration of the deed was made, at the instance of the respondent, $1,400. No explanation of these facts is given by the respondent, and when he does not give any are they not, in connection with the testimony of the plaintiffs witnesses, conclusive against the respondent. Exhibit 1 is as follows :—

Statutory deed, dated January 9th, 1885, registered same day at 3.55 p.m., made by plaintiff Samuel Burgess of the first part, Elizabeth M. A. Burgess his wife (who joins for the purpose of barring her dower only) of the second part, and defendant of the third part, whereby in consideration of $1,400 (the payment of which is therein acknowledged and a receipt for the money signed in the margin) the lands in question were conveyed to the defendant.

Here, then, is shown, not a conveyance of the equity of redemption but a deed in fee simple; with a statement of the joining therein of the wife of Burgess to bar her dower; and the consideration therein is stated to be $1400. By the solemn instrument referred to the amount to be paid for the land was agreed to be $1400 and how then can the respondent be permitted to contradict it? That deed is the best evidence against the respondent, who is a party to it, to establish the contention of the appellants, and I hold that he, the respondent, cannot repudiate it unless he could clearly and by irresistible evidence show that the insertion of that sum as the consideration was made through error or fraud, or by equally irresistible evidence that it was contrary to the terms of the bargain which the parties had made and went to Napanee to have carried out. Such has not been attempted to be shown. It is, however shown that before the delivery of the deed some figuring, as Burgess calls it, was done by Currie, the clerk who prepared the deed, and the respondent, and after some conversation with Burgess the sum of $104.50 was

announced by them to him as the balance coming to him after providing for the payment of the mortgage. This he demurred to as Whalen, the father-in-law of the respondent, had made a calculation when Burgess was about selling to Wagar, by which Burgess would be entitled to about $300. On his so demurring and stating that such was the case the respondent and Currie told him that Whalen did not understand figuring; and that he had made a mistake. Hearing that Burgess reluctantly submitted to what they said and received the $104.50 as the balance due him. I have just quoted from the evidence of Burgess; and from the manner in which he gave it, and from the surrounding circumstances, I have satisfied myself that his evidence is more reliable than that of the two others referred to. Currie knew personally nothing of what took place before the parties went to the office. His evidence therefore does not sustain that of the respondent as to matters previous. The respondent, therefore, is wholly unsustained when he, to some extent but inferentially only, contradicts the evidence of the witnesses of the appellant as to the bargain of the previous day. I feel bound, under that evidence sustained by admitted facts and by uncontradicted statements, to find that a bargain for $1400 was entered into and that the parties went to Napanee to have it completed.

Having arrived, then, at that conclusion where can a defence be found to the appellant's action?

That defence consists of the allegation that the respondent purchased the equity of redemption for $104.50 and that he paid it. It will be seen that the defence is not that the respondent purchased for $1400 but that subsequently, and before the execution of the deed, Burgess agreed to take a less sum which was paid to him. That defence under the evidence,

1887

BURGESS v. CONWAY.

Henry J.

would not be sufficient, but the testimony of Burgess being more probable should be acted on.

The more I have considered the evidence and surrounding circumstances the more firmly I have been convinced that Burgess was imposed upon when he received the $104.50. The respondent admits that at the time of the dispute as to the balance due to Burgess that he said to Burgess that the time for paying off the mortgage for $1063 had expired and he adds

Mr. Drury said if Mr. Conway assumes that or pays anything out of it he will be doing it on his own responsibility,

meaning that if Conway did not charge Burgess $1313 be would run the risk of losing the difference between that sum and $1068 and when Drury made that statement Conway says

I told Burgess the time had passed for the Company's offer.

It is plain then that they falsely and fraudulently persuaded Burgess that he (Conway) would have to pay the larger amount when he at the time knew full well that he could have the mortgage released for the smaller one.

Burgess was examined and cross examined at great length and amongst other questions was asked

How much did you expect to get? A. The way Conway and Whalen figured there was between three and four hundred dollars coming to me. Q. $1075 was the amount against the place? A. Yes. Q. That would be $375 difference? A. Yes that is what Conway and Whalen said would be coming to me—That is the way they spoke the day before—Thursday.

These statements were either true or false. If the latter we should expect them to have been contradicted by Conway and Whalen but they were not; and when both were examined as witnesses and were silent as to those statements of Burgess are we not bound to believe them? He appears to have been rather an illiterate man unable to make the calculations required to ascertain the sum really due him. He says he was dissatisfied first and last. He says they, Conway and

Drury, did not go over any calculations with him but merely gave results.

He was asked in cross-examination

Then how did you come to quietly accept $104 without asking some explanation? A. I asked Conway and Drury how it was and they said Mr. Whalen didn't understand figuring it.

He is asked by His Lordship the presiding Judge:

What did you understand the mistake to be? A. That there should be more money coming to me than I got. Q. Why? A. The way Whalen figured it to me and the way Conway figured it when we made the bargain—I did not figure it myself—I was not capable of figuring it.

If those statements are true, and I fully believe them to be so, it requires but a slight imagination to picture the position of this man, incapable of making the necessary calculations, in the hands of the other two, an unconscious victim.

The law governing this case is plain and well ascertained and establishes the right of the appellants to recover the difference between the amount the respondent paid to redeem the mortgage to which is to be added the $104.50 paid and the sum of $1400. I think the judgment of the Divisional Court should de sustained and that the judgment of this court should sustain it with costs.

TASCHEREAU J.—I am of opinion that the appeal should be dismissed for the reasons stated in the judgment of Mr. Justice Gwynne.

GWYNNE J.—In my opinion it is to be regretted that the judgment of Mr. Justice Rose, who tried the case, was interfered with by the Divisional Court of Queen's Bench. I quite agree with those learned judges of the courts below who have held that the question was purely one of fact, which the learned judge who heard the witnesses had the best opportunity to determine. That question

1887

BURGESS v. CONWAY.

Gwynne J.

was: What was the agreement between the parties upon which the deed executed by Burgess in favor of Conway was executed? And the learned judge has in effect found, as matter of fact, that the bargain was that Conway was to give $1400 for the fee simple estate in the land, of which sum the mortgage to the Hamilton Provident Loan Society should be counted as part, to the amount which appeared upon its face to be secured by it, and not to the amount which the company would accept in satisfaction of it if paid before its maturity, and that the difference between such face value of the mortgage and $1400.00 should be paid in cash to Burgess; that thereupon a calculation was made in Burgess' presence to ascertain the amount so coming to him in cash which was ascertained to be $84.50 or thereabouts; that thereupon Burgess suggested that he should receive interest upon instalments of the mortgage which he had already paid, to which Conway assented, the amount being ascertained to be about $20.00, which sum added to the $84.50, making together $104.50, Conway paid to Burgess, whereupon Burgess executed a deed to Conway which, although in terms purporting to convey the fee simple estate in the land did in fact pass only, as it only could pass, Burgess' interest therein, that is to say his equity of redemption subject to the mortgage to the loan society which Conway assumed. With the bargain so concluded the learned judge has found that Burgess was and expressed himself to be well satisfied.

Subsequently Conway paid the mortgage before its maturity the company accepting in discharge of it a less sum than the amount appearing on its face to be secured by it and thereby realised a sum of money the prospect of realising which the learned judge found to have been Conway's motive for concluding the above

1887

BURGESS v. CONWAY.

Gwynne J.

bargain with Burgess. This sum of money is the subject of this suit and upon the above findings the learned judge rendered a verdict and judgment for the defendant. The Court of Appeal for Ontario has concurred in this view; and unless we can pronounce it to be clearly erroneous we are not justified in interfering with it. So far from thinking it to be erroneous I concur in the findings of the learned judge. The appeal therefore, in my opinion, should be dismissed with costs.

Appeal allowed with costs.

Solicitors for Appellant: *Deroche & Madden.*

Solicitors for Respondent: *Kerr & Bull.*

1887

*Mar. 8 & 9.

*June 20.

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

AND

DAME AGNES ROBINSON (PLAINTIFF) ..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR LOWER CANADA (APPEAL SIDE). *

Damages—Misdirection as to solatium—New Trial—Art 1056 *C. C.*

In an action of damages brought for the death of a person by the consort and relations under Art. 1056. C. C. which is a re-enactment and reproduction of the Con. Stats. L. C. ch. 78, damages by way of solatium for the bereavement suffered cannot be recovered.

Judgment of the court below reversed and new trial ordered.

APPEAL from a judgment of the Court of Queen's Bench for Lower Canada (appeal side) (1) reversing the judgment of the Court of Review on the motion granting a new trial.

---

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

(1) 2. M. L. R. Q. B. 25.

1887

CANADIAN PACIFIC RY. CO. v. ROBINSON.

This was an action by a widow for herself and daughter for damages arising from the death of the husband of the former caused by an accident attributable to the fault of the defendant railway company. The case was tried by a jury, and there was a verdict for the plaintiff.

The plaintiff's motion for judgment was met by one for a new trial on the part of the defendants, which was made on five different grounds: 1st. The omission from the assignment of facts for the jury of some of the things necessary to be proved. 2nd. Misdirection. 3rd. Partiality on the part of the jury. 4th. The absence of an important witness at the commencement of the trial without any fault of the party, and whose evidence was tendered before the close of the proceedings but refused by the Court. 5th. The discovery of new evidence since the trial.

The part of the judge's charge reduced to writing conformably to Article 405 of the Code of Civil Procedure, in consequence of defendants' objections as to misdirection, is as follows:—

"With reference to the fifth ground or head of objec-
"tions, and which is the only one involving a question
"of law, the judge told the jury, in effect, that in
"assessing the amount of damages, if they found for
"plaintiff, they had right to and might consider the
"nature of the anguish and mental sufferings of the
"widowed mother and her orphan child."

And another of the grounds for the motion for new trial was:—

"Because an important and essential witness on be-
"half of the defendants was absent at the time of the
"trial without any fault on their part, and said witness
'appearing before the plaintiff had submitted her case
"to the jury, his evidence was duly tendered by the de-
"fendants, but was refused by the Court, the said defen-

1887

CANADIAN PACIFIC RY. CO. v. ROBINSON.

"dants having made due diligence to have the witness "present in time at the said trial, and he having been "prevented by causes beyond his control or that of the "defendants; and the evidence of the said witness being "still obtainable."

The following is an extract of the minutes of the prothonotary for the 28th April, 1883.

"The defendants move that the case be postponed to "examine Charles Scott, of Philadelphia, a witness "summoned, now on his way to Montreal. Affidavit "of R. T. Heneker fyled in support of said motion.

"The Court allows ten minutes in order to give time "to said Charles Scott to appear before this Court and "give his evidence.

"The time allowed by the Court to permit witness "Scott to appear having expired, the *enquête* of defendants is declared closed.

"The *enquête* on both sides is declared closed.

"Mr. Harry Abbott, counsel for defendants, addressed "the court and jury.

"At the conclusion of Mr. Abbott's address, Mr. "Charles Scott, the witness above mentioned being pre-"sent into court, application is made by defendant's "counsel for leave to examine him as a witness.

"Mr. Hatton, one of plaintiff's counsel, objects to the "examination of said witness at this stage of the case.

"The objection of Mr. Hatton is maintained by the "court."

C. Scott's affidavit is as follows:

Charles Scott, of Philadilphia, in the state of Pennslvania, one of the United States of America, manufacturer, being duly sworn, doth depose and say:—

(1) I was the manufacturer and owner of the machine in question in this cause at the time the accident in question occurred to deceased, Patrick Flynn.

(2) The machine on the day of the accident, was lying at the Grand Trunk Railway freight depôt, and was brought from there to the Canadian Pacific Railway Company's shops at Hochelaga, upon a

1887

CANADIAN PACIFIC RY. CO. v. ROBINSON.

waggon to the shed in question, hired by me.

(3) I had previously applied to Mr. Blackwell, the then mechanical superintendent of the Canadian Pacific Railway Company for permission to take the machine to the Canadian Pacific Railway Company's shops, for the purpose of exhibiting a test of springs which had been sent up here by me. Mr. Blackwell referred me to Mr. Black, the mechanical foreman at Hochelaga Station. I asked Mr. Black if he would hire me some men to unload this machine, or whether I would send the men from the freight depot with the team. He replied that it was not worth while to do that; that he would furnish the men to unload the machine and put it in the shops; and I told him I would pay the men for their services.

(4) I arrived at the shops shortly after the accident; and hearing of it, expressed my willingness to Mr. Blackwell to do something for the man, Flynn, who had been injured; and gave him a cheque for one hundred dollars.

(5) I paid Mr. Black the sum of twenty or twenty-five dollars, I am not quite sure which, for the services of the men who had engaged in unloading the machine.

(6) The machine was in my possession, that is to say, upon the waggon and in its unloading, until it was actually delivered in the Canadian Pacific Railway shops, and it continued to be my property and was afterwards removed from there in the same manner, that is without any special appliances except rails or planks, which were not fastened together or secured in any particular manner, merely sliding it off and on the truck.

(7) I have always moved these machines in the same manner, and have never had an accident. I have never seen the rails or planks braced together under them; and I moved this very machine again from the Grand Trunk to the Canadian Pacific Railway new shops afterwards in the same manner.

And I have signed.

The jury having returned a verdict awarding $2,000 damages to the respondent and $1,000 to her child, the Court of Review, on the motion for the new trial, granted the motion for a new trial. On appeal to the Court of Queen's Bench, that Court reversed the judgment of the Court of Review, and ordered judgment to be entered for the plaintiff for the amount of damages awarded by the jury.

Scott Q.C. and *H. Abbott* for the appellants.

The following authorities may be cited on the question of misdirection and improper rejection of evidence:

1887

CANADIAN PACIFIC RY. CO. v. ROBINSON.

Fuller v. *G. T. R. Co.* (1); *Bourdeau* v. *G. T. R. Co.* (2).

As to the solatium allowed, see *Ravary* v. *G. T. R. Co.* (3); *St. Lawrence & Ottawa Ry. Co.* v. *Lett* (4).

The evidence shows that the accident was caused by the negligence of fellow servants of the deceased for which defendants are not liable. See McDonald on Master and Servant (5); *Morgan* v. *Vale of Neath Ry. Co.* (6); *Lovell* v. *Howell* (7); *Howells* v. *Landore Siemens Steel Co.* (8); *Feltham* v. *England* (9).

Arts. 1056, 426 and 427 sub-sec. 7 were referred to.

Hatton Q C. for the respondents.

The grounds relied on for a new trial should have been urged before the verdict was entered. It is too late to bring them forward now. See *Cannon* v. *Huot* (10).

Fuller v. *G. T. R. Co.* and *Bourdeau* v. *G. T. R. Co.* relied on by appellants' counsel, do not apply, as the circumstances in those cases were different from the present. See *Hall* v. *Canadian Copper & Sulphur Co.* (11).

The propriety of the direction to the jury as to mental suffering, &c., must be decided according to the law of Quebec. *Ravary* v. *G. T. R. Co.* (3) contains the law on this point. The articles of our Code 1053–5 on this subject were copied from the Code Napoleon Arts. 1382–6 inclusive.

As to the right to recover these damages see *Labelle* v. *City of Montreal* (12); *Evans* v. *Monnette* (13); *Richelieu Nav. Co.* v. *St. Jean* (14).

The case of *St. Lawrence & Ottawa Ry. Co.* v. *Lett* (4)

(1) 1 L. C. L. J. 68.
(2) 2 L. C. L. J. 186.
(3) 6 L. C. J. 49.
(4) 11 Can. S. C. R. 422.
(5) P. 303 et seq.
(6) L. R. 1 Q. B. 149.
(7) 1 C. P. D. 161.
(8) L. R. 10 Q. B. 62.
(9) L. R. 2 Q. B. 33.
(10) 1 Q. L. R. 139.
(11) 2 L. N. 245.
(12) 2 M. L. R. (S. C.) 56.
(13) 30 L. C. J. 204.
(14) 28 L. C. J. 91.

1887

CANADIAN PACIFIC RY. CO. v. ROBINSON.

was decided under English law and does not apply to Quebec.

The following authorities were also referred to: Sourdat (1); Dalloz Jurisprudence générale, Vo. Responsibilité No. 1; Toullier (2); Potter's Dwarris on Statutes (3). The resolution of the Barons of the Exchequer in Heydon's case (4); *Allan et al* v. *Pratt* Court of Queen's Bench (appeal side) Montreal, coram Dorion C.J., Tessier, Cross and Baby J.J., reported in Montreal Daily Gazette of 19th March instant by Mr. Kirby, editor of the Montreal Law Reports, from the notes of Mr. Justice Cross who delivered the judgment of the Court which was unanimous.

SIR W. J. RITCHIE C.J.—I think the damages must be estimated, not by the injured feelings of the plaintiff, but must rest on the privation of some advantage actually suffered or reasonably expected to be suffered from the homicide and to be compensated by a sum of money in lieu thereof.

The statute provides for the assessment of damages by a jury in proportion to the injury suffered by the wife, &c., from the death of the deceased. The code provides for his consort and his ascendant and descendant relatives recovering "all damages occasioned by such death" (5), all damages occasioned—that is to say, according to the loss they have severally and personally sustained, capable of ascertainment by a reasonable calculation in money, in which calculation the feelings of the parties are not to be taken into consideration for the purpose of assessing damage, but the actual pecuniary damage sustained.

I think the reasoning of Justices Badgeley and Duval in *Ravary* v. *Grand Trunk Railway* (6),

(1) Pp. 24, 39.
(2) Vol. 11, Paris, 1830.
(3) Ed. for 1871. p. 275, note 5.
(4) P. 184, note 6.
(5) See Art. 1056, C. C.
(6) 6 L. C. J. 58.

1887

CANADIAN PACIFIC RY. CO. v. ROBINSON.

Ritchie C.J.

should prevail.

The code appears to me to have intended to embody the provisions of the statute passed when Ontario and Quebec were in union and to be substantially the same, and under which statute the same rule for assessing damages would be applicable alike to Ontario and Quebec; and this I cannot think the code intended to alter, and which rule, on the authority of the cases in Ontario as well as those in England under a similar statute and from which the Canadian act was copied, clearly excludes damages by way of solatium for wounded feelings.

I think it would be much to be regretted if we were compelled to hold that damages should be assessed by different rules in the different provinces through which the same railroad may run.

If the damages are so assessed as solatium to the widow and next of kin for the bereavement and mental suffering, how is it to be apportioned? It seems to me very difficult, if not impossible, to say how much the feelings of the mother and each of the children have respectively suffered. I am of opinion that the appeal should be allowed and a new trial ordered.

STRONG J.—The respondent instituted this action, as well on her own behalf as in the quality of tutrix of her minor daughter Mary Agnes Flynn, to recover damages for the death of her former husband Patrick Flynn, which was the consequence of an accident met with by the deceased while in the employ of the appellants when engaged with other employees in unloading a machine from a waggon or truck, and which accident, as the respondent alleges, was occasioned by the negligence of the appellants in not providing proper appliances for performing the work in the course of which it occurred. The respondent in her declaration

1887

CANADIAN PACIFIC RY. CO. v. ROBINSON.

Strong J.

claimed a trial by jury. The appellants pleaded two pleas; That the accident was not caused by the negligence of the appellants but by the negligence, carelessness and inattention of the deceased himself, and that every possible means to prevent any accident were used by the appellants' employees at the time in question—in short a plea of contributory negligence. The other plea was the general issue. The respondent replied to the first plea by a general answer denying its allegations.

Assignments of the facts to be proved having been furnished by the parties, the cause came on for trial on the 27th and 28th April, 1885, before Mr. Justice Doherty and a jury. The facts of the marriage of the respondent with the deceased and the birth of the minor as issue of that marriage having been admitted, the jury after having heard the testimony of numerous witnesses found in answer to questions put to them by the judge (amongst other findings):—That the deceased Patrick Flynn was, in unloading the machine, acting under the orders of the appellants' officers and so in the employ of the appellants; that the accident was caused by the fault or negligence or want of skill of the company appellants or their servants; that the deceased Patrick Flynn was not guilty of carelessness, negligence or rashness in connection with the unloading of the machine; that the respondent had suffered damage to the amount of $2000 and the minor child of the respondent to the amount of $1000 by reason of the death of their husband and father. It appears from the report of the trial made by the learned judge, and which forms part of the record, that overruling the objections on that head of the appellants' counsel, he told the jury in effect, that in assessing the amount of damages if they found for the respondent "they had right to and "might consider the anguish and mental suffering of the

"widowed mother and her orphan child."

The appellants moved before the Court of Review for a new trial on five specific grounds: (1) Because the assignment of facts submitted to the jury did not contain all the facts necessary to be found; (2) Because the judge misdirected the jury; (3) Because the jury exhibited undue partiality in favor of the respondent; (4) Because an important witness for the appellants was, without any fault on their part, absent at the time of the trial and that the witness appearing after the evidence had been closed, but before the respondent's counsel had begun to address the jury, the learned judge refused the application of the appellants' counsel to have him examined; (5) Because of the discovery of new evidence. The Court of Review considered all these grounds of the motion insufficient save the fourth, but upon that ground granted a new trial on payment of costs.

On an appeal from this decision of the Court of Review, the Court of Appeals disallowed all the grounds for a new trial, reversed the judgment of the Court of Review, and gave judgment in the respondent's favor on the verdict, for the damages found by the jury. From this last judgment the present appeal has been taken to this court.

I entirely agree with both the courts below that the 1st, 3rd and 5th grounds assigned in the motion for a new trial are insufficient, and further with the Court of Appeals that the proposed witness Scott, whose absence without any fault on the part of the appellants formed the 4th ground of appeal, was not so material that it ought to have induced the ourt to remit the cause for the consideration of another jury. It appears to me that Scott's evidence, as detailed in his affidavit, is not inconsistent with the finding of the jury that the deceased was in the actual employ of the appellants

1887

CANADIAN PACIFIC RY. CO. v. ROBINSON.

Strong J.

when the accident happened. It would not establish a case where workmen had (to use the expression of the present Master of the Rolls in the case of *Murray* v. *Currie* (1)) been lent to another employer. The evidence of Oliver, the appellants' own witness, shows conclusively that the deceased and the men engaged with him in unloading the machine which caused the accident were acting under the immediate directions of Oliver as foreman of the gang, who was himself acting in obedience to the orders of his superior officer, Jackson, who acted as he did with the sanction of Mr. Black the general foreman of the appellants' mechanical works at Hochelaga.

In the face of this evidence at the trial, taken in conjunction with what Scott says in his affidavit, no jury could be expected to find that the deceased was not in the employment of the appellants when the accident happened, and I am therefore of opinion that the Court of Appeal exercised a wise discretion in refusing to grant a new trial on this ground in exercise of the powers conferred by article 426, No. 15 of the Code of Civil Procedure.

As regards the first ground for a new trial there was ample evidence of negligence which was entirely a matter for the consideration of the jury. The point principally made under this head, in the argument of the present appeal, was however, that the appellants were not responsible for the negligence of the fellow servants of the deceased. This point, however well founded in fact, would be an insufficient defence in point of law, for, according to the best French authorities, the rule of modern English law upon which that defence is founded is rejected by the French law which governs the decisions of such questions in the Province

(1) L. R. 6 C. P. 24.

of Quebec (1).

1887

CANADIAN PACIFIC RY. CO. v. ROBINSON.

Strong J.

The point on which I feel compelled with sincere respect to differ from the Court of Appeals is that comprised in the second ground specified in the motion viz : misdirection—the particular misdirection which I consider fatal to the verdict being that the learned judge told the jury that they were at liberty in estimating the damages to consider the anguish and mental suffering of the respondent and her child.

The present action is founded on article 1056 of the Civil Code which is as follows :—

In all cases where the person injured by the commission of an offence or a quasi-offence dies in consequence, without having obtained indemnity or satisfaction, his consort and his ascendant and descendant relations have a right but only within a year after his death, to recover from the person who committed the offence or quasi-offence, or his representatives, all damages occasioned by such death. In the case of a duel, action may be brought in like manner not only against the immediate author of the death, but also against all those who took part in the duel, whether as seconds or as witnesses. In all cases no more than one action can be brought in behalf of those who are entitled to the indemnity, and the judgment determines the proportion of the indemnity which each is to receive. These actions are independent and do not prejudice the criminal proceedings to which the parties may be subject.

The first question which presents itself is: Whether this article is to be taken as a reproduction of the enactment contained in the consolidated statutes of Canada, cap. 78, and as providing for the continuance of the action conferred by that act, exclusively of all other actions by the persons named in the article, for the same cause, or whether it is to be considered as putting an end to the remedy given by the statute and as continuing or reviving an action known to the former common law of Lower Canada, an action to be regulated as regards the recovery of damages by the principles of French law and irrespective altogether of the rules in relation to damages applied in proceedings

(1) Demolombe Vol 31 No. 368; Sourdat Vol. 2 No. 911.

1887

CANADIAN PACIFIC RY. CO. v. ROBINSON.

Strong J.

under the act.

From the terms of article 1056 it is apparent that the only action which can now be brought by or on behalf of the persons named in it to recover indemnity for the death of a relative is one subject to the provisions of the article, for it says in express terms, that no more than one action can be brought for that purpose. Therefore the action given by article 1056 and the action conferred by the statute cannot co-exist as cumulative and alternative remedies, but the statutory action must be considered as entirely superseded by an action depending on this article of the code. The question we have to decide therefore is one concerning the interpretation of the article, and the answer to it must depend on whether or not we can say that article 1056 contains in its terms intrinsic evidence of an intention to continue the remedies given by the statute rather than that given by the common law.

The consolidated statute cap. 78 was derived from the statute of Canada 10 & 11 Vic. cap. 6. which in turn was (as is well known) a literal re-enactment of the Imperial Statute 9 & 10 Vic. cap. 93 commonly called Lord Campbell's Act. If, therefore, article 1056 is to be considered as embodying the provisions of the statute it is clear that, according to a rule of construction which has the sanction of the highest authority, it ought to receive the same interpretation at our hands as that which the English courts have applied to the original act.

The principal argument against the contention that article 1056 is to be interpreted in the same manner as the statute is that derived from the former law of Lower Canada as it existed at the time of the passing of the statute in relation to the remedial rights of the relatives of deceased persons whose deaths had been caused by "délits" or "quasi-délits."

It appears that such an action could have been maintained on well established principles of the old French law. Further, it may be conceded that in such an action the plaintiff was not limited to an indemnity in respect of such pecuniary or material loss as he might be proved to have sustained by the death of his relative, but beyond and apart from these damages, he might also recover in respect of that which the learned judge in his charge to the jury in the present case defined as "the anguish and mental suffering of the plaintiff and her child;" and which Larombière (1), in a passage quoted in the respondent's factum, designates as "the moral wrong to the natural and "legitimate affections of the party complaining;" in short that same element of damages, which in the Scotch law is termed the "solatium," by which name also it has been rejected by the English courts as a ground of damages to be recovered in an action brought under Lord Campbell's act. Whilst, however, I am willing to concede for the present purpose that damages by way of consolation for the bereavement suffered could be recovered in an action brought at common law before the statute, the judgment of Mr. Justice Badgley in *Ravary* v. *G. T. R. Coy.* (2), and the French authorities referred to therein, shew that even this was by no means free from doubt.

The jurisprudence of the courts of the Province of Quebec bearing on the questions involved in the present case, so far as it can be collected from the published report of the decisions of those courts, is somewhat scanty. We have been referred, however, to some cases of which the three following may be particularly noticed.

In the case of *Ravary* v. *The G. T. R. Co'y.* (2) which

(1) Vol. 5 p. 714. (2) 6 L. C. J. 49.

1887

CANADIAN PACIFIC RY. CO. v. ROBINSON.

Strong J.

was decided by the Court of Appeals, in 1860, a majority of the court consisting of Sir H. L. Lafontaine C.J., Mr. Justice Aylwin and Mr. Justice Bruneau (sitting *ad hoc*) held, that irrespective of the statute an action could be maintained by the widow and children of a man who had been killed by an accident resulting from the negligence of a railway company against the authors of the death, and that in such an action damages were recoverable in respect of a "solatium"—and this decision was based on the jurisprudence of the French courts both ancient and modern, and the opinions of writers of authority collected from several legal treatises, all referred to in the full and learned judgment of Mr. Justice Aylwin. It also seems to have been the conclusion of the majority of the court, that, even in an action avowedly brought under the statute, the rule as to damages would be the same, and that in this latter case the decisions of the English courts against such a measure of damages would not apply. This decision was far from being arrived at unanimously. Mr. Justice Badgley, in a judgment entitled to weight as well from the force of argument as from the great research which it displays, recorded his reasons for an opinion opposed to that of the majority of the court, and in this latter opinion Mr. Justice Duval concurred. In the Court of Review, on the motion for a new trial in the same case, two of the three judges who composed that court, Mr. Justice Mondelet and Mr. Justice Day, expressed opinions coinciding with that of Badgley J, while the third judge, Mr. Justice Smith, was in favor of sustaining the verdict by which the jury had given damages for a considerable amount without any proof of material or pecuniary loss, such damages being attributed by them to a solatium exclusively. This verdict, too, was in direct contradiction to the charge of the judge who presided

1887

CANADIAN PACIFIC RY. CO. v. ROBINSON.

Strong J.

at the trial, by whom the law was laid down in the same way as it was afterwards adopted by the majority of the Court of Review and by Mr. Justice Badgley in the Court of Appeal.

There was, therefore, very considerable dissent from the judgment of the Court of Appeal, and opposed to the views of the four judges whose opinions there prevailed there were those of five judges who all, at different stages of the same cause, gave judgments in it, including the judge who presided at the trial, two judges in the Court of Review, and the two dissentient judges in the Queen's Bench. It is not, therefore, surprising that in the case of *Provost* v. *Jackson* (1), decided in the Court of Appeals at Montreal in 1863, on an appeal from a judgment pronounced in the Superior Court in 1860, we find no disapproval expressed by the majority of the court of the "motifs" of the judgment of the Superior Court in Review, in which it was considered that an action by a father and mother for causing the death of their son depended entirely on the statute, although the *ratio decidendi* of the Court of Appeals certainly was the failure of the plaintiffs to prove their intermarriage. In *Ruest* v. *Grand Trunk Railway Coy.* (2), decided in 1878, Mr. Justice McCord determined that the action given by article 1056 is exclusive of any other action to recover damages for the loss suffered by the death of a relative within the degrees provided for by the article, and he held that no such action was maintainable by the brothers and sisters of the deceased. The learned judge's own language is as follows:—

> But no such action lies except under the terms of article 1056, the express inclusiveness of which excludes the right of any other persons than those herein mentioned. According to the terms of this article, the consort and ascendant and descendant relations can

(1) 13 L. C. J. 170.

(2) 4 Q. L. R. 181.

1887

CANADIAN PACIFIC RY. CO. v. ROBINSON.

Strong J.

alone have the right to claim damages for death occasioned by quasi-offence. In so far therefore as the brothers and sisters of Ruest are concerned the action is not founded and the defence *en droit* will be maintained.

These are the only authorities to be found in the reports which throw any light on the question we have to decide on this appeal.

The conclusion I have arrived at, after considering these and other authorities, and the terms in which the fourth section of the statute is expressed as well as those of the articles, is, that the common law action was entirely superseded, at least as regards the persons mentioned in the second section as those for whose benefit an action might be brought, by the action given by the statute, and that article 1056 was a re-enactment and reproduction of the statute and is to be interpreted in the same way. The fourth section of the statute provides that, "not more than one action 'shall lie for and in respect of the same subject of com-"plaint"—that is "a subject of complaint" entitling the parties named in the 2nd section to an action to be brought by a nominal plaintiff for their benefit. I think it impossible that the intention of the legislature to exclude all other actions for the benefit of the same parties and for the same cause, at common law or otherwise, could have been more explicitly demonstrated than by these words. I am therefore of opinion, that from the date of the enactment of the statute the remedy, for the causes mentioned in it, was confined to an action founded on it. In like manner, entirely agreeing in this respect with Mr. Justice McCord's decision in *Ruest* v. *G T. Ry. Co.*, I am of opinion that the almost identical words, "not more than one action can be "brought on behalf of those who are entitled to the "indemnity," contained in article 1056, have the same effect of restricting the remedy of the relations named in the article to an action founded on its terms.

1887

CANADIAN PACIFIC RY. CO. v. ROBINSON.

Strong J.

Then the state of the law of Lower Canada at the date of the promulgation of the Civil Code being such as I have mentioned—that the only remedy for persons coming within the degrees of relationship specified in the statute, was an action founded on the statute—it would seem to be a reasonable inference, apart altogether from the internal evidence afforded by the language and provisions of the article, that the action given by it was intended to afford the same remedy and to be subject to the same limitations and restrictions as the former statutory action. When, however, we find on an examination of the terms in which the article is expressed that it includes the same persons as those for whose benefit an action under the statute could alone be maintained, that it is exclusive of all other actions for the same injury, that it is subject to the same anomalous condition that the right to institute it may be intercepted by indemnity or satisfaction made to the deceased in his lifetime, and that the same exceptionally short period of prescription applies to it, and that whilst in all these features it resembles the statutory action, it differs entirely and radically from the action given by the old French law, it appears to me we may safely conclude that it was not intended by the code to lay down any new law or to give any new remedy or to revive the old extinct common law action, but merely to continue the same state of the law as that which previously existed under the statute.

This also accounts for the absence, as applied to art. 1056, of the marks by which the codifiers distinguished new law.

Then taking it as established that art. 1056 is to be read and interpreted as an adoption into the code of the provisions of the statute, and having regard to the history of the legislation already stated, we are bound to follow the English courts in the con-

1887

CANADIAN PACIFIC RY. CO. v. ROBINSON.

Strong J.

struction which, in the early case of *Blake* v. *Midland Railway Company* (1), they placed on the original enactment, viz: that it does not authorize the assessment of damages in respect of the injured feelings and affections and mental sufferings of the party complaining. The rule that courts, in construing colonial statutes copied from Imperial legislation, ought to follow the construction applied by the English courts has the sanction of the highest authority. In the case of *Trimble* v. *Hill* (2) the Judicial Committee of the Privy Council lay down the rule just adverted to as one which ought invariably to be acted on and applied by colonial courts in interpreting statutes of English origin. It is true that the case of *Blake* v. *Midland Railway Company* was not a decision of a Court of Appeal, but, independently of being the decision of a court comprised of very eminent judges, of whom the author of the act, Lord Campbell, was one, it has ever since been acquiesced in by text writers and acted on by the courts as an authoritative construction of the act. Moreover, it was tacitly recognized as a sound decision in *Rowley* v. *P. & N W. R. Co.* (3) where the principles on which damages are to be calculated in an action brought by a widow and children for indemnity under Lord Campbell's act were considered, and certain rules laid down which entirely exclude the element of damage now in question.

I am therefore of opinion that the learned judge should have instructed the jury that the plaintiff and her child were not entitled to recover any damages in respect of and by way of consolation for the bereavement they had suffered and that his direction to the contrary was erroneous.

Further, in view of the great injustice and incon-

(1) 18 Q. B. 93.
(2) 5 App. Cas. 342.
(3) L. R. 8 Ex. 221.

venience which would be sure to result if so impalpable a ground of damages as the solatium could be taken into account by juries in estimating damages in cases like the present, I should, if the question came before us without previous decision, as *nova res*, for these reasons, which are very ably pointed out in the judgment of Mr. Justice Cross, unhesitatingly adopt the same conclusion as that arrived at in the case of *Blake* v. *Midland Railway Co.*

I am of opinion to reverse the judgment of the Court of Queen's Bench and restore and affirm that of the Court of Review for a new trial.

FOURNIER and HENRY J.J. concurred with the Chief Justice that there had been misdirection.

TASCHEREAU J.—I am of opinion that the judge at the trial misdirected the jury in telling them that, in assessing the amount of the damages, they might consider the nature of the anguish and mental sufferings of the plaintiff, or, in other words, that they could make an estimation of her tears, sighs, and sorrows, in pounds, shillings, and pence.

Though the French law allowed a larger basis for a pecuniary compensation in such cases, I take it that now, with us, under article 1056 of the code, which is the re-enactment of our statute 10–11 Vic. similar to Lord Campbell's Act, there is no difference between the English law and ours on the subject. The Privy Council held, in *Trimble* v. *Hill* (1), that when a colonial legislature has passed an act in the same terms as an Imperial statute, and the latter has been authoritatively construed by a Court of Appeal in England, such construction should be adopted by the courts of the colony. And in *City Bank* v. *Barrow* (2), in the House of Lords, on the interpretation of an article of

(1) 5 App. Cas. 342. (2) 5 App. Cas. 664.

1887

CANADIAN PACIFIC RY. CO. v. ROBINSON.

Taschereau J.

our code, Lord Blackburn said that where a colony re-enacts an Imperial statute it is as if the English law was carried over bodily to the colony, and in construing the colonial law, the interpretation given to the similar law by the courts in England should be followed. I think this reasonable rule should be followed in this case.

When by the 10th and 11th Vic. the legislature of the United Canadas re-enacted Lord Campbell's act, it was the intention not only to provide for damages resulting from death in Upper Canada but also to put the law in both Provinces on the same footing. That is why the act was extended to Lower Canada, though the common law then gave a remedy for such injuries. It cannot have been intended by this legislation, that if a man was killed in Upper Canada, no solatium should be granted to his wife or legal representatives by way of damages, but that if he was killed in Lower Canada, such a solatium could be given. That in the present case, for instance, this plaintiff can get a solatium, because her husband was killed in Lower Canada, whilst if he had been killed a few miles further west, in Upper Canada, none would be granted under the same statute. The statute and the code entirely changed the laws. 1st, As to prescription; by article 2261, C. C. it would be two years; 2nd, As to the parties entitled to the action; 3rd, In giving only one action to all the parties injured; 4th, In denying, as in England (1), the action where the deceased party had himself obtained an indemnity (2). From this it is evident in my opinion that the action now given is an entirely different one from the common law action. And if different in four such important respects, can it be contended that as to a fifth, the mea-

(1) *Read* v. *Great Eastern Railway*, L. R. 3 Q. B. 555.

(2) *Chemin de fer* v. *Magaud*, Dalloz 72, 2, 97.

sure of damages, the principles of the common law action can be engrafted on the statutory action? This obviously would be to set at naught the intention of the legislator, who, for no other reason than to have the law in both Canadas on the same footing, has extended this legislation to Lower Canada, and this no doubt as it was to principally affect companies incorporated for and running their roads through both Provinces.

It could not be contended, I take it for granted, that, if the English act had been extended to Scotland, it would not receive there the same construction as is given to it by the courts of England. A statute would not be held to mean one thing in England and another in Scotland. And so here, I take it, it cannot mean in Lower Canada what it does not mean in Upper Canada, or give a larger remedy in one Province than in the other.

Furthermore, in this section itself (1056) of the code, there is intrinsic and, to my mind, unmistakeable evidence that the Legislature intended that the measure of damages in such cases should be thereafter the same in Lower Canada as in Upper Canada. That is in the enactment that if the deceased has himself obtained an indemnity, this will be a bar to any action by his consort or legal representatives for their injuries resulting from his death. This, as I have already remarked, is entirely new law. Previously, at common law, the indemnity received by the deceased, or the action by him instituted for his injuries, was no bar to his consort or relatives' action for their own injuries resulting from his death. They were held to be two distinct rights giving the two distinct actions (1). But now the code, as the statute did, though in no such express words, clearly refuses a new action to the survivors in such cases (2).

(1) *Re Chemin de fer* v. *Magaud, Ubi supra.*

(2) *Read* v. *The Great Eastern* (cited above).

1887

CANADIAN PACIFIC RY. CO. v. ROBINSON.

Taschereau J.

Now, is this not, as Mr. Justice Cross well remarked in the court below, enacting as clearly as if it were laid down in so many words, that anguish of mind and mental sufferings are not to be the subject of pecuniary compensation. The injured man, if he settled before his death with the party who caused his injury, obviously did not settle for his wife's or children's anguish of mind caused by his death. So that when the action in that case is taken away from said wife or children it is, it seems to me, equivalent to an express enactment that their anguish of mind is no ground for damages.

The code, in my opinion, has taken away the common law action and the remedy it gave.

When *Ravary* v. *The G T. R.* (1) was decided, before the code, it might have been a question whether the statute had had that effect. But since the code there can be no doubt on the subject, and that case upon that ground is entirely distinguishable.

It is expressly enacted by art. 2613 thereof that all laws previously in force are abrogated in all cases in which express provision is thereby made upon the particular matter to which such laws relate. This clearly leaves for an injury caused by death nothing but the action given by art. 1056, and the jurisprudence is all in that sense. *Provost* v. *Jackson*, judgment of Superior Court (2); *Ruest* v. *G. T. Ry.* (3); *G. T. Ry.* v. *Godbout* (4). And if the statutory action only now lies, the statutory damages can only be allowed. Moreover, when *Ravary* v. *The G. T. R.* was decided *Read* v. *The Great Eastern Railway* had not been decided, and there was not in the statute, as there is now in art. 1056, the express refusal of the action where the

(1) 6 L. C. J. 49.
(2) 13 L. C. J. 170.
(3) 4 Q. L. R. 181. S. C. in appeal 1 L. N. 129.
(4) 6 Q. L. R. 63.

1887

CANADIAN PACIFIC RY. CO. v. ROBINSON.

Taschereau J.

deceased had received an indemnity. That consideration was consequently not before the judges who determined that case. I would, for all these reasons, hold that the charge of the learned judge at the trial in this case is as illegal here as it would be in Ontario or in England.

But I go further and would hold that even under the French law, supposing that it ruled this case, the charge of the learned judge was illegal by its vagueness. Laurent (1) would call it dangerous. I would say it is illegal, because it is dangerous. The jury may have been led to believe, under the terms in which it was given, that they might consider the anguish of mind and mental sufferings of the plaintiff during the fifteen months that elapsed between the accident to the husband and his death. Clearly this could not be taken into consideration. Then, apart from this there is not a single authority that sustains such a charge. In this case, there is even no evidence of what the deceased earned at his death; nothing but the speculative opinion of one witness who hardly knew him. No evidence whatever of how much it would take to educate the child and to support her or her mother, not a word of all this. None. All the authorities cited by Mr. Justice Badgley in *Ravary* v. *The G. T. R.* demonstrate that there must be some basis upon which the damages can be assessed. I need not refer to them more particularly here. As said by Mr. Justice Mondelet, in that case in the Superior Court (2):—

> If vindictive damages were to be given, without any rule, upon the mere caprice of juries excited by public clamor, there would be no safety for railway companies against the most monstrous fines.

If a jury could be charged, as has been in this case, the court would lose all control over their verdict. In the present case, for instance, a verdict for $10,000 or $20,000 would be unassailable, if this one is. It is not

(1) Vol. 20 p. 569. (2) 1 L. C. J. 283.

1887

CANADIAN PACIFIC RY. CO. v. ROBINSON.

Taschereau J.

a question of excessive damages. How could the court say that the damages are excessive, if it has no means to ascertain on what principles and for what they have been assessed. The court, it seems to me, should direct the jury to state what amount they grant for actual real damages, and what amount for mental sufferings or anguish of mind. Otherwise, the court has no check on the verdict. The jury should also be charged that though they may take into consideration the mental sufferings and anguish of mind of the plaintiff, yet the damages must not be assessed to an amount out of proportion with the actual pecuniary loss they have suffered. Such are the remarks of the court of Marseilles in the case cited by Laurent (1), of *Compagnie P. L. M.* v. *Olivier* (2). If in France, where the damages are *à l'arbitrage du Juge*, these considerations guide the courts in the assessments of such damages, I think that with us, in a case tried by a jury, the court should direct them that they also are to be guided by these considerations. The jury should also be told of the rule of law, that, for a death caused by an accident, they cannot give as heavy damages as for a death caused by an assassination or any crime, a rule admitted by all the writers, and mentioned by the court in the case of *Enfants Verviers* v. *Constant* (3). The law authorizes vindictive damages and damages for a *préjudice moral*, in cases where the party causing the death has acted with malice or committed a *délit*, but not when the death was caused by a *quasi-délit*. For this proposition we have no less an authority than that of the Cour de Cassation, the highest tribunal in France, in the case of *Re Roche* (4), who held that:

Les dommages-interêts reclamés en matière criminelle ne doivent pas necessairement être restreints, comme en matière civile, au pré-

(1) Vol. 20 No. 525.
(2) Dalloz 73, 2, 57.
(3) Dalloz Responsabilité No. 190' Laurent vol. 20 No. 530.
(4) Dalloz 53, 5, 167.

1887

CANADIAN PACIFIC RY. CO. v. ROBINSON. CO.

Taschereau J.

judice matériel résultant du crime ou du délit; ils peuvent aussi, comprendre le préjudice moral causé à la partie civile par ce crime ou par ce délit.

Said the court:—

Attendu que cet article n'est point applicable aux dommages intérêts résultant d'un délit ou d'un quasi delit; que les dommages intérêts réclamés en matière criminelle ne sont pas de la même nature, et peuvent n'être pas restreints comme doivent l'être ceux qui sont réclamés en matière civile, que le préjudice matériel résultant d'un crime ou d'un délit peut, en outre, être accompagné d'un préjudice moral qui peut entrer dans les appreciations du juge et, par consequent, influer sur la quotité des dommages-intérêts qu'il accorde à la partie civile—Rejeté.

Is not this holding, as unequivocally as can be, though in the negative form, that though for a crime damages for a moral loss can be given, yet for a *délit civil* or a *quasi-délit*, none but the real damages for the pecuniary loss are allowable? And it is only for murders or other crimes that all the books and *arrêts* in France before the codes allow damages. This remark applies specially to the authorities cited by Sourdat at No. 54 (1). The *arrêt* of the 3rd of April, 1685 (2), (the reference in Sourdat is wrong) was in a case of murder, in fact these cases are all trials in the criminal courts.

The respondent has invoked as supporting the legality of the judge's charge to the jury a passage from Sourdat (3), where the author says that an indemnity is due to a son for the death of his father even if his father had been entirely supported by him. This, is a mere opinion of the author, coupled with the argument of a member of the French bar in one of his cases, and then it must be remarked that the author in that passage, as in No. 54 of the same book, speaks of a death caused by a murder. The same remarks applies to the passage in Demolombe (4). To the opinions of

(1) De la Responsabilité, vol. 1 No. 33.
(2) Journal des audiences, 984.
(3) Vol. 1, No. 33.
(4) Vol. 31, No. 675.

1887

CANADIAN PACIFIC RY. CO. v. ROBINSON.

Taschereau J.

those commentators I find a forcible answer by the annotator to the *Magaud* case (1), in Dalloz, in the following words :—

Ces arguments inspirés par des reminiscences de notre ancienne législation, ou l'action publique et l'action civil n'étaient pas nettement distinguées comme elles l'ont été par notre droit pénal moderne, ne sont conformes ni aux principes généraux sur la responsabilité, ni même aux sentiments qu'éveille aujourd'hui généralement dans une famille l'accident ou même le crime qui lui a enlevé un des siens. Il ne répugne pas moins à la loi qu'aux sentiments les plus nobles de l'âme humaine de faire d'un malheur de famille une source de vengeance et de gain. La personne qui a perdu un enfant ou un père qui était à sa charge ne nous paraît donc pas fondée à venir demander à l'auteur de l'accident le prix en argent de sa douleur. L'individu qui a éprouvé un préjudice moral, par suite de l'atteinte portée à sa réputation ou à son honneur, est bien venu à réclamer une réparation, parce qu'il craint d'avoir perdu l'amitié, l'estime et le respect des honnêtes gens, et qu'il veut prendre des mesures pour faire taire ou pour punir le mensonge et la calomnie. Mais la personne à qui un accident a enlevé un père infirme ou un jeune enfant, n'a reçu aucune atteinte dans sa considération ; son malheur a dû au contraire lui attirer de nouvelles affections et de nouvelles sympathies. Et puis, si de pareilles questions pouvaient s'agiter devant les tribunaux, il faudrait permettre d'apprécier, de discuter, et même de nier les sentiments de tendresse et d'amitié qui existaient entre la victime et la réclamante.

Enfin quel criterium guiderait le juge dans la fixation des dommages-intérêts? Il en faut donc revenir à ce principe qu'on ne peut exiger une réparation pécuniaire qu'à raison du préjudice souffert dans ses intérêts matériels ou moraux; mais non dans ses affections et ses sympathies.

Le juge accueillera la demande d'un père, d'un enfant, d'une veuve, venant dire: cette mort, qui me frappe dans mes affections les plus chères, porte aussi un grave préjudice à ma fortune, à mon avenir, ou à mon honneur. Mais il ne prêtera pas l'oreille au plaideur qui osera dire: cette mort me cause une immense douleur et des regrets éternels; diminuez-en l'amertume et la durée au moyen d'une somme d'argent!

I refer also to Dalloz (2).

Il ne suffit pas, pour justifier l'intervention civile d'une personne qu' elle ait été blessée dans ses affections, ses goûts ou ses habitudes, par un fait criminel; il faut, que l'action civile soit fondée sur un préjudice sérieux et appréciable.

(1) Dalloz 72, 2, 98. (2) Rep. v. instruct. crim. No. 81.

And at No. 83—Une lésion purement morale peut servir de fondement à une action civile dès que cette lésioin résulte d'un crime ou d'un délit.

And to Mangin, Action publique (1) where he says :—

Il ne a suffirait pas non plus que le delit l'eût blessé dans ses affections.

Also to Larombière (2), where the writer gives the considerations that should guide the judge in the assessment of damages for mental sufferings, which I hold the judge with us should mention to the jury for their guidance.

In the *Magaud* case (3), a widow with her children was suing a railway company for damages caused by the accidental death of her husband. The plaintiff recovered but there is not a word in the judgment of solatium or damages for mental sufferings on the contrary, the court distinctly holds, that

La réparation devant toujours être calculée sur le préjudice réel et sur la privation plus ou moins grande imposée à celui qui se plaint.

Likewise in a case of *Boesch* v. *Gitz* cited in Merlin (4), where 600 francs ($120) are granted to the widow of a man who has been killed by the defendant, "pour dommages réels," but not a word of damages for sorrows and anguish of mind. The same remark applies to the case of *Caderousse Gramont* (5).

I refer also to a case of *Joire*, 17 Febry, 1819, (6). It was there held that

Le préjudice résultant d'un délit ne donne par lieu à des dommages interêts s'il ne constitue qu'un préjudice moral et non un préjudice pecuniare.

I am of opinion that the appeal should be allowed and a new trial granted.

Appeal allowed and new trial ordered with costs.

Solicitors for appellants : *Abbott, Tait, Abbott & Campbell.*

Solicitor for respondents : *J. C. Hatton.*

(1) No. 113.
(2) 5 Obligations p. 716.
(3) Dalloz, 71, 1, 97.
(4) Quest de droits, Vo. réparation civile, p. 156.
(5) S. V. 63, 1, 321.
(6) Sirey. Recueil Général, vol. 6, 2, 26.

1884

*Jan. 21.

*June 23.

THE CANADA SOUTHERN RAILWAY COMPANY..... } APPELLANTS;

AND

MARTHA PHELPS.....RESPONDENT.

ON APPEAL FROM THE QUEEN'S BENCH DIVISION OF THE HIGH COURT OF JUSTICE FOR ONTARIO.

Negligence—Damages—Fire communicated from premises of Company—14 *Geo.* 3 *ch.* 78 *sec.* 86 *not applicable in cases of negligence.*

In an action brought by P. against the appellants company for negligence on the part of the company in causing the destruction of P's. house and outbuildings by fire from one of their locomotives, it was proved that the freight shed of the company was first ignited by sparks from one of the company's engines passing the Chippewa station, and the fire extended to P's. premises. The following questions *inter alia*, were submitted to the jury, and the following answers given:—

Q. Was the fire occasioned by sparks from the locomotive? A. Yes.

Q. If so, was it caused by any want of care on the part of the company or its servants, which, under the circumstances, ought to have been exercised? A. Yes.

Q. If so, state in what respect you think greater care ought to have been exercised? A. As it was a special train and on Sundays, when employees were not on duty, there should have been an extra hand on duty.

Q. Was the smoke stack furnished with as good apparatus for arresting sparks as was consistent with the efficient working of the engine? If you think the apparatus was defective, was it by reason of its not being the best kind, or because it was out of order? A. Out of order.

And P. obtained a verdict for $800.

On motion to set aside the verdict, the Queen's Bench Division unanimously sustained the verdict.

On appeal to the Supreme Court, *Held*, affirming the judgment of the court below, Henry J. dissenting,—

1. That the questions were proper questions to put to the jury, and that there was sufficient evidence of negligence on the part of the appellants' servants to sustain the finding.

---

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

1884

CANADA SOUTHERN RY. CO. v. PHELPS.

2. If a railway company are guilty of default in the discharge of the duty of running their locomotives in a proper and reasonable manner, they are responsible for all damage which is the natural consequence of such default, whether such damage is occasioned by fire escaping from the engine coming directly in contact with and consuming the property of third persons, or is caused to the property of such third persons by a fire communicating thereto from the property of the railway company themselves, which had been ignited by fire escaping from the engine coming directly in contact therewith.

3. The statute 14 Geo. 3 ch. 78 sec. 86, which is an extension of 6 Anne ch. 31 secs. 6 and 7 is in force in the Province of Ontario as part of the law of England introduced by the Constitutional Act 31 Geo. 3 ch. 31, but has no application to protect a party from legal liability as a consequence of negligence.

APPEAL, by consent of parties, under the 27th section of the Supreme and Exchequer Court Act, brought directly to the Supreme Court from a judgment of the Queen's Bench Division of the High Court of Justice for Ontario discharging an order *nisi* asking that a nonsuit should be entered or judgment for the defendants, or for a new trial upon grounds set forth in the order *nisi*.

The action was brought by the plaintiff in the Queen's Bench Division of the High Court of Justice for Ontario to recover damages for the loss of her buildings in the village of Chippewa, which were destroyed by fire on the 24th of July, 1881.

The plaintiff's statement of claim alleged that her buildings caught fire from a conflagration which was negligently allowed to spread from the defendant's buildings, namely, a freight house, owing to carelessness and negligence on the part of the defendants, and that these buildings of the defendants had been set fire to owing to the carelessness and negligence of the defendants, from a train passing over the railway of the defendants.

The fire spread and consumed a number of buildings in the village of Chippewa for the loss of which a

1884

CANADA SOUTHERN RY. CO. v. PHELPS.

number of actions were brought, in which it was agreed that the liability of the defendants should be determined by the result of this action.

The cause was tried before Mr. Justice Patterson and he put the following questions to the jury, which were answered as appears below :—

Q.—Was the fire occasioned by sparks from the locomotive? A—Yes.

Q—If so, was it caused by any want of care on the part of the company or its servants, which, under the circumstances, ought to have been exercised? A—Yes.

Q—If so, state in what respect you think greater care ought to have been exercised? A—As it was a special train and on Sunday, when employees were not on duty, there should have been an extra hand on duty.

Q—Was the smoke-stack furnished with as good apparatus for arresting sparks as was consistent with the efficient working of the engine? If you think the apparatus was defective, was it by reason of its not being of the best kind, or because it was out of order? A—Out of order.

Q—Was there anything in the working of the engine which, under the circumstances, was improper, and what was it? A—In our opinion should not have put on such a heavy pressure of steam, passing the freight house and other buildings, owing to the dry weather at that time.

Q—Was the state of the freight house such as, under the circumstances, and with reasonable regard to safety from passing trains, ought to have been permitted? A—No.

Verdict for plaintiff, $800,00.

The order *nisi* asking that a nonsuit should be entered, or judgment for the defendants or for a new trial was on the following grounds :—

1. That there was no evidence given by the plaintiff, of legal evidence of negligence by the defendants upon any of the grounds of negligence relied upon by the plaintiff in support of the alleged liability of the defendants in this action.

2. That any damages shown, were too remote and not caused by any such negligence of the defendants, as they are in law liable for.

3. That by virtue of the Act 14, George III., ch. 78, sec. 86, the defendants are exempted from any liability to this action or

4. For a new trial upon the ground that the finding of the jury on the several questions submitted to them by the learned Judge, is contrary to law and evidence, and for the misdirection of the learned Judge in holding that there was legal evidence to support the same, and also to the weight of evidence at the said trial.

The evidence as to the carelessness and negligence of the defendants while running a special train passing their freight shed at Chippewa station, is reviewed in the judgment of Sir W. J. Ritchie C.J. hereinafter given.

H. Cameron Q.C. and *Kingsmill* for the appellants contended: 1st. That the defendants are exempted from liability by Act 14 Geo. 3 ch. 78 sec. 86, and cited in addition to cases reviewed in the judgments of the court *Richards* v. *Easto* (1); *Dean* v. *McCarty* (2); *McCallum* v. *G. T. R.* (3).

And 2nd. That defendants are not liable for loss caused to a building or property detached and removed at such a distance as the plaintiff's from the defendant's property, on which latter a fire accidentally originated which spread without negligence on the part of the defendants to the plaintiff's property.

(1) 15 M. & W. 251. (2) 2 U. C. Q. B. 448.
(3) 31 U. C. C. P. 527.

1884

CANADA SOUTHERN RY. CO. v. PHELPS.

Ryan v. *N. Y. Central Ry. Co.* (1) is exactly in point. Also, *Pennsylvania R. R. Co.* v. *Kerr* (2).

3rd. There was no evidence given by the plaintiff of legal negligence.

Citing *inter alia Daniel* v. *Metropolitan R. R. Co.* (3); *Williams* v. *G. W. Ry. Co.* (4); *Hill* v. *O. S. & H. Ry. Co.* (5).

Bethune Q.C. for respondent, contended:

That the statute 14 Geo. III. ch. 78 sec. 86 did not apply.

That the appellants were liable in three ways:—

1st. That it was negligence to have had the freight shed in the state in which it was, owing to the dryness of the season and the close proximity of the track to the door, and that having negligently kindled fire in the freight house, the appellants were liable for its extension to the respondent's buildings.

2nd. That there was negligence in the construction of the screen of the smoke stack in question, because it was proved very clearly that a great shower of sparks came from the smoke stack and fell upon the platform, and that this could not have happened if the screen had been in proper order. The jury have found the screen was out of order, and the evidence of the witnesses amply sustains their finding.

3rd. That the locomotive was negligently managed in this, that there was great haste on the part of the engineer to get up speed rapidly, and that he worked the engine in such a way as to throw an unusual shower of sparks while passing the freight shed in question, which, owing to the dryness of the season and other matters, was gross negligence, and so the appellants are liable for the improper management by the engineer on the occasion in question.

(1) 35 N. Y. App. R. 210.
(2) 62 Penn. 353.
(3) L. R. 3 C. P. 222; s. c. L. R. 3 C. P. 594; s. c. L. R. 5 H. L. 56.
(4) L. R. 9 Ex. 161.
(5) 13 U. C. Q. B. 503.

1884

CANADA SOUTHERN RY. CO. v. PHELPS.

Ritchie C.J.

The cases relied on by counsel are reviewed in the judgments of the court.

Sir W. J. RITCHIE C.J.—The following questions *inter alia* were put to the jury:—

Was the fire occasioned by sparks from defendant's locomotive? To which the jury answered. Yes. Then if so was it caused by any want of care on the part of the company or its servants, which under the circumstances ought to have been exercised? The jury answer. Yes. And being asked to state in what respect greater care ought to have been exercised, the jury say that as it was a special train on Sunday when employees were not on duty there should have been an extra hand on duty.

Then come crucial questions:—Was the smoke-stack furnished with as good apparatus for arresting sparks as was consistent with the efficient working of the engine? If you think the apparatus was defective, was it by reason of its not being of the best kind or because it was out of order? To which the jury answer. Out of order.

If there was evidence to support the first and last findings, viz:—That the fire was caused by the defendant's locomotive and that the apparatus of the smoke-stack for arresting sparks was out of order, the case against the defendants would be established.

I think the irresistible inference from the evidence clearly establishes that the fire in the shed was caused by sparks from the defendants' locomotive. There was nothing whatever to shake the evidence of the boys, present on the passing of the train; on the contrary all the surrounding circumstances confirm what they said, and the jury evidently believed their testimony, and no reasonable hypothesis has been suggested that the fire in the shed could have been ignited in any other way.

1884

CANADA SOUTHERN RY. CO. v. PHELPS.

Ritchie C.J.

If then the testimony of the boys is to be accepted as true, there was evidence from which negligence might be inferred proper to submit to the jury.

There was no motion for a non suit, which indicates that defendants assumed there was such evidence in plaintiff's case, but whatever question there may be as to that, the evidence drawn from the defendants' witnesses supplied any deficiency there may have been in the plaintiff's case.

Mr. Domville—recalled, says:

Q. This is established as the actual screen on the locomotive on the day in question; will you look at it and say what that screen represents in reference to your knowledge of the screens of locomotives used on the Great Western Road? A. Well, it is a fair ordinary screen; I would not consider it a first class one. I would think a screen with several holes in it like that, I would have darned it. I have seen better screens and I have seen a great deal worse. Of course it might have got worn after removing it; the cross wire.

Q. In regard to the general character of the screen, how would it compare in its mesh and general arrangement with the screens used by the Great Western? A. It would compare favourably with the screens we have been in the habit of using.

Q. Are there any other screens which would be different from this screen in coal burning locomotives? A. No. The wood burning screen is smaller. I would not have been afraid to run that screen on a train for a short time longer, even in its present state. I would not have condemned the screen for the state it is in now. Without darning, I mean, I would have run that another week rather than stop an engine, and then I would have taken the first opportunity of repairing it.

Q. Assuming that this screen was removed it was still worth repairing? A. Yes. There is quite enough substance in it which when repaired would answer it still. This would last at least another month, or perhaps five or six weeks.

Q. In connection with your duties, is there any particular reason why the actual condition of a screen like this should be examined into from time to time? A. We cannot afford to throw away screens, and we exercise due caution in having them darned from time to time. It is greater economy to repair them from time to time than to let them get in such a state that they are beyond repair. You might get a big hole in one side.

Q. A stitch in time saves nine? A. Yes, that would be the case with this.

Q. They are expensive? A. Yes, that would cost about four dollars to put on an engine. It makes a considerable difference in the expense of running trains.

Q. And what is the ordinary duration of a screen like this? A. From two and a half to three months; and it depends on the material, whether it is really good or not, and as to whether the manufacturer has given you *bona fide* steel, or put some iron in. What we look for is steel. We pay steel price for it.

Cross-examined: Q. I suppose in very dry weather, when everything is ready to go off like tinder, you would probably be more careful about the meshes of the smoke stacks than in winter? A. We always are, and for that reason our practice to tell the forman to be careful in examining them. Especially in dry weather.

Q. I see some holes down there; that would emit a pretty large spark? A. Yes. A spark getting through that might set fire to a building in a very short time. Our cones for coal burning engines are as near as possible like that one on plan 4. Ours might possibly have a little more lip. The more lip you have to a cone the less likelihood there is of a spark being driven against the wire. If the whole force came against the wire, it would soon wear the netting through.

Q. Supposing the cone became displaced so that there was more action on this wire, it would be very much more likely to get through? A. Yes.

Q. Suppose you found a shower of sparks coming in such a manner that a bare-footed boy had to dance about to get away from them, would not that indicate there was an imperfect mesh? A. If the man had been firing with very small coal, and put it on in a hurry, he might get a shower of sparks like that.

Q. That shower would be dangerous if it fell on combustible material? A. No doubt. There would be a chance of a blow up if such sparks fell where there had been coal oil.

Q. Of course a driver in going past a freight house in a villlage ought to be more careful than in the open country? A. Well, I think a man might use a little caution in passing through stations and places like that.

Q. It would be a very hazardous thing to fire up with small coal in passing by such a place as this in question? A. I do not think a man should do it.

Q. Can you conceive a shower of sparks coming through a perfect mesh from any other cause than by firing in that way—throwing in small coal? A. Oh, a man might do it by throwing his engine over, and putting on steam in a hurry, and so lift the coal; it is quite possible he might do that. Or if an engine starting away with a train should slip a good deal it might throw such sparks.

Q. To do that would be dangerous in the proximity of a station?

1884

CANADA SOUTHERN RY. CO. v. PHELPS.

Ritchie C.J.

A. Well, that cannot be avoided sometimes in starting. He might do that while he was running, but I do not think any man would go to do that. If he did do that it would be very dangerous.

Q. So that the sparks could come from the defective netting and also from the defective netting and bad management, as well from one as from the other? A. Yes.

Q. Do you think you would undertake to run that covering the way it is now in a dry time? A. Yes, I think I would.

Q. You do not think you would be in great danger of burning the country up? A. There would be more danger than with a perfect netting, of course.

Charles K. Domville, sworn:

Q. What is your profession? A. Locomotive engineer.

Q. In what position are you now? A. I am locomotive superintendent of the Great Western Division of the Grand Trunk Railway, and I have been for the last six and a half years locomotive superintendent of the Great Western Railway.

Q. Have you had experience prior to that, practical experience upon railways? A. Yes, I have had charge of the locomotive department of railways since 1851.

Q. Are you acquainted with the mode of construction of locomotive engines used upon Canadian railways? A. I am.

(PLAN PRODUCED, WHICH WAS AFTERWARDS MARKED AS EXHIBIT 4.)

Q. Perhaps you can give me some of the chief particulars; I have got here what is supposed to be a sort of section of the smoke-stack on the locomotive; what are the chief requisites of a smoke-stack in connection especially with the ordinary and usual means which are used to prevent the emission of sparks through the firing up of locomotives? A. The principal things are as shown upon the drawing, the netting across the top and the cone in the centre. This netting is made of fine wire mesh; it is made of different sizes. There is very little difference in them, some people use larger wire than others, and the opening in some is less than others. That inverted cone is for the purpose of the sparks striking against it and returning them into the smoke-box, and it destroys them to such an extent that when sparks are emitted out, the fire is out of them, and they are very little when they do come out. The first result of the firing up is to drive the chief stream under that cone. That cone is so constructed that it carries the whole body with it at first; the whole of the sparks strike that at once. They strike the covering of the cone; there are an immense number of sparks get stuck in the netting and are returned into the smoke-box. The chief volume of sparks are arrested in their escape by the cone and then thrown back and fall into the smoke-box.

Q. And reach that in a much smaller condition that they were?

A. Yes, very much smaller, the cone breaks the force of the volume which is emitted.

Q. And also breaks the different sparks into smaller portions? A. Yes, it has that effect. And then they are thrown back into the smoke-box, a great many of them rest there.

Q. What proportion rests there and are not carried off with the smoke? A. Sometimes there is a very large proportion there; it all depends upon the working of the engine. Those are cleaned out at the end of the journey below.

Q. Everything which is capable of passing through the screen goes off there in smoke, the small particles? A. Very small particles.

James H. Rushton, foreman of the boiler making at St. Thomas:

Q. What experience have you had in the making of these screens? A. About 12 years.

Q. Suppose you were perfectly satisfied that a shower of sparks, such as described by these little boys, you would think from that that there must be something wrong with the netting? A. If I saw them myself, I would.

Q. What would you think was wrong with the netting? A. I would think there were some holes in the netting. I should think there was not any netting there at all.

Q. Do you think the managing of the engine could have anything to do with that? A. It might.

Q. Do you think a man could get the fire so shaken up as to send out a shower of sparks like that, either by stirring up his fire or putting on steam? A. Oh, it might throw out a little more.

Q. That would be very dangerous in passing a station where everything was dry? A. Yes.

Q. And you think it would be dangerous to run with a netting that would throw out a shower of sparks as described by these boys? A. I should think so.

Q. You could have a netting to prevent sparks coming out such as described by these boys? A. Yes, if there was any netting at all I do not think sparks such as described by them could come out. If the holes were twice as big as they are now they would not even then get out in such a shower as the boys have described.

Wm. A. Short, master mechanic of the C. Southern railway:

Q. Suppose you found a shower of sparks coming out on the platform, burning boys' feet and going down their backs, and leaving black marks on the platform, would you think that extraordinary, or is that a usual thing? A. I have seen it. Some platforms have small charred marks on them. It might have been from defective netting in some other place.

1884

CANADA SOUTHERN RY. CO. v. PHELPS.

Ritchie C.J.

Q. If the netting was perfect you would not expect to find these indications on the platform? A. No. I was here when the boys gave their testimony.

Q. If what they said was true, it would indicate that there was something wrong in the netting? A. I did not hardly take so much stock in what the boys said this morning.

Q. Just assume that what the boys said was true; would you not infer from that that there was something faulty in the netting? A. I cannot say; I have answered you correctly every thing you have asked me.

Q. If you were on another railway what would you think if you saw what these boys did? A. When an engine is passing I never saw any red-hot sparks yet.

Q. Assume that you found the same quantity described by these boys as coming out of the pipe and dropping down, would you not infer from that that there was something faulty in the netting? A. I do not know; it is hardly a fair question I think.

Q. Could what the boys said be true if the netting was perfect? A, No sir, it could not be true.

Q. Of course it follows that if the boys' stories were true the netting could not be perfect? A. If the netting was perfect you could not get such a shower as that.

David Wright, locomotive foreman at Victoria:

Q. If you found a shower of sparks as described by these witnesses this morning would you not think there was something wrong with the netting? A. Most decidedly.

Q. Suppose the cone got a little put to one side? A. It would have a tendency to throw cinders on the opposite side. It would give more space on one side for sparks to go through.

Patterson Hall, engineer in charge of the locomotive:

Q. Is it part of your duty to examine the netting? A. Yes. I would not swear to a day or two when I examined it.

Do you remember whether the coal was ever thrown back so as to burn you while you were on the tender? A. I never felt anything of that sort.

Q. That would not be possible? A. Well, I suppose it would be.

Q. Do you think, with a good netting like this, that the fire would ever get through? A. I do not know. I never have been burned that way.

Q. If a shower of sparks came as to burn the boys' feet, what would you think? A. I would think there was fire?

Q. Would you think the netting was all right? A. Yes; well, I do not know.

Q. If fire enough came to burn their feet in that way, would you think the netting was all right? A. No, I would not.

Q. You would think it was all wrong? A. Yes.

The mass of sparks of the character of those described by the witnesses was, as proved by defendant's skilled witnesses, evidence that defendants had not adopted every precaution that science or practical experience would suggest to prevent injury, in other words, the screen was both insufficient, defective or not in proper working order or properly placed on the stack; that had the screen been in proper working order, no such quantity of sparks could have been emitted. The evidence of Short, master mechanic of the Canada Southern Railway, Domville, a locomotive engineer, Rushton, foreman of the boiler works, Wright locomotive foreman and Patterson Hall the engineer in charge on the occasion, all concur in the opinion that if there was such a shower of sparks as described by the boys, the netting could not have been perfect and there must have been something wrong with it.

If the fire in the freight shed was caused by the negligence of the defendants, they would be clearly liable for damages occasioned by the fire extending to plaintiff's building.

The appeal must therefore be dismissed with costs.

STRONG J.—The evidence of negligence was amply sufficient to warrant the judge who presided at the trial in leaving the case to the jury. The large shower of sparks which are proved to have been emitted from the smoke stack of the engine and the evidence as to the condition of the iron netting made the case a proper one for the consideration of the jury. It was argued however that the statute 14 Geo. 3. ch. 78, sec. 86 applied and exonerated the appellants from all liability, inasmuch as the fire was accidental and began on the appellants own property. That enactment is as follows:—

No action, suit or process shall be had, maintained or presented

1884

CANADA SOUTHERN RY. CO. v. PHELPS.

Strong J.

against any person in whose house, chamber, stable, barn or other building, or on whose estate, any fire shall accidentally begin, nor shall any recompense be made by such person for any damage suffered thereby, any law, usage or custom to the contrary notwithstanding.

This provision which is an extension of 6 Anne, c. 31, sections 6 and 7, is, I have no doubt, in force in the Province of Ontario as part of the law of England, introduced by the Constitutional Act, 31 G. 3, ch. 31, but I am clear that it has no application whatever to protect a party from legal liability as a consequence of negligence. At common law a person who brings or originates on his land any dangerous element, such as fire or an accumulation of water, or any other thing which if it should escape may damage his neighbour, does so at his peril, negligence being in such cases entirely immaterial. This is shown by the case of *Fletcher* v. *Rylands* (1), where persons who formed on their own land a large reservoir of water were held liable on this express ground for damage done to their neighbour by the escape of the water, though no negligence was proved; and *Jones* v. *Festiniog Railway Co.* (2) proceeded upon the same principle, it being held that a company who had power to maintain and run a railway to be worked with horse power, no authority being given by statute to run steam engines, were liable at their peril and irrespective of negligence for damage caused by a locomotive which they had made use of. Subsequently in the case of *Nichols* v. *Marsland* (3) the same principle was recognised, though an exception to it was also admitted in that case upon the facts there established of the escape of the water having been caused by *vis major*. The rule of the common law there held applicable to water would, but for the statute before referred to, be equally applicable to fire, and every per-

(1) L. R. 3 Q. B. 733.
(2) L. R. 3 H. L. 330.
(3) 2 Ex. D. 1.

son who might light a fire in his house for ordinary domestic purposes would but for that enactment be bound at his peril to keep it safely, and liable to his neighbour for any damage which it might cause him though no negligence could be imputed. It was only to mitigate this rule of law that the statute was passed, and it was not intended thereby to alter the law of liability for negligence. Two cases both of high authority establish this very distinctly, *Filliter* v. *Phippard*, (1); and *Lord Canterbury* v. *Attorney General* (2). In the first of these cases the plaintiff on proving negligence was held entitled to recover damages against the defendant on whose land the fire accidentally began, and in the second Lord Lyndhurst rejected the argument that the suppliant in a petition of right was disentitled to recover, because the damage caused to him by a fire beginning on the propertyof the Crown was shown to have been caused by accident, it being also shown that the fire arose from the negligence of the servants of the crown. Inthe fifth edition of Addison on Torts the learned editor, Mr. Justice Cave, recognizes these cases as having settled the law as to the effect of the statute, and I have found no authority and heard no argument which leads me to doubt for a moment that this is a sound conclusion.

In some of the United States, the qualification in the case of fire of the principle of liability before stated, which has been introduced by the statute in England seems to have been considered by the courts as applying at common law. The decisions which have adopted this common law relaxation of the general doctrine seem to rest it on the necessity which every one is under to keep and use fire, thus rendering it unreasonable as regards that element to enforce the strict duties which apply to other noxious things; and

(1) 11 Q. B. 347.
(2) 1 Phi. 328.

1884

CANADA SOUTHERN RY. CO. v. PHELPS.

Strong J.

this view, by which the case of fire is treated as exceptional at common law, and irrespective of the statute, has also prevailed in the Province of Ontario as is established by the cases of *Dean* v. *McCarty* (1) and *Gillson* v. *North Grey Ry. Co.* (2).

It is sufficient, however, here to say, without pursuing the subject further, that neither the statute of George the III., nor the decisions introducing the restriction to the common law rule, in any way relieve persons from liability for their own negligence or from responsibility for the negligence of their servants.

It was further argued that the damage proved by the plaintiff was too remote, inasmuch as the fire was not communicated directly to the plaintiff's house but spread from the defendants' property to the houses of third persons from whence it reached the plaintiff's house. There are certainly American authorities sustaining the appellants' contention on this head, but no English case has been cited which would warrant such a proposition and the American cases are far from uniform. The courts which deny the liability in such a case seem to have been influenced by a regard to the serious consequences and enormous liability which a responsibility in damages under such circumstances might involve rather than on any sound principle of law. It seems to me that the well known case of *Scott* v. *Shepherd* (3), though the facts are not the same, is in principle directly in point and fully establishes the liability. The subject is discussed in the work of a very able contemporaneous American writer, Mr. Justice Cooley, in his treatise on Torts (4) and although we may not be permitted to cite his work as authority, yet I think a careful consideration of his reasoning will convince any one that the facts in question can have no influence on

(1) 2 U. C. Q. B. 448.
(2) 35 U. C. Q. B. 475.
(3) 2 W. Black p. 892; 1 Smith L. C. p. 466.
(4) P. 77.

1884

CANADA SOUTHERN RY. CO. v. PHELPS.

Strong J.

the question of liability and that the American cases which determine the opposite have no foundation in legal principle.

The case was fairly left to the jury, and the appellants have nothing to complain of either on the ground of the verdict being against the weight of evidence or as regards the amount of damages.

The appeal should be dismissed with costs.

FOURNIER J. concurred that the appeal should be dismissed with costs.

HENRY J.—In dealing with the circumstances of this case I may premise that the statute 14 Geo. 3, ch. 78, sec. 78, has, in my opinion, no bearing upon the present case; and I consider it therefore unprofitable and unnecessary to discuss the several, contradictory decisions given, and views expounded, in respect to it in England. I do not consider that it has any application to cases where damage has been done by fire produced by railway engines when passing through the country. The principles of law applicable to such cases have been so well ascertained and settled by the numerous decisions to be found in the reports in England, in the United States and in this country, that it is unnecessary to debate what has been so fully determined, and that in such a way, as to the leading principles, that they can hardly be misunderstood.

The acknowledged principle is that a railway company chartered by the legislature has the right to use its locomotive engines over its lines propelled by steam generated in the usual way; even although the use of the fire by which the motive power is produced is dangerous from its tendency to set fire to objects near to where the engines run; rapid combustion of the fuel is necessary to the production of the necessary motive power and that necessitates a strong draught in

1884

CANADA SOUTHERN RY. CO. v. PHELPS.

Henry J.

the smoke-stack or chimney. That strong draught carries with it partly consumed fuel, in a burning state, calculated to set fire to objects upon which it falls. To prevent such results means were found necessary, and have been adopted and applied for preventing, as far as possible, the sparks of burning fuel from being carried by the draft outside of the smokestack; and the principle established as applicable to the owners of railways and their liability in cases of damage by fire is, that if they were the ordinary and well known means for such prevention they are not answerable for any resulting damages. The points, then, necessary to be established in such cases are first, that the damage was caused by fire proceeding from the engine; and secondly, that the company was guilty of negligence either in not using the proper preventive appliances or in some other way in the management or working of the engine by which the damage was caused; and in some cases the question of contributory negligence on the part of the plaintiff.

The jury have found in this case, I will not say improperly, that the fire to the station house of the appellants was caused by sparks from the engine, nor, as it was I think a question of contradictory evidence, can their finding as to the question of negligence arising from the alleged defective state of the hood in the smokestack be set aside; but whether the appellants are answerable under the circumstances in this case is a question in my mind of no small difficulty. The fire did not spread to the house of the respondent, and it must have been ignited by sparks or burning wood having been carried by the wind across a part of the railway station and a street, a distance of over 100 feet. Railway companies have been held answerable for the ordinary consequences of the spread of the fire from their station houses or grounds, but can it be

held that they would be answerable for damages resulting from the course that the wind held at the time the damage was caused? If answerable when the sparks should be carried 100 feet they would be equally answerable if they were carried half a mile, or any other greater or less distance, and set fire to and damaged property. If the principle is sound in its application to the one case, it is equally applicable to another, and where should the line be drawn? Railway companies may fairly be held to be bound to know the state of the immediate surrounding territory, and if a quantity of inflamable and combustible matter is on or contiguous to the line of railway, forming the means for ignition and spreading, they may be held bound to know it, and the natural consequences of a fire set to that matter, and to guard against it by the ordinary precautionary means; but I don't think they can be held answerable for an injury that is not the natural or consequential result. Suppose the case of an engine passing through a city, town or village, and sparks, negligently permitted to escape from the smoke stack, passing over several squares and buildings set fire to and burn a house beyond, would the owners of the engine be answerable for the damages resulting solely from the direction of the wind and other independent causes at the time? and if through and by means of frequent changes of wind, whole squares were burnt by the spreading of the fire from the house first set fire to, would the owners of the engine be answerable to the owners of all the houses situated on those squares? If answerable for the first house burnt, what would limit the liability to that one? A difficulty has arisen and has not yet been satisfactorily resolved as to the limit of responsibility where a fire spreads by the ignition of combustible matter along its track, but if the liability of the owners of the engine in the present case

1884

CANADA SOUTHERN RY. CO. v. PHELPS.

Henry J.

is adjudged, the difficulty will be immeasurably increased; and railway companies may be held answerable for the burning of half a city, town or village. In the case of buildings or other insurable property, it is unnecessary so to decide, as insurance is presumed to cover the bulk of such property, and the owners only taxed for the indemnity they obtain. It is, therefore, not so necessary by legal decision to seek other indemnities for them. I don't feel justified or willing to establish a principle having such important consequences and results. In the case of *Ryan* v. *The New York Central Ry. Co.* (1) the Court of Appeal of that State decided that, although negligence was proved, the company was not liable in a case wherein the fire commenced in burning some wood in one of the company's sheds, which was also destroyed, and from there by the force of a strong wind the fire was carried to, and consumed, the plaintiffs property, which was distant about 130 feet from the shed. The court holding that the plaintiff had no cause of action against the company, on the ground that the damage to the plaintiff was not the necessary or natural consequence, ordinarily to be anticipated from the negligence committed. That the plaintiff's injury was the remote and not proximate result of the fire in the shed, and too remote to give a cause of action.

In a subsequent case, however, *Webb* v. *The Rome Watertown & Ogdensburg Ry. Co.* (2), the same court, composed partly of other judges, held that where coals were negligently dropped from the company's engine, which set fire to a tie, from which the fire spread to an accumulation of weeds, grass and rubbish lying on the road, and from those spread to a fence, and into plaintiff's woodland, and burnt and destroyed his trees, the plaintiff was entitled to recover.

(1) 35 N. Y. Rep. 210. (2) 49 N. Y. Rep. 420.

1884

CANADA SOUTHERN RY. CO. v. PHELPS.

Henry J.

It will be observed that the latter case is plainly distinguishable from the other and from this one. In that case, through the negligence of the company, the means for the spreading of the fire on their own property existed, by which the fire spread to their fence, and thence into the land of the plaintiff. The spreading of the fire from the tie was therefore from a cause for which the company was held answerable. In this case it is not shown, that through the negligence of the appellants, the means for the spreading of the fire from the station-house to that of the respondent existed, In fact the opposite is shown; for there was no combustible matter shown to have existed by which the fire could spread to the barn and house of the respondent—there was an open space of over one hundred feet, formed by an angle of what is marked on the plan in evidence "First Cross Street," and nothing by which the fire could spread, and, therefore, no negligence could be imputed as to the spreading of the fire. In the case of *Ryan* v. *The New York Central Railway Company* (1) before referred to, the decision of the court was pronounced in an able judgment pronounced by Hunt J. on the question of proximate and remote damages, and illustrates his views by a supposed case which, with others, he puts. He says:—

So if an engineer upon a steamboat or locomotive, in passing the house of A, so carelessly manage its machinery that the coals and sparks from its fires fall upon and consume the house of A, the railway company or the steamboat proprietors are liable to pay the value of the property thus destroyed. Thus far the law is settled, and the principle is apparent. If, however, the fire communicates from the house of A to that of B, and that is destroyed, is the negligent party liable for his loss? And if it spreads thence to the house of C, and thence to the house of D, and thence consecutively through the other houses, until it reaches and consumes the house of Z, is the party liable to pay the damages sustained by these twenty-four sufferers? The Counsel for the plaintiff does not distinctly claim this, and I think it would not be seriously insisted

(1) 35 N. Y. R. 210.

1884

CANADA SOUTHERN RY. CO. v. PHELPS.

Henry J.

that the sufferers could recover in such a case. Where, then, is the principle upon which A. recovers, and Z fails? Again he says: Without deciding upon the importance of this distinction, I prefer to place my opinion upon the ground that in one case, to wit, the destruction of the building upon which the sparks were thrown, by the negligent act of the party sought to be charged, the result was to have been anticipated the moment the fire was communicated to the building, that its destruction was the ordinary and natural result of its being fired. In the second, third or twenty-fourth case as supposed, the destruction of the building is not a natural and expected result of the first firing. That a building upon which sparks and cinders fall should be destroyed, or seriously injured, must be expected; but that a fire should spread, and other buildings be consumed, is not a necessary or an usual result. That it is possible, and that it is not unfrequent, cannot be denied. The result, however, depends, not upon an necessity of a further communication of the fire, but upon a concurrence of accidental circumstances. Such as the degree of heat, the state of the atmosphere, the condition and materials of the adjoining structures, and the direction of the wind. These are accidental and varying circumstances. The party has no control over them, and is not responsible for their effects.

My opinion, therefore, is, that this action cannot be sustained for the reason, that the damages incurred are not the immediate, but the remote, result of the negligence of the defendants. The immediate result was the destruction of their own wood and sheds; beyond that, it was remote.

In the case of *Pennsylvania Railroad Co.* v. *Kerr* (1) in the Supreme Court of Pennsylvania the judgment of the court was delivered by Chief Justice Thomson. It was in an action to recover damages for the burning of goods in a tavern, leased by the plaintiff, and which was ignited and consumed, with its contents, by fire communicated from a building set on fire, by sparks from the defendants engine. He says:—

It has always been a matter of difficulty to determine judicially, the precise point at which pecuniary accountability, for the consequences of wrongful or injurious acts, is to cease. No rule has been sufficiently defined and general as to control in all cases. Yet there is a principle applicable to most cases of injury, which amounts to a limitation. It is embodied in the common law maxim, *causa proxima non remota spectatur*—the immediate, and not the remote cause, is to be considered.

(1) 62 Penn. 353.

He then refers to an illustration of the rule to be found in Parsons on Contracts (1) and refers to notes in the same volume at p. 180. He again says:—

It is certain that in almost every considerable disaster, the result of human agency and dereliction of duty, a train of consequences generally ensure and so ramify, as more or less, to affect the whole community. Indemnity cannot reach all these results, although parties suffer who are innocent of blame. This is one of the vicissitudes of organized society. Every one in it takes the risk of these vicissitudes.

Again:—

It is an occurrence undoubtedly frequent, that, by the careless use of matches, houses are set on fire. One adjoining is fired by the first, a third is by the second, and so on, it might be, for the length of a square or more. It is not in our experience that the first owner is liable to answer for all these consequences, and there is a good reason for it. The second and third houses in the case supposed were not burned by the direct action of the match; and who knows how many agencies might have contributed to produce the result. * * * * The question which gives force to the objection that the second or third result of the first cause is remote, is put by Parsons, vol. 2, 180, "did the cause alleged produce its effects without another cause intervening, or was it made to operate only through, or by means of, this intervening cause?" There might possibly be cases in which the cause of disaster, although seemingly removed from the original cause, are still incapable of distinct separation from it, and the rule suggested might be inapplicable.

He cites Lowrie J. in *Morrison* v. *Davis & Co.* (2) in support of his views, who, in giving judgment in that case says:—

There are often very small faults, which are the occasion of the most serious and distressing consequences. Thus a momentary act of carelessness set fire to a little straw and that set fire to a house, and by an extraordinary concurrence of very dry weather and high winds, with this little fault, one third of a city (Pittsburgh) was destroyed. Would it be right that this small act of carelessness should be charged with the whole value of the property consumed?

Bigelow, in his list of overruled cases (3) puts down the judgment in *Ryan* v. *New York Central Railway Company* (4), as "denied" in *Kellogg* v. *Chicago &*

(1) 3 vol. p. 198.
(2) 8 Harris 171.
(3) P. 437.
(4) 35 N. Y. 210.

1884

CANADA SOUTHERN RY. CO. v. PHELPS.

Henry J.

N. R. Co. (3). I have examined the latter case and find that although impliedly perhaps but not expressly the principle of remoteness is denied; and as I read the judgment of the majority of the court—there having been a decision of two to one—it is hardly even impliedly denied. The circumstances in the two cases were somewhat different. In the case of *Kellogg* v. *the Chicago Co.* the fire was caused by sparks from the engine which fell on dry grass on the defendant's grounds alongside of the track, and by means of combustible matter was carried to and consumed the plaintiff's stacks of hay, sheds and stables. It was therefore one continuous burning and in that respect different from the circumstances in the other case, and Chief Justice Dixon, who gave the majority judgment, appears to have decided it upon the fact that the fire was uninterrupted throughout, and he so treats it. He says:—

> If when the cinder escapes through the air, the effect which it produces upon the first combustible substance against which it strikes is proximate, the effect must continue to be proximate as to everything which the fire consumes in its direct course.

The distinction drawn by the dissenting judge (Paine) between the result of a fire spreading, as it did in that case, and that of the effect of burning sparks carried by the wind a distance from the building first ignited to another which is consumed is applicable to this case. He says:—

> It seems to me, that where it is negligently kindled, the destruction of whatever is in such a situation as to burn, by the mere force of the conflagration, without other intervening cause is the direct and proximate consequence of the negligence. * * * But, where such a fire is kindled, and by reason of some other intervening cause, it is carried or driven to objects which it would not otherwise have reached, the destruction of such objects would fairly seem to be a remote consequence of the negligence. * * * Thus if a person should negligently set fire to a building in which powder was stored, and the explosion of the powder should throw fragments of the

(1) 26 Wis. 223–238.

burning building to other buildings that would not otherwise have been reached and set them on fire; or, if an unusual gale of wind, should carry such fragments to a distance with the same result, the damage for the loss of such other buildings might justly be said to be remote.

When however the year after the judgment in that case was given, an application for a rehearing was made, in the judgment thereon given.

The law, as laid down in the *Ryan* and *Kerr* cases, was denied, and I will not go so far as to say, that the liability must necessarily in all cases be confined to the first object destroyed.

There have been and no doubt, there will be, cases where the destruction of a second building by fire communicated from the first, may be found to be the natural and consequential result—where the two are connected by combustible materials, forming part of the one or the other, so that under almost any circumstances the destruction of one must result in the destruction of the other, there can be little doubt that for the destruction of the second through the burning of the first, the party guilty of the negligent burning of the first should be held answerable for the loss of the second, the burning of which was the direct and natural result of the burning of the first. Such, however, is not the present case. If the wind at the time had been from an opposite or even slightly different quarter, the respondent's house would not have been burnt. The burning of it was, therefore, not alone the usual or natural result. The burning of the respondent's house was not necessarily, and would not have been in ordinary circumstances, the cause of the damage. It may be admitted that if the appellants' building had not been set fire to, the damage to the respondent's would not have been occasioned; but it must be also admitted that, but for the particular direction and force of the wind at the

1884

CANADA SOUTHERN RY. CO. v. PHELPS.

Henry J.

time, the damage would not have been done. Is, then, a party who negligently causes the destruction of his own or his neighbor's house answerable for, not an immediate or ordinary result, but one arising from a cause over which he had no control? If a fire thus caused is in the near vicinity of houses in every direction around it, which would be in no danger unless with the presence of a strong wind, is the party answerable for any one or more of them that the wind happens to carry sparks to? His liability in such a case would not arise from the natural effect of the original cause but from a *vis major*, which he would have no part in producing, and would he be answerable for the effect of the wind, at one time carrying the sparks to the house of A, and by a change of direction should subsquently carry other sparks from the first building on fire, in an opposite direction to the house of B? Could it be reasonably said that in both cases the damage was the natural and consequential result, and if not in both how could it be said that it was so in either? And is it not the proper conclusion that both were attributable to the fortuitous direction and operation of the wind?

In *Pennsylvania Railroad Co.* v. *Hope* (1) Chief Justice Agnew delivered the unanimous judgment of the court. It was a case of negligently leaving combustible materials on the railway ground, which ignited; and from which the fire spread to, and consumed the plaintiff's property. He says the question of the proximity of the result of a fire by which the plaintiff's property is destroyed is solely for the jury aided by proper instruction from the presiding judge. He canvasses the judgment in the case of the *Railroad Company* v. *Kerr* and sustains the law laid down in it, but distinguishes the two cases. He says:—

(1) 80 Penn. R. 373.

1884

CANADA SOUTHERN RY. CO. v. PHELPS.

Henry J.

As the case was placed before the mind of Chief Justice Thomson, there is no reason to doubt the correctness of his conclusion.

Again:—

From the very issue of the thing, the natural probability of a consequence, which ought to have been seen, is a matter of fact to be determined upon the evidence. Every case must depend upon its own circumstances.

Referring to *Railway Co.* v. *Kerr* and *Kellogg* v. *Chicago & N. W. Railway Co.* (1), he says:—

That in the former the point was: that the burnings were distinct and separate, a series of events succeeding one another, while in that before him, there was but one burning. One continuous conflagration from the time the fire was set on the railroad, till the plaintiff's property was destroyed.

He, therefore, unreservedly approves of both judgments—the one deciding, that in the case of the distinct and separate burnings, the damages were remote; but in the case of the one continuous burning they were proximate.

I have referred to all the English cases and decisions that I could find likely to throw light on the difficulty presented in this case, but I could not find any decision upon the application of the rule of law applicable to a case like the present. Cases are reported, where the damages were occasioned by the setting fire to combustible materials found to have been negligently left on the railway grounds, by sparks from an engine and, the *spreading* of the fire therefrom, by one continuous conflagration to the properties consumed of the parties claiming damages; but there is no case that I can find where the distinction was drawn, between such cases and one in which damage was occasioned by sparks carried a distance by the wind, and doing damage. As far as I can discover, no case has been determined in England in which it has been decided that damage done, as in this case, was proximate or remote. Whether such damages are the natural, and

(1) 26 Wis. 223.

1884

CANADA SOUTHERN RY. CO. v. PHELPS.

Henry J.

ordinarily, to be expected, result is a question I believe not yet deliberately decided in England; and, as each case should be decided by its own circumstances, it becomes a question for a jury to resolve in each case. There are no doubt cases where a party may be answerable for such damages but they are not the usual ones. Several cases have been tried in the United States, where it was shown that one continuous fire, spreading from sparks from engines, by means of combustible matter on, and alongside of, the railways, consumed property, wherein the railway companies were held answerable. As to cases like the present, the decisions are not uniform and some of them were decided on the liability imposed by statutes, but, as far as I am capable of judging, the weight of authority favors the classing of the damages in such cases as remote.

It is necessary, however, according to the course adopted generally in England and in the courts in the United States, to submit to a jury, the question whether, under the circumstances in evidence, the burning complained of was the natural and ordinary result of the imputed negligence. My own opinion is, that, under the circumstances in this case, there was not a sufficient liability established by the evidence, to justify such a submission; and, still less, for the presiding judge, to withdraw the matter from the jury, as was done, as it appears to me, in this case.

In *Pennsylvania Railroad Co.* v. *Hope* (1) in 1876 it was expressly held by the Supreme Court of that State that such an issue was for the jury. The head note is as follows:—

Sparks from defendants engine fired a railroad tie, from which rubbish, left by the defendants on their road, was fired, communicated with plaintiffs fence next to the road, and spread over two fields, burned another fence, and standing timber 600 feet distant from the

(1) 80 Penn. 373.

road.

Held; that the proximity of the cause was for the jury.

2nd. In such case, the jury must determine whether the facts constitute a continuous succession of events, so linked as to be a natural whole, or whether the chain is so broken as to become independent, and the final result cannot be said to be the natural and probable consequence of the negligence of the defendants.

3rd. The rule for determining what a proximate cause is, that the injury must be the natural and probable consequence of the negligence, and that it might and ought to have been foreseen under the circumstances.

4 *Pennsylvania Railroad Company* v. *Kerr* (1) distinguished.

The learned judge who presided at the trial put the following questions to the jury, which were answered as follows (2):—

It will thus be seen that the questions and answers just quoted have reference only to the origin of the fire in the freight house of the appellants; and not, in the least degree, referring to the catching on fire of the respondents barn or house. The charge of the learned judge is not reported, and we are unable to judge how he charged in reference to the latter question, if he did so at all. I should judge from the nature of the questions and answers, that the question as to the natural and ordinary result was not in any way submitted. It is in my opinion a clear case of *non-direction* upon the vital issue to properly determine the case. Had it been a general verdict, without questions and answers, we might possibly assume—but that would perhaps be going too far—that all the necessary issues under the pleadings had been submitted to, and found by, the jury; but such was not the course adopted. The findings of the jury on the questions put to them, are alone insufficient upon which to found a judgment. They only refer to the setting fire to, and destruction of, the appellants property, but in no way refer to that of the respondent.

(1) 12 P. F. Smith 353. (2) *Ubi supra* p. 134.

1884

CANADA SOUTHERN RY. CO. v. PHELPS.

Henry J.

In my opinion the appellants, as a question of law are not answerable to the respondent for the damage she complains of, but if I am wrong in that position, the liability should be ascertained by a jury, on issues properly submitted.

I think the verdict should be set aside and a judgment of non-suit entered or, under any circumstances, a new trial granted—with costs.

GWYNNE J.—I concur in the opinion that this appeal must be dismissed, but it is unnecessary, in my opinion to decide in this case whether it is an established legal proposition that a fire originating in negligence can never be a fire "beginning accidentally" within the meaning of 14 Geo. 3 c. 78 sec. 86; it is worthy of remark, however, that the observations of Lord Denman in support of this proposition, criticising the opinion to the contrary of Sir William Blackstone as expressed in his commentaries, and the observations of Lord Lyndhurst in Lord Canterbury's case (1), were unnecessary to the decision in *Filliter* v. *Phippard*, (2) and are therefore open to the same objections as, in the opinion of Lord Denman, were the observations of Lord Lyndhurst in Lord Canterbury's case. The judgment of *Filliter* v. *Phippard* is, by Lord Denman himself, rested upon the ground that a fire which was knowingly and intentionally lighted by the defendant could never be said to be a fire beginning accidentally within the meaning of the statute. Neither that case, therefore, nor that of *Vaughan* v. *Menlove*, (3) therein referred to, can, I think, as I have endeavoured to point out in *Jeffrey* v. *The Toronto, Grey & Bruce Ry. Co.* (4), be said to establish such a proposition; against it must be taken the opinion of Sir William Blackstone and the

(1) 1 Ph. 306.
(2) 11 Q. B. 347.
(3) 3 Bing N. C. 468.
(4) 24 U. C. C. P. 276.

express decision of the learned judge Sir John B. Robinson C. J. in *Gaston* v. *Wald* (1) and the fact mentioned by Lord Lyndhurst in Lord Canterbury's case, that although cases of damage from the burning of houses by negligence have frequently occurred since the statute, no instance had ever occurred to his knowledge, nor can be found in the books, of an action having been brought to recover compensation for this species of injury, nor is there any trace of any such proceeding.

The fact that no trace can be found in the English courts of such an action having ever been brought is to my mind strong evidence that the proposition that a fire originating in negligence *can never be* a fire *beginning accidentally* within the meaning of the statute, is at variance with the general impression of the English mind professional and lay, and in the absence of any such action the rule of Lyttleton referred to in *the Attorney General* v. *Vernon* (2) may well apply, namely —"*what never was never ought to be.*" When the point does directly arise it will be time enough to consider the foundation upon which the proposition can be, if it can be, supported, and to decide between the opinion of Sir Wm. Blackstone with the dictum of Lord Lyndhurst, though it was unnecessary to the decision of the case before him, supported by the considered judgment of Sir John B. Robinson C.J. on the one side, and the dictum of Lord Denman, which was also unnecessary to the decision of *Filliter* v. *Phippard*, on the other.

The statute of Geo. 3 referred to has however no application whatever, in my opinion, in actions like the present against railway companies for compensation for injury, alleged to have been occasioned to the plaintiff by negligence upon the part of the defendants and

(1) 9 U. C. Q. B. 586. (2) 1 Vernon 385.

1884

CANADA SOUTHERN RY. CO. v. PHELPS.

Gwynne J.

their servants, in the use by them of the dangerous element which they are by law authorised to use, but this non-application of the statute is not because a fire originating in negligence cannot be an accidental one within the meaning of the statute. The principle upon which the liability of railway companies in such cases rests, is, in my opinion, this; by the common law, apart from any statute, where a person for his own private purposes brings upon his premises an engine of an extremely dangerous and unruly character, such as a locomotive engine worked by the dangerous element of fire, which, if it should escape from the fire box, in which for the working of the engine it is contained, is calculated to do much mischief, he must keep that fire confined, so as to prevent its doing mischief at his peril: and if he does not do so he will be responsible for all damage which is the natural consequence of, and directly resulting from, its escape, unless he can excuse himself by showing either that the escape was owing to the plaintiff's fault, or was the consequence of a *vis major*, or the act of God; this I take to be the principle established by the House of Lords in *Rylands* v. *Fletcher* (1). But the legislature having authorised the use of locomotive steam engines as a motive power, and having authorized the carrying the dangerous element of fire along the railways for impelling the locomotives, the common law is qualified, but conditionally only upon the persons, authorized so to use the fire using it in a proper and reasonable manner (such proper and reasonable manner being estimated relatively to the dangerous nature of the element and the combustible nature of the materials with which it is brought into proximity), and using all the appliances known to science, and taking all reasonable precautions to prevent the fire escaping and

(1) L. R. 3 H. L. 330.

1884

CANADA SOUTHERN RY. CO. v. PHELPS.

Gwynne J.

to prevent also combustible material upon their property becoming ignited by fire from the engine coming in contact therewith, and so extending into the property of a neighboring proprietor;—in fact conditional upon their adopting all such known appliances and precautions as may reasonably be required to prevent damage to the property of third persons near which the Railway passes, and if they are guilty of any default in the discharge of this duty they are responsible for all damage which is the natural consequence of such default, whether such damage is occasioned by fire escaping from the engine coming directly in contact with and consuming the property of such third persons, or is caused to the property of such third persons by fire communicated thereto from property of the railway company themselves which had been ignited by fire escaping from the engine coming directly in contact therewith (1).

We are of opinion (says Bramwell B. when delivering the judgment of the Court of Exchequer in *Vaughan* v. *Taff Vale Ry. Co.*) (2), that the statute (3) does not apply where the fire originates in the use of a dangerous instrument knowingly used by the owners or the land in which the fire breaks out.

And in that case in the Court of Exchequer Chamber (4) (while reversing the judgment of the Court of Exchequer upon the ground that as it was found as a fact that the defendants were guilty of no negligence no action lay), Cockburn C. J. states the principle upon which these actions rest thus:—

Although it may be true that if a person keeps an animal of known dangerous propensities or a dangerous instrument he will be respon-

(1) *Pigott* v. *Eastern Counties Ry. Co.*, 3 H. & N. 743; and in the Exchequer Chamber, 5 H. & N. 679; *Fremantle* v. *L. & N. W. Ry. Co.*, 10 C. B. N. S. 90; *Jones* v. *Festiniog Ry. Co.*, L. R. 3 Q. B. 737; *Smith* v. *L. & S. W. Ry. Co.*, L. R. 5 C. P. 98; and in the Exchequer Chamber, L. R. 6 C. P. 14.

(2) 3 H. & N. 752.

(3) 14 Geo. 3 c 78

(4) 5 H. & N. 688.

1884

CANADA SOUTHERN RY. CO. v. PHELPS.

Gwynne J.

sible to those who are thereby injured, independently of negligence in the mode of dealing with the animal or using the instrument, yet when the legislature has sanctioned and authorized the use of a particular thing, and it is used for the purpose for which it is authorized and every precaution has been observed to prevent injury, the sanction of the legislature carries with it this consequence that if damage results from the use of such thing independently of negligence the party using it is not responsible.

And Blackburn J. says:—

Rex. v. *Pease* has settled that when the legislature has sanctioned the use of locomotive engines, there is no liability for injury caused by using them, so long as every precaution is taken consistent with their use.

The principle of liability then being, that unless every precaution is taken to prevent injury occurring from the fire in the locomotive engine, the party neglecting to take such precaution cannot claim the protection of the statute which authorizes the use of the engine, but is subject to the same liability as he would have been liable to at common law, apart from the statute, for such reason, the statute 14 Geo. 3rd ch. 78 has no application. This it will be observed, also, is the same point as is decided by the judgment in *Filliter* v. *Phippard* (1).

In these actions, therefore, against railway companies for compensation for damage occasioned by fire proceeding from their engines in the use of them as sanctioned by law the enquiry always is:—Have they complied with the condition subject to which alone the use of the fire, in the manner in which it is used by them, is authorized, and by compliance with which they can alone relieve themselves from liability? Have they used the destructive element under their control with that degree of care which was reasonably requisite, in view of the danger to be apprehended of inflicting injury and which the circumstances in each case called for? Negligence, as said by Willes J. in

(1) *Ubi supra.*

1884

CANADA SOUTHERN RY. CO. v. PHELPS.

Gwynne J.

Vaughan v. *Taff Vale Railway Co.* (1), is the absence of care according to the circumstances. In this case the evidence clearly proved, and indeed upon this point there was no dispute, that the property of the plaintiff was set fire to by fire directly communicated to it proceeding from a freight shed of the defendants which was on fire and which was situate just across a street in the village of Chippewa, which separated the property of the defendants from that of the plaintiff, and there was abundant evidence to go to the jury upon the question, whether in point of fact this freight shed was or not set fire to, by sparks issuing from an engine of the defendants which had passed there immediately before the breaking out of the fire in the shed. The defendants' contention at the trial was that the smoke-stack of the particular engine had attached to it a perfect netting or screen to prevent sparks escaping. But there was evidence of the strongest character that a shower of sparks did in fact escape from the smoke stack precisely as the engine passed the shed, and fell on the platform all around about and upon and against the freight shed, and the witnesses of the defendant admitted that if this evidence was true the netting could not have been perfect, what they plainly intended to convey thereby being that, in their opinion, it was not true. The evidence upon this point however, if believed, was quite sufficient to justify the jury in finding, and they did believe it to be true, and accordingly found as a fact, that the freight shed was set fire to by sparks escaping from the smoke stack, and that those sparks escaped by reason of the apparatus for arresting sparks having been out of order; they also found that having regard to the dryness of the season the engine was taken past the freight shed, which was quite close to

(1) 5 H. & N. 688.

1884

CANADA SOUTHERN RY. CO. v. PHELPS.

Gwynne J.

the track, under too heavy pressure of steam, such heavy pressure having the tendency to cause sparks to escape, and that the state in which the freight shed was (there having been evidence that its floor was saturated with oil and that the building itself, which was of wood, was very dry and inflammable) was not such a condition as having regard to its proximity to passing trains should have been permitted. That there was evidence to go to the jury upon all of these points, and which, if believed (and of its truth they were the sole judges), was sufficient to support these findings, cannot, I think, be doubted; it is therefore unnecessary to consider whether their finding that "as it was a special train and on Sunday when "employees were not on duty, there should have been "an extra hand on duty," if it stood alone, would be a sufficient finding of negligence to support a verdict in favor of the plantiff.

The learned counsel for the appellants strongly contended that as the plaintiff's buildings were ignited, not by sparks proceeding directly from the engine and falling on the buildings of the plaintiff, but by fire proceeding from the freight shed, the damage so done to the plaintiff's property was too remote to justify a verdict against the defendants. In support of this contention he relied upon a case of *Ryan* v. *New York Central Ry. Co.* (1), decided in the Court of Appeals of New York in 1866, which certainly does appear to lay down very distinctly such a proposition. In that case the New York Central Railroad Company, by the negligent manner of conducting an engine, or by the defective condition of the engine, set fire to a quantity of wood in one of their own sheds; the fire consumed the wood shed and spread to, and consumed, the house of the plaintiff situate about 180 feet

(1) 35 N. Y. Rep. 210.

distant from the shed, and the court held that the plaintiff had no cause of action against the railroad company, on the ground that the plaintiff's injury was not the necessary or natural consequence of, nor the result ordinarily to be anticipated from, the negligence committed, that the plaintiff's injury was the remote and not the proximate result of the fire in the wood shed, and too remote to give a cause of action. In *Webb* v. *The Rome Watertown & Ogdensburg Ry. Co.* (1), however, the same court differently constituted in 1872, citing and relying upon *Vaughan* v. *Taff Vale Ry. Co.* (2) and *Smith* v. *London & S. W. Ry. Co.* (3), held that where coals were negligently dropped from an engine of the defendants which set fire to a tie, from which the fire was communicated to an accumulation of weeds, grass and rubbish, which lay on the side of the track, and thence spread to the fence and into plaintiff's woodland burning and destroying his trees, the plaintiff was entitled to recover. In the report of *Smith* v. *London & S. W. Ry. Co.* in the Common Pleas, there is something in the language of Brett J., who dissented from the majority of the court, which upon a cursory view appears also to give countenance to the appellants' contention. He says there (4):—

> I take the rule of law in these cases to be that which is laid down by Alderson B. in *Blyth* v. *Birmingham Waterworks Co.* (5), "negligence is the omission to do something which a reasonable man guided upon those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do."

And again at p. 103:—

> I quite agree that the defendants ought to have anticipated that sparks might be emitted from their engines, notwithstanding they are of the best construction and were worked without negligence, and that they might reasonably have anticipated that the rummage and hedge trimmings allowed to accumulate might be thereby set on

(1) 49 N. Y. R. 420.
(2) 5 H. & N. 688.
(3) L. R. 5 C. P. 98.
(4) L. R. 5 C. P. at p. 102.
(5) 11 Ex. at p. 784.

1884

CANADA SOUTHERN RY. CO. v. PHELPS.

Gwynne J.

fire. But I am of opinion that no reasonable man could have foreseen that the fire would consume the hedge and pass across the stubble field and so go to the plaintiff's cottage at the distance of 200 yards from the railway, crossing a road on its passage. It seems to me that no duty was cast upon the defendants in relation to the plaintiff's property, because it was not shown that the property was of such a nature and so situate that the defendants ought to have known that by permitting the rummage and hedge trimmings to remain on the banks of the railway they placed it in undue peril.

And again :—

I am of opinion as matter of fact that no reasonable man could suppose—or at least eight out of ten would fail to suppose—that if by any means the rummage and hedge trimmings on the side of the railway were set on fire, the fire would extend to a stubble field adjoining and so proceed to a cottage at the distance before mentioned.

And he concludes thus :—

I think that the defendants cannot reasonably be held responsible for not having contemplated such an extraordinary combination of circumstances or such a result. For these reasons I am of opinion that there was no such evidence of negligence on their part as could properly be left to a jury.

Now, it is to be observed that these remarks of the learned judge as to the remoteness of the damage, and as to its not being reasonably (within the contemplation of a prudent and careful man,) such a natural consequence of the rummage and hedge trimmings being left where they were, as to make the leaving of them such negligence, as standing alone in the absence of any evidence whatever of negligence in the mode in which the fire was used and its escape guarded against, should render the defendants liable, are made by the learned judge to justify the conclusion at which he had arrived that no evidence of negligence proper to be left to a jury was produced. His remarks are not at all addressed to the consideration, whether : if there was evidence that the fire in the rummage and hedge trimmings had been occasioned by a negligent use of the fire carried in the locomotive, and by its being permitted to escape by reason of some negligent defect in the engine, or its

screen, or of some other negligence in the conduct of the engine, the fact of the fire having been communicated to the plaintiff's property through the medium of the fire spreading from the rummage and hedge trimmings along the ground through the stubble field to the plaintiff's house and not by sparks emanating from the engine directly striking the plaintiff's house and setting fire to it, would make the injury to the plaintiff in such case to be too remote to constitute a cause of action. This distinction is plainly pointed out in the case when in the Exchequer Chamber (1) where Channell B. says:

I quite agree that where there is no direct evidence of negligence the question what a reasonable man might foresee is of importance in considering, the question whether there is evidence for the jury of negligence or not, but if it has been once determined that there is evidence of negligence, the person guilty of it is equally liable for its consequences whether he could have foreseen them or not.

And Blackburn J. who entertained doubts similar to those which had been entertained by Brett J. says:—

I also agree that what the defendants might reasonably anticipate is, as my Brother Channell has said, only material with reference to the question whether the defendants were negligent or not, and cannot alter their liability if they were guilty of negligence.

And after stating the grounds of his doubts of their being sufficient evidence of negligence in that case, he says:—

I do not say that there is not much in what is said with respect to the trimmings being the cause of the injury and not the state of the hedge, but I doubt on this point and therefore doubt if there was evidence of negligence. If the negligence was once established it would be no answer that it did much more damage than was expected.

Now, in the case before us, there was, as I have already said, abundant evidence which, if believed, justifies the finding of the jury that the fire in the shed was occasioned by sparks emanating from the smokestack by reason of the apparatus for arresting sparks being out of order, and that the engine should

(1) L. R. 6 C. P. 21.

1884

CANADA SOUTHERN RY. CO. v. PHELPS.

Gwynne J.

not have been taken past the freight house in that dry season under such a heavy pressure of steam, and as it appears that the plaintiff's buildings were ignited and consumed by sparks conveyed from the burning freight shed, I am of opinion that the injury sustained by plaintiff is a damage naturally consequential upon and resulting from the defendants' negligence found by the jury, and for which the defendants are in law responsible.

I express no opinion upon the point as it does not arise upon this record: whether damage sustained by another person whose buildings may have been destroyed by fire proceeding from the plaintiff's burning buildings, or from an intermediate building of a third person, whose building had been ignited by fire, proceeding from the plaintiff's building, being carried by the wind to the property of the plaintiff would or not be too remote to constitute a good cause of action against the defendants? Whether or not in such case the negligence of the defendants could be said to be *causa causans* of such damage? It may be that there must be some point where, in a fire so spreading from house to house, the liability of the defendants ceases even though their negligence be the cause of the occurring of the first fire. In the case of a fire so spreading it may be that in the case of a building far removed from that in which the fire first broke out becoming ignited by fire, proceeding from an intermediate building, there may be some circumstances to be taken into consideration as constituting the *causa causans* of the damage, which would distinguish that case from that of the fire, as in the case before us, proceeding directly from the defendants' shed but such a point does not arise upon this record. It is stated it is true, in the appellants factum that a number of actions have been brought against the defendants and that it

1884

CANADA SOUTHERN RY. CO. v. PHELPS.

Gwynne J.

has been agreed that the defendants liability in those actions shall be determined by the result of this present one. This circumstance however cannot authorize us to import into the consideration and determination of this case any facts not actually appearing in evidence in the case. It may be that the facts in the other cases are identical with those appearing in this case. It may be that in some of the other actions the facts are in some particulars different. How this may be we know not. To all cases similar in their facts to the present our judgment will of course, under the agreement referred to, naturally apply, and if the agreement affects cases, the facts of which may be materially different from those appearing in the present case, that is a matter over which we have no control and with which we cannot interfere.

Upon the facts, as they appear in the present case, I am of opinion that the damage of which the plaintiff complains is damage naturally consequential upon and resulting from the negligence of the defendants as found by the jury, and that the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for appellants: *Crooks. Kingsmill & Catanach.*

Solicitors for respondent: *Rykert & Ingersoll.*

1885

PATRICK CAREY (PLAINTIFF)..... APPELLANT;

*Nov. 26, 27 & 28.

AND

1886

ALEXANDER MACDONELL, THE CORPORATION OF THE CITY OF TORONTO, WILLIAM HENRY BENNETT AND JAMES ARTHUR BENNETT (DEFENDANTS)..... RESPONDENTS.

*April 9.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Sale of land—Building lots—Plan showing lanes—Alteration of plan—Closing of lane.

The city of Toronto offered land for sale, according to a plan showing one block consisting of five lots each, about 200 feet in length running from east to west bounded north and south by a lane of the same length, and east by a lane running along the whole depth of the block and connecting the other two lanes. South of this block was a similar block of smaller lots, ten in number, running north and south 120 feet each. The lane at the east of the first block was a continuation, after crossing the long lane between the blocks, of lot No. 10 in the second block. The advertisement of sale stated that "lanes run in rear of the several lots."

M. became the purchaser of the first block and C. of lot 10 in the second. Before registry of the plan M. applied to the City Council to have the lane at the east of his block closed up and included in his lease which was granted. C. then objected to taking a lease of his lot with the lane closed, but afterwards accepted a lease which described the land as leased according to plan 380 (the plan exhibited at the sale) and plan 352 (which showed the lane closed), and he brought an action against the city and M. to have the lane re-opened.

Held, affirming the judgment of the court below that C., having accepted a lease after the lane was closed, in which reference was made to said plan 352, was bound by its terms and had no claim to a right of way over land thereby shown to be included in the lease to M.

---

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

1885

CAREY v. CITY OF TORONTO.

Held also, per Gwynne J., that under the contract evidenced by the advertisement and public sale C. acquired no right to the use of the lane afterwards closed.

APPEAL from a decision of the Court of Appeal for Ontario (1) reversing the judgment of Ferguson J. (2) in favor of the plaintiff.

The facts of this case are fully set out in the judgment of Mr. Justice Gwynne.

S. H. Blake Q.C. and *McCarthy* Q.C. for the appellant.

If a man offers to sell property with certain advantages specified he cannot, after the sale, take away those advantages. So here plaintiff bought according to description on plans which showed lane open, and vendors could not after the purchase close them.

In the cases referred to in the Court of Appeal the plans were simply exhibited in the auction room. Here the land was bought in pursuance of the plans and they are referred to in the agreement.

There can be no doubt that we would be entitled to specific performance of our agreement by having the lots with the lanes described in the plan.

Then, we submit that the city of Toronto could do nothing to derogate from the rights of the plaintiff.

The mere registry of the plan did not in any way affect the position of the city. The plan showing the lanes open was made on account of our objection to the other.

MacDonell had knowledge of all that was done and was trying to get an advantage outside of his contract.

As to construction of lease see Broom's Legal Maxims pp. 498-501. A deed, lease, or agreement, to which is annexed a plan of this kind gives an absolute right to the lane and the grantor cannot do anything to derogatefrom his own grant. The authority for this is conclusive on two grounds, one the actual authority of the contract between the parties, and the

(1) 11 Ont. App. R. 416. (2) 7 O. R. 194.

1885

CAREY v. CITY OF TORONTO.

other that for a period of 25 years the courts have held that if you sell by a plan annexed to an agreement, you are just as much bound by the plan as by anything else in the agreement. *Peacock* v. *Penson* (1); *Rossin* v. *Walker* (2); *Cheney* v. *Cameron* (3); *O'Brien* v. *Trenton* (4); *Adams* v. *Loughman* (5); *Re Morton* and *St. Thomas* (6); *Grasett* v. *Carter* (7); *Wallis* v. *Smith* (8).

The cases upon which the Court of Appeal rested their judgment are :—

Feoffees of Heriots Hospital v. *Gibson* (9), which decides that the mere exhibition of a plan at time of sale does not amount to a warranty.

Nurse v. *Ld. Seymour* (10) where the circumstances were very different from this case. The M. R. says in that case "you cannot have specific performance of an agreement with a variation."

Randall v. *Hall* (11) which was similar to the last.

And *Squire* v. *Campbell* (12) where the plan was in no way referred to in the lease, and the decision was that a contract could not be inferred from the mere exhibition of a plan.

The intention of the parties must be gathered from the instrument coupled with the circumstances surrounding it at the time. *Skull* v. *Glenister* (13).

Then if the plan becomes part of the contract we must treat the whole question as a matter of contract. *North British Ry. Co.* v. *Tod* (14).

The following authorities also were cited: *Espley* v. *Wilkes* (15); *Roberts* v. *Karr* (16); *Carr* v. *L. & N. W.*

(1) 11 Beav. 355.
(2) 6 Gr. 619.
(3) 6 Gr. 623.
(4) 6 U. C. C. P. 350.
(5) 39 U. C. Q. B. 247.
(6) 6 Ont. App. R. 323.
(7) 10 Can. S. C. R. 105.
(8) 21 Ch. D. 243.
(9) 2 Dow 301.
(10) 13 Beav. 254.
(11) 4 DeG. & Sm. 343.
(12) 1 Mylne & C. 459.
(13) 16 C. B. N. S. 100.
(14) 12 C. & F. 722.
(15) L. R. 7 Ex. 298.
(16) 1 Taunt 495.

Ry. Co. (1); *Maddison* v. *Alderson* (2).

Robinson Q.C. and *Moss* Q.C. for the respondents.

The case resolves itself into two questions:—

First. What were the rights of the parties at the time the deed was made? and

Secondly. What was the effect, upon those rights, of whatever may have taken place before that?

There is a preliminary matter as to the admissibility of evidence. A petition was put in, and we objected to its being admitted without the documents attached, which were referred to in the petition. His Lordship was entirely wrong in admitting it.

The appellant is entitled to a lane with his lot, but only to a lane abutting upon it not to that in the rear.

For distinction between streets and lanes see *Rowe* v. *Sinclair* (3). See also *Vestry St. Mary* v. *Barrett* (4); and *Hesketh* v. *Atherton Local Board* (5); *Re Morton* and *St. Thomas* (6); *North British Ry. Co* v. *Tod* (7); *Randall* v. *Hall* (8).

There is no pretence that we made any representation; therefore there is no force in the argument that if there was no contract there was a representation. *Nurse* v. *Ld. Seymour* (9); *Feoffees Heriots Hospital* v. *Gibson* (10); *Squire* v. *Campbell* (11); *Leggott* v. *Barrett* (12).

McCarthy Q.C. in reply cites *Wigle* v. *Setterington* (13); *Adams* v. *Loughman* (14); *Fewster* v. *Turner* (15); *Palmer* v. *Johnson* (16).

Sir W. J. RITCHIE C.J.—This action is not for a specific performance of the plaintiff's contract with the city of Toronto. He claims:—1. That the defendants

(1) L. R. 10 C. P. 307.
(2) 8 App. Cas. 467.
(3) 26 U. C. C. P. 233.
(4) L. R. 9 Q. B. 278.
(5) L. R. 9 Q. B. 4.
(6) 6 Ont. App. R. 323.
(7) 12 C. & F. 722.
(8) 4 DeG. & Sm. 343.
(9) 13 Beav. 254.
(10) 2 Dow 301.
(11) 1 Mylne & C. 459.
(12) 15 Ch. D. 306.
(13) 19 Gr. 512.
(14) 39 U. C. Q. B. 247.
(15) 11 L. J. Ch. 161.
(16) 12 Q. B. D. 32.

1886

CAREY v. CITY OF TORONTO.

Ritchie C.J.

should be ordered to open up and maintain a lane in the rear of the lots fronting on Huron street, as shown in the plan by which said lots were sold, and as shown in the new plan registered as 380. 2. That the defendants may pay the plaintiff the law costs incurred by him, and also the rental and taxes upon the said lot which he had to pay to the said corporation; and 3. That the defendants may also pay the plaintiff the costs of this suit.

I find it very difficult to say that under the contract of sale the plaintiff did not acquire a right to, or interest in, the lane shown by the plan in the rear of lots 11, 12, 13, 14 and 15, in view of its immediate contiguity to lot 10 on which it practically abutted or bounded, and in connection therewith is what, to my mind, is the self-evident fact that such a lane would be a most material advantage to lot 10 and one which could not but be patent to all parties bidding at such sale. If I had to determine this question I should desire to give it further consideration before deciding it against the plaintiff. But inasmuch as the plaintiff has not chosen to rely on his executory contract, but has accepted in fulfilment thereof a lease from the corporation after it had leased lots 11 to 15 inclusive to MacDonell, including the land on which is the lane claimed, and the corporation having no right to dedicate any portion of the lots so leased to MacDonell in derogation of his title, and the plaintiff having taken the lease from the corporation with full knowledge of such lease to Macdonell and with express reference to the registered plan No. 352, which shows that lots 11 to 15 were leased to MacDonell including the space plaintiff now claims to have opened as a lane, I cannot see that he is in a position, assuming that under the terms of the sale the exhibition of the plan would give him a right, as against the corporation, to have had a lane as indicated on plan 380 opened, or to give him a

claim for compensation in lieu thereof, or to give him any claim against MacDonell or the corporation to have the lane now opened, inasmuch as, in my opinion, plaintiff took the lease from the corporation in fulfilment of his contract for what it was worth, subject to MacDonell's right, which, by taking the lease as he did, he, in my opinion, clearly recognized.

If the plaintiff should be advised that he has any claim enforceable against the corporation as distinct from the defendant MacDonell, I should be disposed to reserve his right to proceed to make good such claim in a suit properly framed for that purpose. In the meantime I think this appeal should be dismissed with costs to the defendant MacDonell.

FOURNIER J.—I agree with the conclusion of the learned Chief Justice and with his last observation. I think the act of the corporation was most unjust and would have sustained Carey's contention had he not taken a lease of the city property.

I think the appeal should be dismissed.

HENRY J.—I am of the same opinion. I would be very glad if I could have arrived at a different conclusion. The plan shows that the lot was bounded by a lane at one end, and that another lane would be opened right in front of the land purchased by the plaintiff. In the advertisement of the sale the land was bounded by a lane. I think the parties who sold were bound by the plan, and should make good any damage sustained by not opening the lane. But the purchaser knew that a plan had been filed showing the lane not open. He must have known that the title was out of the corporation and vested in MacDonell. The corporation could not convey to him. If he had not taken that other deed he could have enforced his claim against the city.

I think, however, that under the circumstances the

1886

CAREY v. CITY OF TORONTO.

Taschereau J.

appeal should be dismissed.

TASCHEREAU J.—I am also of the opinion that the appellant is bound by the terms of his lease and that he is not entitled to any rights not conferred on him by the same.

GWYNNE J.—The corporation of the city of Toronto being owners in fee of certain land, situate on St. George street, Bloor street, Spadina avenue, the south side of Cecil street, the east and west sides of Huron street and the north side of Baldwin street in the said city, caused the same to be subdivided into building lots for the purpose of offering them to competition for lease at public auction. The lots on the north side of Baldwin street were delineated on a plan as ten in number, numbering from 1 to 10, lot No. 1 being shewn to be 25 feet 6 inches in width, fronting on Baldwin street and extending in a northerly direction along the east side of Huron street 120 feet to a lane of 20 feet in width extending from Huron street to the easterly limit of the block, at the northeasterly angle of the said lot No. 10, which said lot No. 10, as also all the lots numbered from 1 to 10, were shewn to be 21 feet in width fronting on Baldwin street, by 120 feet in depth measuring northerly parallel with Huron street to the lane 20 feet in width laid out along the rear of all of the said lots fronting on Baldwin street. The lots on the south side of Cecil street were designated by the Nos. 16 to 25, lot No. 16 being situate on the eastern extremity of the block, and lots 16 to 24 both inclusive being shewn to be each 21 feet in width and lot 25, on the corner of Huron and Cecil street, 25 feet 6 inches in width fronting on Cecil street by 120 feet in depth measuring in a southerly direction parallel with Huron street to a lane 20 feet in width in rear of the said tier of lots numbering from 16 to 25 inclusive, so laid out as fronting on Cecil street, such lane extending from

Huron street to the eastern extremity of the block and the space between the lanes so laid down as in rear of the said lots, fronting on Baldwin and Cecil streets respectively was laid out as five lots numbering from 11 to 15, the former being 21 feet 8 inches and the others 21 feet 9 inches each fronting on Huron street, by 194 feet 6 inches in depth on lines drawn in an easterly direction at right angles with Huron street to a lane, also 20 feet in width in rear of the said lots numbering from 11 to 15 inclusive. The object of laying out these lanes in rear of these several lots was to provide access, in the event of the lots being leased separately to different persons from the rear of each lot to the street upon which the lots respectively fronted, for the convenience of the persons becoming lessees of such respective lots. The corporation caused an advertisement of the contemplated auction sale to be published in the public papers and in posters distributed through the city, as follows :—

City property for sale or lease by auction at noon on Wednesday, the 18th day of May, 1881, at the auction rooms of F. W. Coate & Co. Leases will be offered for twenty-one years, renewable, of the following valuable lots owned by the city of Toronto and situate as under, that is to say.—

Huron street (between Cecil & Baldwin streets),

No. on Plan.	Size.	Situation.	Reserve per foot.
1 Lot 11,	21 ft. 8 in. x 194 ft. 6 in.	E. side of Huron st.	$1.00
4 Lots 12 to 15,	each 21 ft. 9 in. x 194 ft. 6 in.	do	1.00
2 Lots 8 & 9,	each 27 ft. 2 in. x 128 ft. 8 in.	W. side do	1.00

Cecil street running east from corner of Huron street.

1 Lot 25,	25 ft. 6 in. x 120 ft.	S. E. corner of Cecil and Huron streets	1.00
9 Lots 16 to 24,	each 21 ft. x 120 ft.	S. side of Cecil street, E. of No. 25	1.00

Baldwin street running east from corner of Huron street.

1 Lot 1,	25 ft. 6 in. x 120 ft.	N. E. corner of Baldwin and Huron sts.	1.00
9 Lots 2 to 10,	each 21 ft. x 120 ft.	N. side of Baldwin street, E. of No. 1	1.00

1886

CAREY v. CITY OF TORONTO.

Gwynne J.

PARTICULARS RELATING TO LEASES OF THE ABOVE PROPERTIES.

The above properties will be virtually equivalent to freeholds in the hands of lessees, who will hold for 21 years, renewable, rental to be paid half yearly at the office of the City Treasurer. The first payment to be made in advance by way of deposit at time of sale.

Lessees of two or less than two lots on St. George or Bloor streets to erect within two years a brick residence not less in value than $5,000.

The lot on Spadina Avenue will, if desired, be put up in two half lots as the north and south half of said lot.

The sizes of lots above given are to be read as being according to said measurements "more or less."

LANES RUN IN REAR OF THE SEVERAL LOTS.

Further terms and particulars made known at time of sale.

For further particulars apply at the City Hall where plans and diagrams of the several properties can be seen.

JOHN IRWIN,
Chairman Committee on Property.

City Hall, April 20, 1881.

In the conditions of sale it was provided that all bids should be at a frontage rate per foot per annum upon the lots offered, as the same appear upon the plan or survey produced, each lot being subject to a reserved bid.

At the sale the defendant MacDonell was the highest bidder for, and as such became the purchaser of, the leasehold interest offered for sale in the lots 11 to 15 on the east side of Huron street; other persons became purchasers of all the other lots fronting upon Baldwin and Cecil streets respectively and numbering from 1 to 10 on Baldwin street and from 16 to 25 on Cecil street. The plaintiff being the highest bidder for lot No. 10, fronting on Baldwin street, signed his contract for that lot at the foot of the conditions of sale in the terms following:

TORONTO, May 18th, 1881.

I hereby agree to lease the property described in the plan hereto annexed and marked A as lot No. 10, on the north side of Baldwin street subject to the foregoing conditions of sale for the sum of one $\frac{30}{100}$ dollars per foot frontage per annum on Baldwin street.

P. F. CAREY.

1886

CAREY v. CITY OF TORONTO.

Gwynne J.

The defendant MacDonell having become the purchaser of the lots 11 to 15 inclusive and having no occasion for a lane in rear of those lots, but considering that the keeping it open as a lane would be a nuisance to him and to the corporation, made application to the city authorities, before any plan of the several lots was registered, to have the space designed for a lane in rear of these lots thrown into the respective lots and to have a lease given to him of the lots as including within their area the lane in rear which had been designed for the purposes of affording access to those respective lots in the rear. This application appearing to be reasonable was concurred in and a plan was prepared under the direction of the city authorities showing no lane in rear of the lots numbering 11 to 15 on Huron street but shewing lanes 20 feet in width widening at their eastern extremity to twenty-five feet in rear of the lots fronting on Cecil and Baldwin streets, which plan, duly certified under the corporate seal and signed by the Mayor and City Treasurer as representing correctly the lots and lanes, they caused to be registered in the registry office of the city of Toronto on the 9th day of June, 1881, under the provisions of the revised statutes of Ontario in that behalf as plan No. 352. On the fourteenth of the same month of June the corporation duly executed, under their corporate seal and signed by the Mayor and Treasurer of the city, an indenture of lease whereby, in consideration of the rents, covenants and agreements therein reserved and contained, they demised and leased unto the defendant MacDonell, his executors, administrators and assigns, the said lots 11, 12, 13, 14, and 15, according to the registered plan No. 352 *habendum* for the term of twenty-one years, to be computed from the first day of July, 1881. The purchasers at the auction held on the 18th of May of all the other lots fronting on Cecil street and Baldwin street, except the purchaser of lot No. 10 on

1886

CAREY v. CITY OF TORONTO.

Gwynne J.

Baldwin street, accepted leases for like terms of twenty-one years of the lots bid for by them respectively, in each of which leases their several lots were described as being according to the plan No. 352. The plaintiff does not appear to have applied for a lease of his lot No. 10 fronting on Baldwin street until early in the year 1882, and when he did he refused to take his lease according to said plan 352, insisting that by the terms of his contract of the 18th May, 1881, he had an interest in the lane as originally designed in rear of lots 11 to 15 on Huron street of which, as he contended, he could not be deprived, and that the corporation had no right to register the plan No. 352 not shewing such lane but shewing the said lots 11 to 15 leased to Mr. MacDonell to extend across the space as originally designed for a lane in rear of those lots.

The plaintiff having brought the matter under the consideration of a committee of the city council called the property committee, the defendant MacDonell presented a petition in the shape of a letter addressed to the Mayor and Aldermen of the city in council assembled remonstrating against any attempt to prejudice his rights. In this, his petition, he referred to three certificates of the authorities which he transmitted with, and made part of, his petition in support of his contention. One of these certificates was that of the city commissioner, another of the city treasurer, the third of the surveyors who had been employed by the city to subdivide the block of land into the building lots offered at auction in May, 1881, and who had certified the plan No. 352 as correct in accordance with the provisions of the registry act chapter one hundred and eleven of the revised statutes of Ontario, section 82, sub-section 2. These certificates were by the learned judge of first instance detached from the defendants petition, which was received in evidence without the accompanying certificates, but as the certificates were

so referred to in the petition as to be made part thereof they should not, I think, have been separated from it but should have been received *quantum valeant*. That of the city commissioner is as follows:—

CITY COMMISSIONERS OFFICE,
TORONTO, 21st February, 1882.

I, Emerson Coatsworth, of the city of Toronto, City Commissioner, do hereby certify that I have examined the plan of sub-division of the block of land owned by the city lying on the east side of Huron street between Baldwin and Cecil streets, and state that I find the allowance for lanes in rear of the lots fronting on Baldwin and Cecil streets respectively, ample and sufficient for all purposes relating to the said lots, and I further state that the permission to the lessee of the lots on Huron street referred to to enclose the lane in rear thereof is undoubtedly in the interests of the city, as thereby preventing the facility for nuisances being deposited clandestinely and saving extra labor to this department in keeping same clean, and there being but one lessee of all the lots for which said lane is laid out it cannot prejudice any other person whomsoever to have it closed.

E. COATSWORTH,
Comr. Works and Health.

The certificate of the City Treasurer who had also signed the plan, No. 352, for registration on behalf of the corporation is as follows:—

OFFICE OF THE CITY TREASURER,
TORONTO, 23rd February, 1882.

I, Samuel Bickerton Harman, of the city of Toronto, City Treasurer, certify that the plan for the sub-division of the blocks of land belonging to the city lying east of Huron street between Baldwin and Cecil streets was prepared under my supervision for the purpose of laying off same into building lots with lanes in rear of the lots fronting on said streets respectively, such lanes being intended to be appurtenant respectively to the tier of lots lying between them and the streets on which such lots fronted. The lanes in rear of the tier of lots fronting on Baldwin and Cecil streets were made of sufficient width to serve every practicable purpose of lanes for those lots respectively, without regard to the lane between them in rear of the lots fronting on Huron street, which was intended for the latter named lots only. I fail to see how any one has any right or interest to interfere in a matter which seems to me to affect only the purchaser of the lots on Huron street.

SAML. B. HARMAN,
City Treasurer.

1886

CAREY v. CITY OF TORONTO.

Gwynne J.

The certificate of the surveyors who laid out the lots for the corporation, is as follows :—

We, Unwin & Sankey, formerly Wadsworth & Unwin, of the city of Toronto, Land Surveyors, hereby certify that the plan of sub-division of the block of land owned by the city of Toronto lying on the east side of Huron street between Baldwin and Cecil streets prepared by us, shows the allowance for lanes in rear of the lots fronting on said streets respectively the lanes in rear of the lots on Baldwin and Cecil streets being wide and amply sufficient for all purposes relating to said lots. We further state that the lane originally proposed to extend along the rear of the lots fronting on Huron street was designed for the benefit of the lessees of those lots solely; and the lessees of lots fronting on Baldwin and Cecil streets could not be entitled to any right thereto practically; and the closing up the said lane can only be a matter of business between the city and the lessee of the lots on Huron street.

UNWIN & SANKEY,
Provincial Land Surveyors.

Toronto, 21st February, 1882.

While these certificates cannot be looked to as affording any evidence in this action in favor of the defendants of the truth of the matters therein alleged they may, I think, as representations made to the corporation by their officers of the intention of those officers in doing on behalf of the corporation the acts therein referred to, be looked at as a matter before the corporation, and as part of the *res gesta* in respect of which the subsequent action of the corporation in relation to the subject matter was taken, and to throw some light upon such action if it should prove to be of doubtful construction; and the action taken, we find, to have been that they caused to be prepared for registration a new plan not corresponding with the one in existence at the time of the auction, but on which the space comprising the rear twenty feet of the lots 11 to 15 as leased to MacDonell, together with the angle cut off from lots 11 and 15, as shown on plan 352, is shown to be cut off with the words "lane to be opened" thereon, and this plan is registered in the registry office of the city of Toronto with a certificate thereon under the corporation seal, and signed by the same

mayor of the city as had signed plan 352 and by the same city treasurer, and the firm of surveyors who had prepared and signed that plan for registration, and had signed the above certificate laid before the council.

We certify that this plan represents correctly the manner in which we have dedicated and set apart the rear 20 feet of lots 11 to 15 inclusive for the purposes of a public lane.

It is to be observed that the lane here spoken of as "to be opened" is, in this certificate, spoken of as being at present part of lots 11 to 15. Upon this plan being registered the plaintiff on the same day that it was registered, namely, the 19th day of May, 1882, accepted a lease from the corporation executed under the corporate seal demising to him for 21 years "lot No. 10, on the north side of Baldwin street according to registered plans Nos. 352 and 380," and he has filed his statement of claim wherein after alleging the auction sale of May, 1881, and that at such sale, relying upon the plan and conditions of sale then produced he bid for and became the purchaser of lot No. 10 on the north side of Baldwin street.

That on the 19th day of May, 1882, the defendants, the said corporation, executed a lease to the plaintiff of the said lot number ten in which lease the said lot is described as being according to a plan of said property registered in the registry office of the city of Toronto numbered 380.

That the said plan numbered 380 is identical with the plan produced at the day of sale and according to which the plaintiff purchased the said lot.

That on the 14th day of June, 1881, the defendants, the said corporation, executed a lease to the defendant, Alexander MacDonell, and granted him lots 11, 12, 13, 14 and 15.

That the said lots are described in the deed to the said Alexander MacDonell as extending over the said lane already described as being shewn on the map or plan between the said lots 11, 12, 13, 14 and 15 and the

1886

CAREY v. CITY OF TORONTO.

Gwynne J.

property of the Hon. George Brown, and no mention is made in the said lease of the reservation of the said lane or of any right of way by virtue of the said lane, but the said lots were sold as designated on the said plan and the said Alexander MacDonell had notice of the said plan and of the contract of the defendants, the said corporation, to lease the said lot number ten to the plaintiff according to the said plan. That the said Alexander MacDonell has caused the said lane lying in rear of the said lots 11, 12, 13, 14 and 15 to be closed up. And the plaintiff alleges that he has done so with the approval and authority of the defendants, the said corporation.

That the plaintiff has applied both to the defendants and to the said Alexander Macdonell to have the said lane re-opened and the obstruction removed therefrom, in order that he, with the other lessees, might have the full, free and unrestricted use of the said lane, to which he and they are entitled by virtue of the said lease to enjoy.

And the plaintiff claims that by virtue of the said conveyance to him he is entitled, as owner of the said lot, to have a right of way over the said lane lying in rear of the said lots 11, 12, 13, 14 and 15, and to have the said lane kept open and unobstructed, in order that he might not be prevented or interrupted in the free use of the same. And the plaintiff prays that the defendants should be ordered to open up and maintain a lane in rear of the said lots fronting on Huron street, as shown on the plan by which the said lots were sold, and as shown on the new plan registered as plan 380.

The plaintiffs claim is not for specific performance of his contract of the 18th May, 1881, and in virtue of that contract to be declared to be entitled to a perpetual right of way over the rear 20 feet of the land leased to MacDonell in June, 1881, as lots 11, 12, 13, 14 and 15, on the east side of Huron street as and for a lane to

be maintained in rear of what he insists to be the true lots of those numbers. It is only as not forming a part of lots 11, 12, 13, 14, and 15 on the east side of Huron street, and as being in point of fact in rear of the true lots of those numbers, that the plaintiff could have asserted any claim whatever, if he ever had any to a right of way over the land in question. The plaintiffs claim, however, as asserted in his statement of claim is—that having entered into a contract with the corporation to take a lease of a piece of property designated, on a plan exhibited to him at the time of the contract being entered into, as lot No. 10 on the north side of Baldwin street, and such contract having been specifically performed, as he alleges, by a lease dated the 19th May, 1882, executed to him by the corporation wherein, as he also alleges, the said property is described as said lot number ten according to a registered plan 380, which plan, as he further alleges, is identical with the plan produced when he entered into the contract, he is entitled to have a portion of lots 11, 12, 13, 14, and 15 on the east side of Huron street, which were leased by the corporation to the defendant MacDonell in June, 1881, opened as a lane so as give to the plaintiff full, free, and unrestricted use thereof as a lane, to which he claims to be entitled in virtue of the lease executed to him on the 19th May, 1882.

At the trial the defendants called the three witnesses who gave the certificates above set forth to prove the matters of fact therein alleged to be in point of fact true, but an objection having been taken to such evidence the learned judge, by whom the case was tried, rejected it as inadmissable and he made a decree in favor of the plaintiff in accordance with the prayer of his statement of claim; thereby virtually holding that whatever may have been the intention of the corporation of the city of Toronto in laying out lanes in rear of the several lots as stated in the advertisement of the particulars

1886

CAREY v. CITY OF TORONTO.

Gwynne J.

of the several lots, the leasehold interest in which were intended to be offered for sale at auction, the plaintiff was entitled in virtue of his lease of the 19th May, 1882, as set out in his statement of claim to a right of way over the rear twenty feet of the lots 11, 12, 13, 14 and 15 on the east side of Huron street leased to the defendant MacDonell in June, 1881. This judgment having been reversed by the Court of Appeal for Ontario, from the judgment of that court the plaintiff now appeals.

After the execution by the corporation of their lease to MacDonell of June, 1881, in which the lots 11, 12, 13, 14 and 15, are described as they are shown on registered plan 352, which shows them to extend to the utmost limit of the land owned by the corporation there, that is to say, to the distance of 214 feet 6 inches easterly from the eastern limit of Huron street, it was not competent for the corporation by any act of theirs to detract from their lease or to appropriate any part of the land so leased, so long as the interest granted by such lease should continue, to the purposes of a public or of a private lane. They could not by registering a plan declaring such intention, and exhibiting thereon a lane as "to be opened" and laid out on any part of the land so leased, defeat, or in any manner prejudice, their lease to MacDonell. The corporation must be taken to have known that they could not do so, but that they had no intention of presuming to attempt to do so appears, I think, as well from the plan 380 itself as from the lease to the plaintiff, which he accepted in fulfilment of his contract of May, 1881. Whatever may have been the idea of the parties who procured the registration of plan 380, that plan upon its face shows that all that was intended was a dedication in the future, and that although the time when the lane should be opened in pursuance of such dedication is not stated, it could not be during the continuance

1886

CAREY v. CITY OF TORONTO.

Gwynne J.

of the term created by the lease to MacDonell. That the plan was not intended to have been, if it could be, in prejudice of that lease or in derogation from the plan 352, which was the plan registered according to law upon which the boundaries of the lots leased to MacDonell were shown, appears from the certificate on the plan 380, whereby it is certified by the corporation authorities, that "this plan represents correctly the "manner in which we have dedicated and set apart "the rear twenty feet of lots 11 to 15 inclusive for the "purpose of a public lane." The land so said to be dedicated as a "lane to be opened" is stated at the time of the registration of the plan 380, to be "the rear 20 feet of lots 11 to 15," thereby affirming the plan 352 which showed it to be so. And yet it is only by establishing the land dedicated for the purposes of a lane never to have been part of lots 11, 12, 13, 14 and 15 that the plaintiff could claim, or pretend to have, any right of way whatever in or over the same.

Then the lease executed to the plaintiff on the 19th of May, 1882, and which he has accepted in fulfilment of his contract of May, 1881, and in virtue of which lease alone the plaintiff now rests his claim to the right of way, instead of describing the property leased, as alleged in the plaintiffs statement of claim, as being lot No. 10, on the north side of Baldwin street, according to registered plan No. 380, describes it as being lot No. 10, on the north side of Baldwin street according to registered plans numbers 352 and 380. Moreover the plan 380 instead of being, as alleged in plaintiffs statement of claim, indentical with the plan exhibited to the plaintiff at the time of his entering into the contract of May, 1881, adopts plainly the deviation from that plan in the width of the lane in rear of lot No. 10 on the north side of Baldwin street and in the rear of lot No. 16 on the south side of Cecil street, as the same is represented on the plan 352.

1886

CAREY v. CITY OF TORONTO.

Gwynne J.

So that it plainly appears that all the plans 352 and 380, taken together, shew, is that the piece of land which upon plan 380 has inscribed "lane to be opened," is part of lots 11, 12, 13, 14 and 15, as shewn on plan 352, and which (as is part of the matter stated in the statement of claim,) was leased to MacDonell in June, 1881, and which could not be opened by the corporation so long as the term for which those lots were granted to MacDonell should continue; and it is in this state of facts that the plaintiff on the 19th May, 1882, accepted as in fulfilment of his contract of May, 1881, a lease for 21 years of lot No. 10 on the north side of Baldwin street, which lease, upon the basis on which the plaintiff rests his right to the way which he claims, must be held to be subject to the rights of the defendant Macdonell in the land leased to him as forming part of lots 11, 12, 13, 14 and 15, and which these plans 352 and 380 conjointly and each separately represent to be parts of those lots. The plans represent them to be so, the lease refers to and recognizes the plans, and the plaintiff cannot, in virtue of the lease upon which he bases his claim, insist that the land over which he claims the right of way is not part of these lots, but on the contrary is in fact a piece of land in rear of and outside of those lots. The whole gist of the plaintiff's contention is, that in virtue of his contract of May, 1881, to lease the lot described on a plan said to be annexed to the contract as lot No. 10 on the north side of Baldwin street, he thereby contracted for and became entitled to a right of way over a piece of land shown on the same plan as a lane in rear of lots on the east side of Huron street; if that contention be well founded, *a fortiori* when he accepted a lease under said plan in fulfilment of his contract, he can only claim whatever that lease and the plans therein referred to give him, and as the lot No. 10 on the north side of Baldwin street

is therein described as being the lot of that number and street, "according to registered plans 352 and 380" his rights must be taken to be governed by plan 352 as well as by plan 380, or wholly by 352 if the corporation could not by registering plan 380 detract from their lease of lands particularly designated on the plan 352 as lots 11, 12, 13, 14 and 15 on the east side of Huron street. The plaintiff can, therefore, have no right of way whatever in virtue of his lease of May, 1882, over land shown upon plan 352, (as indeed it also is by plan 380,) to be part of the above lots on the east side of Huron street leased to MacDonell in June, 1881; his claim, therefore, as asserted in his statement of his claim under that lease cannot be sustained. But I am of opinion that the plaintiff's contention as founded on his contract of May, 1881, assuming it to be yet unexecuted, is not well founded. That contract did not in terms give or profess to give to the plaintiff a right of way over the piece of ground in rear of the lots on Huron street, nor did it deprive the corporation of the right to throw that piece of ground into the lots on Huron street. All that the plaintiff contracted for was a lease of the piece of ground shown on the plan exhibited at the auction as lot No. 10 on the north side of Baldwin street. That is to say, a lot as described in the advertisement of the particulars of the auction sale as being situate on the north side of Huron street, and east of Huron street and numbered ten having a frontage of 21 feet on Baldwin street and a depth of 120 feet to a lane, 20 feet in width extending along the rear of the several lots numbered from 10 to 1 inclusive on the north side Baldwin street to Huron street. The plan as referred to in the contract is not imported into it further than to show the boundaries of lot No. 10, and the access afforded to its rear from Huron street by the lane of twenty feet in width, which the particulars of sale stated to be in rear of the

1886

CAREY v. CITY OF TORONTO.

Gwynne J.

several lots to be offered at the auction. The plaintiffs contract gives him no interest whatever in the pieces of land originally designed to be lanes in rear of the lots 11 to 15 on Huron street, or in rear of lots 16 to 25, on Cecil street, nor any right to prevent the corporation from altering the dimensions of those lots by throwing the pieces designed as lanes in rear of them into lots; the language of Lord Cottenham in *Squire* v. *Campbell*, (1) and of Lords Cottenham and Campbell in the *North British Railway Co.* v. *Tod* (2) also reported in 10 Jur. 975, and of Sir J. L. Knightbruce in *Randall* v. *Hall* (3), and the other authorities referred to by Chief Justice Hagarty are conclusive on this point. As the present case, however is, not for specific performance of an unexecuted contract, but as the claim asserted by the plaintiff is based wholly on the terms of the lease which he has accepted as in fulfilment of his contract, it is sufficient to say that his lease confers upon him no such rights as he claims, and he has no right to interfere with the lease executed to the defendant MacDonell in June, 1881.

This appeal therefore must be dismissed with costs.

Appeal dismissed with costs.

Solicitors for appellants: *Cameron, Caswell & St. John.*

Solicitors for respondent MacDonell: *Moss, Falconbridge & Barwick.*

Solicitor for respondents, City of Toronto: *W. G. McWilliams.*

Solicitor for respondents Bennetts: *W. Mortimer Clarke.*

(1) 1 Mylne. & C. 459. (2) 12 C. & F. 722.
(3) 4 De G. & Sm. 349.

THE CORPORATION OF THE COUNTY OF OTTAWA..... } APPELLANTS;

AND

THE MONTREAL, OTTAWA AND WESTERN RAILWAY CO..... } RESPONDENTS.

1885
*Oct. 30.

1886
*Mar. 8.

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

Capital stock—Damages—Covenant—Breach of—Debentures—Arts. 1065, 1070, 1073,1077, 1840 & 1841, *C. C.* (*P. Q.*)

The Corporation of the County of Ottawa under the authority of a by-law undertook to deliver to the Montreal, Ottawa and Western Railway Company for stock subscribed by them 2,000 debentures of the corporation of $100 each, payable twenty-five years from [illegible] per cent. interest, and subsequently, without any [illegible] reason, refused and neglected to issue said debentures. In an action brought by the company against the corporation jointly and severally for damages for their neglect and refusal to issue said debentures,—

Held, affirming the judgment of the court below, that the corporation, apart from its liability for the amount of the debentures and interest thereon, was liable under arts. 1065, 1073, 1840 and 1841, C. C. for damages for breach of the covenant. (Ritchie C.J. and Gwynne J. dissenting.)

APPEAL from the Court of Queen's Bench for Lower Canada (appeal side) (1), affirming the judgment of the the Superior Court (2).

The respondents were formerly styled the Montreal Northern Colonization Railway Co., and while so styled the corporation of the County of Ottawa passed a by-law entitled, "by-law to authorize the corporation of the County of Ottawa, in the Province of Quebec, to take stock in the capital stock of the Montreal Northern

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

(1) M. L. R. 1 Q. B. 46. (2) 26 L. C. Jur. 148.

1885

CORPORATION OF THE COUNTY OF OTTAWA v. MONTREAL, OTTAWA & WESTERN RY. CO.

Colonization Co. to the extent of $200,000, and to pay the same in bonds or debentures, and to impose a yearly rate to pay interest and provide for a sinking fund."

This by-law was submitted to the electors of the county and approved; and it was subsequently incorporated in the statute 36 Vic. ch. 49 of the Province of Quebec.

The Préfet du Conseil of the county duly subscribed for 20,000 shares in the stock of the said company of the par value of ten dollars per share, on certain conditions referred to at length in the judgments hereinafter given.

The Company commenced work on their road in the fall of 1873 and in March, 1875, had expended $300,000. They then demanded the debentures from the County of Ottawa, which the latter refused to deliver. The Company claimed that there was due from the appellants, at the time of the said demand, $112,096.70. This action was then brought, the respondent alleging that by the refusal of the Corporation to deliver the debentures according to agreement they had lost credit and were obliged to abandon work on their road. They claimed $500,000 damages. The defendants demurred to the declaration alleging as grounds of demurrer that the only legal claim that could be made was one for the issue of the debentures or their value in money and no claim for damage for injury to credit of Company could be sustained.

That plaintiff could only claim a specific sum and interest thereon, which they do not claim.

That if this action could be maintained defendants would still be liable for the amount of their obligation with interest thereon.

The defendants also pleaded a number of pleas, the principal being:

That the debentures were only to be issued on con-

dition of the road being completed before December, 1875; and that plaintiff had declared that they could not do so, and defendants alleged that is was impossible for them to do so.

That plaintiffs were utterly insolvent and unable to meet their liabilities.

That they had not paid for the land over which their road was being built and had no title to the same.

And several pleas alleging fraud on the part of the company in issuing bogus stock and colluding with contractors.

They also pleaded that they never consented to the substitution of the name of the present company and that their subscription was therefore void.

The Attorney General for Quebec intervened, claiming that the railway and the rights of the company had been transferred to the Government of Quebec by a conveyance executed November 2nd, 1875.

The intervention was contested and finally discontinued, but the appellants contend that the company have parted with all their interest in the contract to the government.

The demurrer was over ruled by the court of first instance, and the judgment of that court was sustained by the Court of Appeal—Dorion and Cross JJ. dissenting.

The principal question to be decided was, whether any damages, except interest, can be recovered. The appellants relied on art. 1077 of the Civil Code, which reads as follows:—

> The damages resulting from delay in the payment of money, to which the debtor is liable, consist only of interest at the rate legally agreed upon by the parties, or, in the absence of such agreement, at the rate fixed by law.

The respondents contended that they were entitled to other damages than those resulting from the mere delay, which fall under the general rule, allowing the

1886

CORPORATION OF THE COUNTY OF OTTAWA v. MONTREAL, OTTAWA & WESTERN RY. CO.

court to assess damages according to the loss really sustained.

Laflamme Q.C. for appellants.

DeBellefeuille for respondents.

The authorities and cases cited are referred to in the judgments hereinafter given and in the reports of the case in the courts below.

Ritchie C.J.

Sir W. J. RITCHIE C.J.—I have been unable to bring my mind to the conclusion at which my brothers have arrived. I think it right to express, but with great hesitancy, the doubts I entertain. If this case had been brought for the delivery of the debentures, the correct measure of damages in the case, it appears to me, would be to recover the debentures, or the amount of the debentures and interest. But, as I understand the judgment, this is not the nature of the action, no such claim being put forward. On the contrary, the claim is to recover damages, apart from the amount of the debentures and interest, for which, it is stated, an action has been brought and is pending.

I am unable to discover anything in this case other than simple delay in not paying in the manner agreed on, for which the only claim I can conceive the plaintiffs would have against the defendants would be for the delivery of the debentures, or their value in money, and interest. This delay, the plaintiffs allege, caused the damage complained of, but such damages I think the article of the Civil Code of Lower Canada 1077 clearly declares shall consist only of interest. The agreement to take stock and pay for it by debentures, was no more than an agreement to take stock securing the payment of the money therefor by debentures, and therefore an obligation to pay money, which, in the words of the respondents factum, "the corporation purely and simply refuse to pay," and to which,

1886

CORPORATION OF THE COUNTY OF OTTAWA v. MONTREAL, OTTAWA & WESTERN RY. CO.

Ritchie C.J.

it seems to me, article 1077 applies. That article reads thus:—

The damages resulting from delay in the payment of money to which the debtor is liable, consists only of interest, at the rate legally agreed upon by the parties, or, in the absence of such agreement, at the rate fixed by law. These damages are due without the creditor being obliged to prove any loss. They are due from the day of the default only, except in the cases where, by law, they are due from the nature of the obligation. This article does not affect the special rules applicable to bills of exchange and contracts of suretyship.

There does not appear to have been any interest due on the subscription of appellants, or on the debentures had they been issued at the time the action was instituted, in which, however, neither debentures nor interest were claimed. My mind inclines strongly with that of the learned Chief Justice of the court below, that the plaintiffs' action should be dismissed on the two-fold ground, that the declaration discloses no right of action, and that the respondents have not proved that they had suffered any loss or damage for which the appellants could be held liable. Therefore I am inclined to think this appeal should be allowed, and the judgments of the courts below should be reversed.

FOURNIER J.—L'action de l'Intimée réclame de l'Appelante des dommages résultant de l'inexécution d'un contrat par lequel cette dernière, dûment autorisée à cet effet par un règlement spécial, confirmé par les électeurs du comté d'Ottawa, avait souscrit 20000, parts dans le capital de la compagnie de l'Intimée. La souscription contenait les réserves suivantes, entre autres :

Subject however to such conditions as are appended to their signatures and not otherwise, and also subject to such allotment of the shares hereinafter subscribed for by them, as shall be made by the Board of Directors of the said Company.

Date. Name. Residence. Occupation.

December, 4th 1872 (Signed) Alexander Bourgeau, Aylmer, Gentleman.

1886

CORPORATION OF THE COUNTY OF OTTAWA v. MONTREAL, OTTAWA & WESTERN RY. CO.

Fournier J.

number of shares Total
twenty thousand ; (20,000) $200,000

Warden of the County of Ottawa and acting for the Corporation of the County of Ottawa, under and in virtue of the authority of the By-law No. 2, (two) authorizing the said Corporation to take stock in the Montreal Northern Colonization Railway Company, to the amount of two hundred thousand dollars ($200,000), passed the said By-law by the Municipal Council of the said County of Ottawa on the twelfth day of June one thousand eight hundred and seventy-two and approved of by a majority of the votes polled and registered in the manner provided by law, subject the said subscription to all the stipulations contained in the said By-law, a copy of which is annexed to this signature for the purpose of defining the nature and extent of the said stipulations.

(A true extract from the subscription book).

Montreal, 19th June 1875.

Cette souscription fut ensuite régulièrement acceptée par le bureau des directeurs de la compagnie avec les conditions et stipulations contenues dans le règlement qui l'autorisait.

D'après ce règlement l'Appelante devait remettre en acquit des 20,000 actions souscrites des bons ou débentures du comté au montant de $200,000 remboursables dans 25 ans. Cent cinquante mille piastres devaient être émis à mesure que l'ouvrage avancerait, mais sans dépasser cependant la moitié du coût des ouvrages faits dans le comté d'Ottawa, et la balance de ces débentures devait être livrée lorsque les travaux seraient terminés.

L'Intimée prétendant avoir exécuté les conditions de la souscription et du règlement, réclama, le 19 janvier 1877, la somme de $112,096, de débentures pour moitié des ouvrages qu'elle avait faite dans le comté d'Ottawa. Le 19 juin suivant, l'Intimée après avoir préalablement mis l'Appelante en demeure de lui livrer les débentures tel que convenu, porta sa présente action pour dommages-intérêts, lui résultant du refus de l'Appelante de livrer les dites débentures. Ce refus, ainsi que l'allègue l'Intimée, l'aurait mis dans l'impossibilité

1886

CORPORATION OF THE COUNTY OF OTTAWA v. MONTREAL, OTTAWA & WESTERN RY. Co.

Fournier J.

de compléter le chemin de fer, et exposé par là à la perte des $80,000 de débentures payables à la terminaison des ouvrages du chemin de fer, et lui aurait aussi fait perdre les subsides considérables qu'elle avait droit d'avoir de la cité de Montréal et du gouvernement de la province de Québec. Elle allègue aussi qu'elle avait droit à l'intérêt depuis le 19 janvier 1875 sur le montant pour lequel les débentures auraient dû être émises. Mais la conclusion qui demande $500,000 de dommages-intérêts, causés par le refus en question, omet de demander l'intérêt sur les débentures depuis le 19 janvier, bien que l'action contienne une allégation à cet effet.

Par sa défense en droit à cette action l'Appelante a plaidé que l'Intimée n'avait pas droit à des dommages pour la perte de son crédit et le tort causé par la non-livraison des débentures ; que le seul droit qu'il y avait était de demander l'émission des débentures ou leur valeur en argent,—que l'obligation de l'Appelante étant pour une somme d'argent, la réclamation de l'Intimée devait se borner aux intérêts sur cette somme, mais qu'ils n'étaient pas demandés par l'action, enfin que si l'Intimée avait droit à sa présente action, l'Appelante n'en demeurerait pas moins obligée au paiement des débentures et de l'intérêt. Cette défense était accompagnée d'une exception au sujet de laquelle il ne s'élève maintenant aucune question. La défense en droit fut renvoyée par la Cour Supérieure et l'Appelante condamnée à $100, de dommages-intérêts. Ce jugement a été confirmé en appel.

La question soulevée sur cette contestation est de savoir si l'Intimée ayant exécuté les conditions auxquelles elle avait accepté l'Appelante comme actionnaire, cette dernière n'est point passible des dommages et intérêts autres que l'intérêt légal en conséquence de son refus de livrer au temps convenu les débentures

1886

CORPORATION OF THE COUNTY OF OTTAWA v. MONTREAL, OTTAWA & WESTERN RY. CO.

Fournier J.

promises. L'obligation contractée par l'Appelante n'est pas l'obligation ordinaire de l'actionnaire qui a souscrit des parts conformément au statut organisant une compagnie de chemins de fer, et aux lois concernant les chemins de fer. L'étendue et les conséquences d'une telle obligation sont réglées d'une manière spéciale par ces lois qui devraient être appliquées à l'Appelante, si elle n'était qu'un souscripteur ordinaire. Dans ce cas, il n'est pas douteux que l'obligation de l'Appelante serait limitée au paiement d'une somme d'argent, par versements, tel qu'exigé par la compagnie, et que le défaut de paiement à l'époque fixée entraînerait l'obligation de payer l'intérêt et emporterait même la peine de confiscation, si le paiement n'était pas fait dans les deux mois après que l'actionnaire a été mis en défaut—ces dispositions des lois de chemins de fer n'ont pas d'application au cas actuel. L'Appelante, par suite du contrat spécial qu'elle a fait n'aurait pu être poursuivie pour le paiement de ses parts ; aucune confiscation n'aurait pu être prononcée contre elle—parce que, par leurs conventions les parties avaient dérogé à ces dispositions de la loi pour établir un autre moyen d'acquitter les parts souscrites. Le mode convenu consistait dans la livraison à l'Intimée, par l'Appelante, à l'époque fixée, des bons ou débentures de cette dernière pour la somme de $200,000, montant des parts souscrites. L'Appelante ne s'obligeait par là qu'à livrer ses bons payables dans vingt-cinq ans et non pas à payer de l'argent dans le présent. Son obligation ne consistait qu'à remettre et livrer ses débentures tel que convenu. C'est donc l'obligation de faire une certaine chose—la livraison en question que la compagnie avait le droit d'exiger de l'Appelante et non le paiement d'une somme d'argent qui n'était exigible que dans vingt-cinq ans.

L'intention évidente des deux parties en adoptant ce

mode d'acquitter les parts, était, sans doute, de mettre de suite la compagnie en état, par la réalisation des débentures, d'exécuter ses travaux. Le refus de les livrer, privait la compagnie du moyen convenu pour se procurer des capitaux nécessaires et compromettait inévitablement le succès de l'entreprise commune. Dans ce cas, la compagnie avait une action pour contraindre l'Appelante à faire la livraison des débentures, mais elle n'en avait pas pour exiger le paiement d'une somme d'argent avant l'expiration des 25 ans. Quelle doit être la conséquence de l'inexécution d'une telle obligation ? La réponse dépend du caractère que l'on attribue à cette obligation ; si c'est simplement une obligation de payer une certaine somme d'argent, nul doute que l'on doit alors faire application de l'article 1077, C. C., et que dans ce cas, les dommages ne peuvent pas dépasser l'intérêt légal. Mais si l'on considère que le véritable caractère de l'obligation contractée consistait uniquement à faire, au temps convenu, la tradition des débentures promises, n'est-ce pas alors une de ces obligations dont l'inexécution soumet la partie qui l'a contractée aux conséquences des articles 1065 et 1073 C. C. ? Il me semble qu'il est clair que ce sont là les articles du Code Civil qui devraient, plutôt que l'art. 1077, être appliqués au cas actuel.

Bien que les opinions aient été partagées dans la cour du Banc de la Reine, que la majorité de la cour ait adopté le principe que l'art. 1077 ne s'appliquait qu'aux intérêts moratoires et qu'il pouvait y avoir d'autres dommages pour le défaut de paiement d'une somme d'argent, tandis que cette doctrine a été combattue par la minorité, tous les honorables juges ont cependant été d'avis que c'est le Code civil, et non les lois de chemins de fer qui doivent déterminer les conséquences de l'obligation en question. Sans entrer dans le mérite des savantes dissertations qui ont été faites de

1886

CORPORATION OF THE COUNTY OF OTTAWA v. MONTREAL, OTTAWA & WESTERN RY. CO.

Fournier J.

part et d'autres, je crois que du moment qu'il est admis que l'on doit chercher la solution dans le Code civil, la question, cesse de faire difficulté, car le Code contient des exceptions à l'article 1077 qui sont d'une évidente application à cette cause.

Quelle est en réalité la position de l'Appelante vis-à-vis de l'Intimée,—n'est-ce pas celle d'un associé, plutôt que d'un actionnaire ordinaire ?—Au lieu de prendre cette dernière position qui ne l'aurait soumise qu'aux conséquences déterminées par les Statuts, elle a jugé à propos de faire un contrat spécial qui n'est nullement affecté par le Statut et qui doit nécessairement tomber sous l'effet du Code civil. Par ce contrat elle s'est assurée d'un mode plus avantageux pour elle que celui fixé par le Statut, pour faire le paiement de sa mise dans le fonds social. Les véritables relations qui existent entre les parties étant celles d'associés,—c'est alors dans les articles du Code civil, concernant les obligations des associés entre eux que l'on doit chercher la solution de la question qui nous occupe. Si, comme je le crois,—ils doivent s'appliquer à la position particulière que se sont faite les parties en cette cause, il n'est plus douteux que l'Intimée a droit en conséquence du refus de livrer les débentures à des dommages en outre de l'intérêt, ainsi que le disent les articles 1840 et 1841. L'associé qui manque de verser dans la société une somme qu'il a promis d'y apporter devient débiteur des intérêts sur cette somme à compter du jour qu'elle devait être payée.

Il est également débiteur des intérêts sur toutes les sommes prises dans la caisse de la société pour son profit particulier, à compter du jour où il les en a tirées.

ART. 1841.—"Les dispositions contenues dans les deux articles qui précèdent sont sans préjudice au recours des autres associés pour dommages contre l'associé en défaut, et pour obtenir la dissolution de la société suivant les règles énoncées au titre Des Obligations et dans l'article 1896."

1886

CORPORATION OF THE COUNTY OF OTTAWA v. MONTREAL, OTTAWA & WESTERN RY. CO.

Fournier J.

L'article 1846 du Code Napoléon correspondant aux articles 1840 et 1841 de notre Code contient les mêmes dispositions, et tous les commentateurs qui ont écrit sur cet article se sont accordés sur son évidente signification. Je me bornerai à n'en citer que quelques-uns :

Laurent (1).

L'article 1846, (C. C. P. Q, articles 1840, 1841) contient une seconde dérogation au droit commun. D'après l'article 1153, les dommages-intérêts résultant du retard dans l'exécution d'une obligation ayant pour objet une somme d'argent ne consistent jamais que dans la condamnation aux intérêts fixés par la loi. L'article 1846, après avoir dit que l'associé doit les intérêts de plein droit, ajoute : "Le tout sans préjudice a de plus amples dommages-intérêts, s'il y a lieu." Cette exception résulte aussi de la nature du contrat de société. On ne s'associe point pour retirer l'intérêt légal des mises sociales, on s'associe pour faire des bénéfices qui excèdent le profit que l'on retire d'ordinaire de ses capitaux ; le dommage étant supérieur à l'intérêt légal, la loi a dû donner aux associés une action en dommages-intérêts. S'il n'en est pas de même dans les contrats en général, alors qu'ils ont pour objet une somme d'argent, c'est qu'il eût été impossible d'évaluer le montant du dommage souffert par le retard dans le paiement. Ce motif n'existe point dans la société, puisque l'objet de la société indique l'emploi que les parties auraient fait des fonds ; il est donc facile de calculer le dommage que la société souffre quand elle ne peut pas faire cet emploi.

Aubry et Rau, Droit civil français (2). Des obligations des associés entre eux.

1° Chaque associé est tenu d'effectuer sa mise au temps convenu, art. 1845, al. 1.

L'associé qui ne satisfait pas à cette obligation au terme fixé pour son exécution est de plein droit constitué en demeure, et doit, à partir de cette époque, faire état à ses associés des fruits ou revenus des objets composant sa mise, des intérêts des sommes qu'il avait à verser et des profits par lui retirés de l'industrie qu'il devait pour le compte commun. Il est en outre dans toutes ces hypothèses, passible de plus amples dommages-intérêts, s'il y a lieu. Arts. 1846, 1847.

Massé, Droit commercial (3).

N° 270. Il y a encore, en matière de cautionnement et de société, exception à la règle qui défend aux juges d'accorder des dommages-intérêts excédant le taux de l'intérêt légal. La caution qui a payé

(1) T. 26 No. 249 p. 263. (2) 4 vol., p. 554, §380.
(3) 4 T. p. 325.

1886

CORPORATION OF THE COUNTY OF OTTAWA v. MONTREAL, OTTAWA & WESTERN RY. CO.

Fournier J.

pour le débiteur principal, a un recours contre ce dernier, non seulement pour le capital, mais en outre pour des dommages-intérêts proprement dit, s'il y a lieu.

En matière de société, l'associé qui devait apporter une somme dans la société et qui ne l'a pas fait, ou qui a pris des sommes dans la caisse sociale pour les employer à son profit particulier, doit non seulement les intérêts de ces sommes, soit à compter du jour où elles devaient être payées, soit à compter de celui où il les a tirées de la caisse, mais encore de plus amples dommages-intérêts, s'il y a lieu.

Demante. Code Civil (1).

Si l'apport consiste en argent, la loi, toujours eu égard à la nature de ce contrat, essentiellement commutatif, consacre ici deux dérogations aux règles ordinaires ; 1o. les intérêts courent de plein droit, par conséquent sans demande, ajoutons et sans sommation, du jour de l'échéance ; 2o. leur prestation ne dispense pas de plus amples dommages-intérêts, s'il y a lieu.

Duranton. Cours de droit Français (2).

Ainsi, dans le cas où un associé, en n'effectuant pas sa mise au jour convenu, ou en tirant de la caisse sociale une somme pour son avantage particulier, aurait empêché la société de faire une opération avantageuse, ou lui aurait occasionné des frais de la part de ses créanciers, qu'elle n'a pu payer faute de cette somme, l'associé outre l'intérêt légal, devrait être condamné à des dommages-intérêts envers la société.

Troplong. Contrat de Société (3).

Il y a plus ; il ne doit pas seulement les intérêts de plein droit ; il peut même être condamné à des réparations plus considérables, si son retard a fait manquer quelque bonne opération à la société, ou l'a empêché de remplir ses obligations envers des tiers qui ont obtenu contre elle des indemnités. L'article 1153 du Code civil est ici sans autorité. La disposition finale de notre article place, avec raison, l'associé sous des règles plus rigoureuses, qui ne sont que des règles de justice.

Si l'on fait application des articles 1840 et 1841 aux faits de cette cause, le sort du présent appel n'est pas douteux. Le savant conseil de l'Appelante s'étant, lors de l'argument, désisté de la prétention que l'Intimée n'avait pas exécuté ses engagements, il s'en suit qu'en vertu des articles ci-dessus,—aussi bien qu'en vertu des articles 1065 et 1073 l'Intimée a droit à des dommages-

(1) P. 15. (2) 423, titre IX.

(3) 22, 542.

intérêts, autres que ceux mentionnés dans l'article 1077 qui ne consisteraient que dans l'intérêt légal. En vertu de l'article 1841, elle avait droit de réclamer et l'intérêt et des dommages spéciaux, s'il en existait. Dans ses conclusions n'ayant pas demandé l'intérêt, il ne peut être accordé, mais les dommages estimés à $100, doivent lui être accordés, l'appel doit être renvoyé avec dépens.

HENRY J.—I am of the opinion that the appeal here should be dismissed. This is not an action brought to recover money; it is brought on the failure on the part of the defendants to perform a contract they had entered into. That contract was, that in consideration of certain work to be done on the road, they would give the company debentures to the extent of $200,000, as assistance to build the railway, and the county to take stock in the company to that extent, said debentures to be delivered in the proportions in which such work proceeded. Up to a certain time the work had proceeded, and, by the terms of the agreement, the company became entitled to receive a certain portion of these bonds. They were not furnished, and the matter remained over, nothing being done. This action was brought for the damage sustained in consequence of non-delivery of said bonds at the time and in the manner pointed out by the agreement. There was a failure then to comply with the terms of the agreement and the failure is admitted. But it is alleged that this company cannot recover damages in any case. If they were entitled to anything, it could only be in the shape of interest, and they are not entitled to interest because the bonds or debentures had never been delivered. That being the case, this cannot be an action for interest, and it is not an action, in my view, for the bonds them-

1886

CORPORATION OF THE COUNTY OF OTTAWA v. MONTREAL, OTTAWA & WESTERN RY. CO.

Henry J.

selves, or for the value of the bonds, but it is an action founded solely on the failure of the parties to deliver the bonds at the particular time in which they agreed to deliver them.

The question first arises: Can the parties succeed, under the code in force in the Province of Quebec, in an action for damages in a case of this kind? In the next place: What are the damages, and have they shown any in this action?

Under the articles referred to by my brother Fournier, viz., 1065, 1073, the obligations referred to there are the common obligations between men. But under the provisions of another chapter, title 11, under the head of partnership, we find there is a different provision, and one which does not apply to common business between one man and another.

The provision is in art. 1840 as to the liability for interest due by a partner who fails to pay a sum which he has agreed to pay the partnership. But there is another one following it, art. 1841, and it enacts that the provisions contained in the last two preceeding articles are without prejudice to the rights of partners to damages.

In the first place, I cannot bring myself to the conclusion that this is an action at all for the non-payment of money. It is an action for the non-delivery of bonds, and these bonds, when delivered, were to be placed on the market for what they were worth.

But the company say "in consequence of your failure, other parties who intended to take stock have failed to do so, you having refused to carry out your agreement." The plaintiffs contend that they undertook the work and entered into engagements on the condition that these bonds were to be given, and that they have therefore sustained damages, and substantial damages, independent of the money altogether.

1886

CORPORATION OF THE COUNTY OF OTTAWA v. MONTREAL, OTTAWA & WESTERN RY. CO.

Henry J.

I think there might, under the Quebec code, be a good cause of action independent of the question of time or of interest, and although they were not entitled to the amount of the bonds, I can see my way clear to say that they were entitled to damages.

There is another point, that when a party has suffered wrong, and is unable to prove the damages sustained by that wrong (as is the case here) the court should not dismiss his action, but give him reasonable damages. Here the plaintiffs did not prove the exact amount of their damages, yet as the defendants caused the loss which plaintiffs had incurred, it appears to me, that in a case of this kind the court, as a court and jury, are entitled to say that although plaintiff has not proved the amount, we will award him, under the circumstances, $100. Now as to the position taken by my brother Fournier, it is clearly laid down by Laurent (1), commenting on art. 1846, when dealing with the question of partnership, that besides interest the parties have the right to recover substantial damages, and he says that the article in the code referring to mere interest, has no effect whatever upon the defendants.

I think, therefore, referring to the Civil Code of Quebec, and the code from which it is taken, and the decision of the court below, and the opinion of Laurent, that the respondents are entitled to have their judgment sustained.

TASCHEREAU J.—This is not an action for damages resulting from delay in the payment of money. The obligation of this municipality did not consist in the payment of money. It had not to pay any money on the capital till twenty-five years after the issue of the debentures. And the railway company had not the right to ask any cash payment on their shares All that it could ask were the debentures. But these de-

(1) T. 26, No. 249.

1886

CORPORATION OF THE COUNTY OF OTTAWA v. MONTREAL, OTTAWA & WESTERN RY. CO.

Taschereau J.

bentures, the municipality did not hand over, as they were obliged to do under their covenant, though they were regularly put *en demeure*. Are they not responsible for the non-execution of their obligation? Arts. 1065-1073 C. C. To say that here the municipality's obligation was nothing but an obligation to pay money, and that consequently the only damages for non-execution of that obligation is the interest, would be, it seems to me, to concede that for 25 years they might refuse to issue these debentures, and that, during all that time, all that the railway company would have the right to claim would be the interest. Can it be so? Surely not.

This railway company were not capitalists who desired to invest $200,000 at 6 per cent. for 25 years. Not at all. They were a company who wanted $200,000 to build a railway, not in twenty-five years, but then and there, and as this municipality was not able to pay its $200,000 of shares in cash, it was agreed that it should give its debentures, or promissory notes as it were, for the amount, said notes payable in 25 years. So that by negotiating these notes or these debentures either at par, at a discount, or at a premium, the railway compay might procure the funds required for the construction of the road.

Upon the faith of that agreement, the railway company proceeded to build the railway, and when they demand the issue of the debentures according to the agreement, the municipality says: never mind we will pay you the interest during 25 years, and you must be satisfied. Is that the contract? Are the company to build the railway with the interest?

The appellants' contentions are untenable.

The interest specified was for the delay given to the municipality in the payment of the money. The damages asked are for the delay in the issue of the

debentures, and do not fall under art. 1077 of the code.

To extend this article in the sense that the appellants ask the court to do so would lead to grave consequences.

Suppose a man engaged in mercantile pursuits, having a note for $10,000 due to-morrow at the bank in Montreal, goes to the telegraph office in Ottawa, pays them $10,000, with commission, charges, &c., for the consideration of which the telegraph company covenant to pay his note by telegraph, through their Montreal office. Through the negligence or embezzlement of their officers, the note is not paid, it is protested, this man's financial standing is gone, the bank immediately calls upon him or his firm in Montreal for an assignment. He suffers heavy damages, it is clear. But, say the appellants, the telegraph company are not responsible for these damages, beyond the interest of the money, and if the day after to-morrow they pay his note or refund him his $10,000, all the damages they will have to pay him will be one day's interest, and with that he must rest satisfied.

So if a man, for instance, going to New York to make purchases, goes to the Express Company's offices here, and hands them over $10,000 to be transmitted to him at New York. This man arrives in New York but the Express Company fails or delays to pay him the money. He suffers damages, but, say the appellants, the company was responsible only for the amount of the interest of the money. If that were so it must be conceded that they might keep the money for years, and all they would have to pay would be the interest. Can that be so? Was it an investment that this man intended to make in the Express Company? So, in the present case, was it an investment of $200,000 payable in twenty-five years that this railway company intended to make?

1886

CORPORATION OF THE COUNTY OF OTTAWA v. MONTREAL, OTTAWA & WESTERN RY. CO.

Taschereau J.

It could not be contended that in these two instances these companies would not be liable in damages. Yet their obligations were to pay money, nothing else. The present case is still clearer. Here, as I have said, no money was due, no money could be asked, there was consequently no delay in the payment of money, and the damages are not claimed for any such delay. The payment of the shares is to be in debentures. Art. 1139-1148 C. C. The municipality's obligation was to make, sign and deliver them to the company.

As to the point taken at the bar, on the part of the appellants, that the railway company's action does not lie because they have transferred all their rights to the Quebec government, it has not even been noticed in the judgments of the two courts below, though also raised there, and for very good reasons.

1st. There is no issue on that point raised in the pleas to the action;

2nd. It is *exciper du droit d'autrui* (*jus tertii*);

3rd. The damages claimed were never assigned;

4th. Had they been assigned, the assignee could have sued in the name of the assignor;

5th. The Attorney General who had intervened in the case as assignee under the assignment referred to has withdraw his intervention;

6th. This assignment took place since the institution of the present action.

As to there being another action pending, no proof, no plea, that there is an action pending for the debentures. Then, the demand for the debentures and the demand for damages could not have been joined in one action.

As to the amount of the damages, it is self-evident that they must have been very large, and they are proved to have been so. Only a small and nominal sum was given; owing, I presume, to the fact that the

company has virtually ceased to exist. The amount was evidently not pressed, a verdict sufficient to carry costs only being required.

1886

CORPORATION OF THE COUNTY OF OTTAWA v. MONTREAL, OTTAWA & WESTERN RY. CO.

Taschereau J.

That the amount is too small does not lie in the defendants' mouth. There was sufficient evidence to justify the verdict. In the case of non-execution of a contract, says the Court of Appeal of Rouen, reversing the judgment of the original court, in *Re Marie* v. *Grenet* (1), if it is evident that the plaintiff must have suffered some damages, the court will not dismiss his claim altogether on the ground that it is difficult to precisely determine the extent of the loss he has suffered, or that he has not established any substantial basis upon which an amount may be arrived at, but, in such a case, the court will establish the amount according to the rules of equity. The court of first instance had dismissed the claim for damages on the ground that the plaintiff had not proved a clear pecuniary loss. I am of opinion that the appeal should be dismissed with costs.

GWYNNE J.—The appellants in pursuance of the terms of a by-law of the corporation of the County of Ottawa became subscribers for 200,000 shares of ten dollars each amounting to $200,000 of the capital stock of the Montreal, Ottawa and Western Railway upon and subject to the following conditions, namely: that the said subscription should be payable in debentures of the corporation of the county of the sum of one hundred dollars each payable in 25 years from date bearing interest at six per cent. per annum payable half yearly on the first days of January and July of every year, at the office of the Merchants Bank, Ottawa, such debentures to be accepted at par in payment of such subscription.

2. That out of such subscription a sum of one hun-

(1) S. V. 44. 2. 550.

1886

CORPORATION OF THE COUNTY OF OTTAWA v. MONTREAL, OTTAWA & WESTERN RY. Co.

Gwynne J.

dred and fifty thousand dollars should be paid in monthly instalments as the work should progress so as, however, not to pay more than one half of the value of the work done within the limits of the county of Ottawa, or $3,000 per mile on the certificate of the engineer of the company which might be verified by an engineer selected by the corporation.

3. That the said railway should be completed and put in operation on or before the first day of December, one thousand eight hundred and seventy-five.

4. That the bridges should be constructed with stone piers and that the rails, if of iron, should be of the weight of sixty pounds per yard and, if of steel, of forty-eight pounds per yard and that the road and its appurtenances should be built of materials equal in quality to those of the Saint Lawrence and Ottawa Railway.

The plaintiffs allege in their declaration that on the 19th January, 1875, they had fulfilled all conditions precedent necessary to be fulfilled to entitle them to receive from the defendants their debentures for the principal sum of $112,096.70 bearing interest from that date at six per centum, payable on the first days of July and January in each year in pursuance of the terms of their subscription agreement and the by-law in that behalf and that upon that day the plaintiffs duly demanded of the defendants the delivery of the said debentures which they refused to give and so that upon the said 19th day of January, 1875, the defendants were put in default for non delivery of the debentures.

Now, assuming all conditions to have been fulfilled, to have entitled the plaintiffs to receive the above amount of debentures from the defendants, the plaintiffs under article 1065 of the Civil Code had two remedies. They might have instituted a suit to enforce specific performance of the defendants obliga-

1886

CORPORATION OF THE COUNTY OF OTTAWA v. MONTREAL, OTTAWA & WESTERN RY. CO.

Gwynne J.

tion, by delivery of the debentures, or they might have instituted an action once for all to recover all damages consequential upon the breach of their obligation in not delivering them, but in such an action they must, as it appears to me, allege and prove all the damages which they are entitled to recover. They cannot split the one cause of action up into several actions, in one of which claiming damages for one loss alleged to have been sustained; in another, or others for other and different losses alleged to have been sustained, or profits of which they had been deprived; and in another claiming nominal damages only, shewing a breach of the obligation, but not alleging and proving any loss or deprivation of gain necessarily and directly consequential thereon.

Under the provisions of articles 1073-4 and 5 of the Civil Code, the damages recoverable for the non-execution of an obligation are the amount of such loss or deprivation of gain as, being the foreseen, necessary, immediate and direct consequences of the non-execution of the obligation of the defendants, the plaintiffs had sustained. That loss or deprivation of profit, in a case like the present, appears to me to be readily ascertainable, for the debentures which the plaintiffs should have received, upon the assumption of their having become entitled to receive them, being negotiable instruments for the payment of money at a future time and transferable by delivery had a money value, of a varying character, it is true, according as the credit of the corporation was good or bad, and as the demand for such securities in the market was great or small, but still they had an ascertainable money value, which money value constituted, in my opinion, the precise measure of the damages which the plaintiffs had sustained, and which they were entitled to recover for the non-delivery to them of the debentures in question

1886

CORPORATION OF THE COUNTY OF OTTAWA v. MONTREAL, OTTAWA & WESTERN RY. CO.

Gwynne J.

assuming them to have been entitled to demand and receive them. The plaintiffs, however, instead of instituting an action in which they claimed such damages instituted an action, in which, after averring their right to receive the debentures, and the default of the defendants, they alleged that they had sustained the damages following, namely, the putting in peril the sum of $50,000 part of the $200,000 subscription, the debentures for which were issuable only on condition of the road being completed on the 1st day of December, 1875; the injury to the credit of the plaintiffs and the depriving them of considerable sums that the respondents would have had the right to receive, and would have got and received as well from the City of Montreal under and in virtue of by-law No. 59, Schedule A, of the Act 36 Vic. ch. 49, as from the government of Quebec from and out of the subsidy voted to the plaintiffs by and in virtue of the act of Quebec 37 Vic. ch. 2, and that besides these damages the plaintiffs had the right to claim from the appellants interest on the amount of the debentures due to the company upon and from the date of the protest and notification of the 19th January, 1875, which said damages and interest so composed amount, as the plaintiffs allege, to the sum of $500,000, wherefore the plaintiffs concludes by praying that the defendants be condemned to pay the plaintiff the said sum of $500,000 so made up with interest, expenses, &c.; the whole under the express reservation of the plaintiffs' right to demand and recover all damages to accrue subsequently to the date of the present action, namely, the 19th of June, 1875.

Now, as to the putting in peril the sum of fifty thousand dollars, or as to the alleged loss of credit of the plaintiffs, or as to the alleged deprivation caused to them, by the non-delivery of the defendants debentures,

1886

CORPORATION OF THE COUNTY OF OTTAWA v. MONTREAL, OTTAWA & WESTERN RY. CO.

Gwynne J.

of considerable sums accruing to them from the city of Montreal under the by-law of that corporation and from the Government of the Province of Quebec under the act of the Legislature of that Province, it is very clear, I think, that none of these apprehended or alleged losses can be recovered in this action as having any natural or necessary connection with, or as being directly or at all attributable to, the non-delivery by the defendants of their debentures. Such alleged losses cannot be held to be either the foreseen, or necessary, or natural, or immediate, or direct consequences of the non-delivery by the defendants of their debentures. None of these alleged losses, if at all suffered, can be said to have been suffered in respect of the particular thing which was the subject of the defendants obligation which was to deliver their debentures when earned, and no damages can be recovered in this action except such as necessarily and directly arise in respect of the particular thing which was the subject of the defendants' obligation and as are necessarily and directly consequential upon the non-performance of that obligation.

Then as to the interest which is claimed on the amount of the debentures, which, as is alleged, should have been delivered to the plaintiffs on the 19th day of January, 1875, from that day until the commencement of this action on the 19th June, 1875, this interest accrues and becomes payable only under the terms of the defendants' subscription contract and the by-law in that behalf and can only be claimed in right of such contract, which contract is that the interest shall be payable half yearly on the first days of July and January, and as this action was commenced on the 19th day of June, 1875, before the day appointed for the accruing due of any of such interest, no interest in respect of that sum can be recovered in this action

1886

CORPORATION OF THE COUNTY OF OTTAWA v. MONTREAL, OTTAWA & WESTERN RY. CO.

Gwynne J.

The learned judge of the Superior Court before whom this action was tried has awarded the plaintiffs one hundred dollars damages, but this amount, which is neither substantial nor nominal, is plainly not given in full satisfaction of all damage incident upon the non-execution of the defendant's obligation in respect of the particular breach of that obligation which is complained of; and no part of the amount so awarded can be attributed to or allowed upon any of the items of damage especially enumerated in the declaration, none of these items being necessarily and directly consequential upon the breach complained of. The one hundred dollars have been, in fact, arbitrarily awarded without reference to any allegation made or proof offered of any actionable loss or deprivation of profit sustained, and the plaintiffs' right of action, in respect of what they are entitled to recover, if they are entitled to recover anything, is left open and undisposed of by this action, and is, as was said in the argument before us, now the subject of another action. There has been no precedent cited, nor do I think there can be any, establishing a right in the plaintiffs to recover the $100 awarded to them in this action which can be recovered only as damages awarded in the absence of any actionable loss alleged and proved: and also the right to recover in another action substantial damages which, if entitled to recover anything, the plaintiffs are entitled to recover in respect of the one breach of the same obligation. As judgment for the plaintiffs in the present action cannot be treated as a complete adjudication in respect of the breach of obligation which is the cause of action stated in the declaration; and as the substantial damages which are recoverable, if the plaintiffs are entitled to recover anything, are not sought to be recovered in the present action but are made the subject of another action; and as the losses which are speci-

1886

CORPORATION OF THE COUNTY OF OTTAWA v. MONTREAL, OTTAWA & WESTERN RY. CO.

Gwynne J.

fically enumerated in respect of which indemnity is sought by this action are not actionable, or directly consequential upon the breach of obligation stated; the judgment of the Superior Court cannot, in my opinion, be sustained; this appeal therefore should be allowed with costs and the action in the court below dismissed with costs. With the greatest deference to my learned brother Fournier I am unable to concur in regarding the county of Ottawa; by reason of their being shareholders in the railway company, as partners with the company who can therefore sue the county for damages within article 1840 C. C. Nor if they can be so regarded does that, as it appears to me, get over the difficulty that the damages specially sought to be recovered are not recoverable, being altogether too remote, and, in fact, not consequential on the non-execution of the obligation declared upon nor, as it appears to me, is there any loss alleged and proved to support a judgment for the $100 given and what it has been given for it is impossible to say.

Appeal dismissed with costs.

Solicitors for appellants: *Laflamme, Laflamme & Richard.*

Solicitors for respondents: *DeBellefeuille & Bonin.*

HORACE FAIRBANKS *et al.* (PLAINTIFFS) ..... } APPELLANTS;

AND

BRADLEY BARLOW *et al.* (DEFENDANTS) ..... ;

AND

JAMES O'HALLORAN (INTERVENANT) RESPONDENTS.

1886

*Nov. 16.

1887

*March 14.

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

Pledge without delivery—Possession—Rights of creditors—Art. 1970 *C. C.*

B., who was the principal owner of the South Eastern Railway Company, was in the habit of mingling the moneys of the company

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

1886

FAIRBANKS v. BARLOW.

with his own. He bought locomotives which were delivered to, and used openly and publicly by, the railway company as their own property for several years. In January and May, 1883, B., by documents *sous seing privé*, sold with the condition to deliver on demand, ten of these locomotive engines to F. *et al.*, the appellants, to guarantee them against an endorsement of his notes for $50,000. but reserved the right on payment of said notes or any renewals thereof to have said locomotives re-delivered to him. B. having become insolvent, F. *et al.*, by their action directed against B., the South Eastern Railway Company, and R. *et al.*, trustees of the company under 43 and 44 Vic. ch. 49, P.Q., asked for the delivery of the locomotives, which were at the time in the open possession of South Eastern Railway Company, unless the defendants paid the amount of their debt. B. did not plead. The South Eastern Railway Company and R. *et al.*, as trustees, pleaded a general denial, and during the proceedings O'H. filed an intervention, alleging he was a judgment creditor of B., notoriously insolvent at the time of making the alleged sale to F.

Held, affirming the judgment of the court below, that the transaction with B. only amounted to a pledge not accompanied by delivery, and, therefore F. *et al.*, were not entitled to the possession of the locomotives as against creditors of the company, and that in any case they were not entitled to the property as against O'H., a judgment creditor of B., an insolvent.

APPEAL from a judgment of the Court of Queen's Bench for Lower Canada (Appeal Side) (1) affirming the judgment of the Superior Court dismissing the appellants' action.

The facts and pleadings are fully stated in the judgements hereinafter given. See also report of the case in M. L. R. 2 Q. B. (2).

Church Q.C. for appellants:

Was this an agreement to pledge and not a sale? This seems to me the important question to be decided on this appeal.

That it was not a contract of pledge is, I contend, sufficiently established by two facts:—

1. The plaintiffs were not creditors of Barlow, to whom a pledge could be given, because the notes which they endorsed were to be held, and were held, by the Bank of Montreal; and

(1) M. L. R. 2 Q. B. 332. (2) P. 332 *et seq.*

1886

FAIRBANKS v. BARLOW.

2. The parties did not intend to make a pledge, because a pledge would have involved the transfer of possession of the locomotives from Barlow to the plaintiffs; on the contrary, they called their contract a sale in terms, and acted upon it as such—Art 1025 C. C.

The consideration of the sale appears by the documents to have been the endorsation of notes drawn by Barlow in favor of third parties, which notes the appellants undertook to pay. Barlow, however, reserved the right practically (although not in formal terms) to intervene and pay the notes himself at maturity, or pay them after maturity, in which case he was entitled by the agreement to a re-delivery of the locomotives sold. The accepted principle of construction and interpretation, made a rule of law in the Province of Quebec by Art. 1013 of the Civil Code, which provides that when the meaning of the parties to a contract is doubtful their common intention must be determined by interpretation rather than by an adherence to the literal meaning of the words of the contract, should be applied here if there is any doubt of what was meant; and the subsequent rules laid down in articles 1014 and 1015 concur in showing that no ambiguity of meaning or expression shall be permitted to defeat the real meaning of the contract. These rules would manifestly be overlooked and set at naught if this agreement or contract were taken as a pledge. Moreover, the defendant Barlow and the other defendants could say that the contract was inchoate, because no delivery had been made, and therefore no pledge given, and the whole transaction, like the agreement, would become purposeless and meaningless. Moreover, the words of the contract show that a sale was intended; "I have this day sold" are the words of the contract. The

1886

FAIRBANKS v. BARLOW.

price was clearly the payment by the plaintiffs, at their maturity, of the notes. The delay of payment was the period which would elapse between the signing of the notes and their maturity. Considered as a contract of sale, this delay in payment, and non-delivery at the time of the sale, did not affect it, because article 1025 C. C. provides that a contract for the alienation of a thing certain and determinate, makes the purchaser owner of the thing by the consent alone of the parties, although no delivery be made; and this interpretation makes the document a binding obligation, and avoids its miscarriage as a pledge. The things sold in this instance were certain and determinate, because the defendant Barlow sold ten locomotive engines of the make of the Rhode Island Locomotive Works then owned by him—"which I now own" are the words of the contract—and it appears from the statement that of the fifteen locomotives of the make of the Rhode Island Locomotive Works, which were sold to the parties in this cause, ten only were sold to Barlow individually.

See also arts. 1472, 1027, C. C

As to the trustees of the bondholders they have no *locus standi*.

The bondholders could, if they wished, have intervened, as they had been notified through their trustees of the suit. Our code in terms declares "no person can plead in the name of another," and that "corporations plead in their corporate names," and that only those who have not the free exercise of their rights plead through others representing them. *Vide*, art. 19 C. C. P. *Brown* v. *Pinsonneault* (1); *Robillard* v. *La Societé de Construction* (2); *Valliers* v. *Drapeau* (3).

Now, as to the intervenant's remedy, we contend that

(1) 3 Can. S. C. R. 102. (2) 2 L. N. 181 S. C. 1879.
(3) 6 L. N. 154 Q. B. 1883.

his only legal remedy would have been to take an attachment by garnishment of these locomotives in the hands of the South Eastern Railway Company, and the trustees, and the appellants; and that certainly he could have no greater right, even if allowed to intervene in the present cause, than to ask that when the appellants had recovered possession of the engines, they should be ordered to hold them in the interest of the insolvent Barlow's creditors generally, or that the seizure avail as a conservatory attachment in the interest of all Barlow's creditors, or some conclusion of that nature. But this he has not asked; he merely seeks to defeat appellants' action; and appellants submit that his prayer is not justified, and should be rejected.

1886

FAIRBANKS v. BARLOW.

O'Halloran Q.C. for respondents contended that there had been no sale, no price mentioned, no absolute vesting of the property in the appellants, and cited and relied on *Cushing* v. *Dupuy* (1); *Grand Trunk Railway* v. *Eastern Townships Bank* (2); as to the intervenant's claim it is clear that having proved Barlow's insolvency, plaintiffs cannot be entitled to the property of these locomotives in the possession of a third party as against the intervenant a judgment creditor of Barlow.

Sir W. J. RITCHIE C.J.—By their action the appellants, Fairbanks and his partners, sought to recover possession of ten locomotive engines, which they alleged had been sold to them by Bradley Barlow, one of the respondents, to secure them against the endorsement of three promissory notes, of the aggregate amount of fifty thousand dollars, endorsed at his request, and which had been renewed and the renewals taken up by them. The suit was accompanied by a

(1) 5 App. Cas. 409. (2) 10 L. C. Jur. 11.

1887

FAIRBANKS v. BARLOW.

Ritchie C.J.

seizure and was directed as well against Barlow as against the South Eastern Railway Company, and against Redfield, Farwell & McIntyre, trustees, under a statute of Quebec, 43 and 44 Vic. ch. 49.

The defendant, Barlow, made default. The South Eastern Railway Company by their plea claimed the locomotives as their property, and denied having given Barlow any authority to sell or pledge them.

The trustees pleaded their possession and ownership under the statute of Quebec 43 and 44 Vic. ch. 49, having in good faith received the locomotives from the South Eastern Railway Company.

The railway company pleaded that the locomotives belonged to them, and never were the property of Barlow, nor was he ever authorized to sell or pledge the same. The appellants produced the title under which they claimed being a *sous-seing privé* document dated 16th January, 1883, which declares that Barlow sold them.

After a certain amount of evidence had been taken on these issues, the respondent, James O'Halloran, intervened, alleging that he was a creditor of Barlow, and denying any right, whether of ownership or authority, in Barlow to pledge the locomotives, or to guarantee them against an endorsement of his notes for $50,000; Barlow's insolvency long before the institution of the action; the non-delivery of the locomotive to the appellants, and a denial of appellants having any right to or lien or privilege on the locomotives, and his right as a creditor, to have the pretended sale or pledge declared invalid. He concluded that the plaintiffs be declared to have no lien on the locomotives, and that their action should be dismissed.

The plaintiff's claim is on two instruments, the one dated the 16th January, 1883, and the other the 10th of May, 1883, as follows:—

1887

FAIRBANKS v. BARLOW.

Ritchie C.J.

ST. JOHNSBURY, VT., January 16, 1883.

Hon. Horace Fairbanks and Hon. Franklin Fairbanks having endorsed for my accommodation two notes for twenty thousand dollars each, one dated January 1st, 1883, and one dated January 10th, 1883, and payable in four months at the Bank of Montreal, and one note of ten thousand dollars, dated January 16th, payable at the Bank of Montreal, in three months from date, now in consideration of the said endorsement, I have this day sold to the said Horace and Franklin Fairbanks, ten locomotive engines of the make of the Rhode Island Locomotive Works, which I now own, and which I agree to deliver to the said Horace and Franklin Fairbanks on demand, to be held by them as collateral security for the payment of said notes at maturity, and when said notes are paid, the said ten locomotives are to be re-delivered to me.

(Signed), BRADLEY BARLOW.

ST. JOHNSBURY, VT., May 10, 1883.

Whereas, as appears by my agreement of the 16th of January, 1883, Horace Fairbank and Franklin Fairbanks endorsed for me certain notes to the amount of ($50,000) fifty thousand dollars, described in an agreement, signed by me, pledging ten locomotives as collateral security for the payment of said notes, the names of said locomotives now declared to be as follows: "C. W. Foster," "Bradley Barlow," "B. B. Smalley," "L. Robinson," "Longueuil," "Newport," "North Troy," "A. B. Chaffee," "Richford," and "Farnham," said locomotives to be held as collateral security for the payment of said notes, or any renewals thereof, for value received.

(Signed), BRADLEY BARLOW.

As regards this document, I quite agree with Judge Cross that

It is obvious that it does not make any evidence of a sale, or that the transaction amounted to a sale. It was a mere pledge of the locomotives in security for the appellants' endorsement of notes for Barlow's accommodation. A pledge that was wholly inoperative as against any party having an adverse interest in the absence of an effective delivery to and a lawful possession by the pledgee of the locomotives, the subject of the pledge. The conclusions I deduce from the foregoing remarks, is that the appellants have shewn no grievance entitling them to relief in any respect from the judgment they have appealed; it must consequently be confirmed.

The appellants' claim is based entirely on the property being the property of Barlow. Assuming such to be the case, of which, on the evidence, I should very much doubt, then the appellants are out of

1887

FAIRBANKS v. BARLOW.

Ritchie C.J.

court, and the conclusions taken by the intervention of O'Halloran must prevail.

Whether the locomotives were owned by the railway company or by Barlow, who was insolvent, the plaintiffs proved no title to them, and no right to their possession, as against a *bonâ fide* creditor of Barlow, which O'Halloran clearly was.

STRONG J.—For the reasons given by the majority of the court below, I am of opinion that the appeal should be dismissed with costs.

FOURNIER, J. :—Les Appelants, demandeurs en Cour Supérieure, ont réclamé des Intimés dix locomotives qu'ils allèguent leur avoir été données en gage, par Bradley Barlow l'un des défendeurs, comme sûreté du paiement d'un billet de $50,000 qu'ils ont endossé pour lui.

L'action allègue que Barlow qui a reçu le produit des billets endossés pour lui était alors le gérant de la dite compagnie et qu'il a disparu depuis pour se soustraire aux actions de ses créanciers.

Les Appelants font reposer leur droit sur les deux lettres suivantes (1).

La compagnie intimée a plaidé à cette action par défense au fonds en fait, et par exception péremptoire que lorsque Barlow a fait les écrits ci-dessus cités les locomotives en question étaient la propriété et en la possession de la dite compagnie, et non celle de Barlow qui n'a fait les dits écrits qu'en son nom personnel et non pas comme le représentant autorisé de la dite compagnie.

Les autres Intimés, Redfield, Farwell et McIntyre ont plaidé qu'en leur qualité de fidéi commissaires, en vertu d'un acte créant un *mortgage* sur le South E. R., en faveur de ses porteurs de bons, la dite compagnie

(1) See p. 223.

leur avait transporté le dit chemin de fer et leur en avait confié l'administration, et que les locomotives en question qui se trouvaient alors faire partie du roulant du dit chemin de fer étaient aussi passées de bonne foi en leur possession, en leur qualité de fidéicommissaires et qu'ils avaient droit de les retenir en vertu de l'acte de fidéicommis. Ils ont aussi plaidé le statut autorisant la compagnie à constituer ce fidéicommis pour faire un emprunt.

Barlow mis aussi en cause comme défendeur n'a pas plaidé.

La contestation était liée et la preuve commencée lorsque l'Intimé O'Halloran présenta son intervention alléguant: 1o, qu'il était créancier de Barlow en vertu d'un jugement; 2, que longtemps avant l'institution de l'action des Appelants, Barlow était insolvable et en *déconfiture*; 3, qu'en admettant même la vérité des allégations de l'action des Appelants, ceux-ci n'avaient en conséquence de leur défaut de possession aucun droit de propriété ni privilège sur les dites locomotives à l'encontre des autres créanciers de Barlow.

Les Appelants ont répondu à l'intervention par une dénégation générale et par une réponse spéciale alléguant qu'à l'époque de leur transaction avec Barlow, celui-ci était solvable et en état de disposer librement de ses biens; ils ont aussi allégué que leur transaction était une vente avec droit de réméré,—que l'intervenant agit de connivence et collusoirement avec la compagnie. Cette réponse était accompagnée d'une défense en droit à l'intervention, soulevant des questions qui ne pouvaient aucunement affecter l'issue en cette cause et elle a été renvoyée.

Les différentes contestations liées entre les parties soulèvent les questions suivantes: 1. Lors de la transaction du 16 janvier 1883, Barlow était-il solvable et les locomotives en question lui appartenaient-elles? 2.

1887

FAIRBANKS v. BARLOW.

Fournier J.

La transaction du 16 janvier 1883 constitue-t-elle un contrat de vente ou un contrat de gage ?

Les Appelants après avoir dans leur déclaration qualifié la transaction du 16 janvier comme un contrat de gage se sont désistés de cette prétention par leur réponse spéciale à l'intervention. Ils l'ont également abandonnée par leur factum dans lequel à la page 5 ils donnent de fortes bonnes raisons pour démontrer l'erreur de cette prétention ; d'abord, qu'ils n'étaient pas créanciers pouvant prendre un droit de gage, et ensuite que l'intention des parties n'avaient pas été de faire un contrat de gage, parce que ce contrat aurait exigé la remise par Barlow aux Appelants de la possession des locomotives.

Après une enquête assez considérable, la Cour Supérieure, après audition sur le mérite de l'action et de l'intervention seulement, a rendu le 12 mars 1885, jugement déclarant que les Appelants n'avaient pas prouvé leur droit de propriété, et que la transaction alléguée n'était qu'une vente simulée pour obtenir un privilège sur les locomotives, sans donner la possession. Elle a maintenu l'intervention et renvoyé l'action des Appelants.

Ce jugement porté en appel à la Cour du Banc de la Reine a été confirmé.

Les Appelants ont produit plusieurs témoins pour prouver que Barlow était le propriétaire des locomotives en question. Après en avoir disposé comme de sa propriété personnelle, Barlow ne pouvait guère faire autrement que de déclarer comme il l'a fait dans son témoignage, que ces locomotives lui appartenaient. Mais le contraire de cette prétention a été démontré par les faits prouvés par lui-même dans ses transquestions et par le témoignage de A. B. Chaffee, le secrétaire-trésorier de la compagnie South Eastern Railway, dont Barlow était le président et le gérant général. Tous

deux établissent que tous les argents provenant soit de l'exploitation du chemin de fer, soit d'emprunts, étaient déposés au crédit personnel de Barlow et payés par lui sur son propre chèque. Il achetait tout ce qui était nécessaire pour le chemin de fer, même le droit de passage et prenait les titres en son nom. Il avait aussi fait mettre en son nom le compte pour l'achat des locomotives ; mais elles furent envoyées directement de la manufacture sur le chemin de fer de la compagnie qui en paya le fret: Elles furent, pendant plusieurs années, employées comme propriétés de la compagnie, sans aucune convention de loyer ou de paiement pour leur usage. Jamais Barlow n'éleva la prétention d'en être le propriétaire, avant sa fuite de la province de Québec vers le 5 d'août 1883. Au contraire, dans les rapports faits au gouvernement par la compagnie et signés par Barlow, comme président, elles sont mentionnées comme faisant partie des propriétés de la compagnie. Dans un autre état des affaires de la compagnie, préparé sous la direction de Barlow pour la négociation d'un emprunt avec Stephens et autres, ces mêmes locomotives furent comprises comme faisant partie du *rolling stock* de la compagnie. En conséquence les créanciers de la compagnie avaient droit de les considérer comme faisant partie du chemin de fer, et la conduite de Barlow était de nature à les confirmer dans cette croyance. La prétendue vente que leur en aurait fait Barlow ne peut avoir aucun effet quelconque parce qu'il n'était ni propriétaire ni en possession, qu'au contraire la compagnie en avait la possession ouverte et publique. La prétendue vente étant d'une chose qui n'appartenait pas au prétendu vendeur Barlow et dont il n'a jamais fait la tradition, est absolument sans effet à l'égard de la compagnie (1) qui en était en possession.

(1) Art. 1487 C.C.

1887

FAIRBANKS v. BARLOW.

Fournier J.

Quant au caractère de l'écrit dont les Appelants infèrent maintenant une vente après l'avoir traité comme un contrat de gage dans leur déclaration, je le considère absolument sous le même point de vue que l'honorable juge Cross qui, dans ses notes, en parle dans les termes suivants :

It is obvious that it does not make any evidence of a sale, or that the transaction amounted to a sale. It was a mere pledge of the locomotives in security for the Appellant's endorsement of notes for Barlow's accommodation. A pledge that was wholly inoperative as against any party having an adverse interest in the absence of an effective delivery to and a lawful possession by the pledgee of the locomotives, the subject of the pledge.

L'intervenant, ayant établi sa qualité de créancier en vertu d'un jugement obtenu par lui contre Barlow et la Compagnie du South Eastern Railway, avait droit d'intervenir dans cette cause pour sauvegarder ses intérêts en faisant maintenir la dite compagnie, sa débitrice, dans la possession des locomotives réclamées.

Je suis d'avis que l'appel doit être renvoyé avec dépens.

HENRY J.—I am of the opinion from the evidence afforded by the documents that the appellants were but the pledgees and not the *bonâ fide* owners of the locomotives in question, and that inasmuch as they had not, as such pledgees, the possession of them they cannot maintain this action, and that as the question of the ownership of them as between O'Halloran and the South Eastern Railway Company does not arise on the pleadings in this case, it is unnecessary I think to refer to it. The appellants, to recover, must show their rights to do so, and in that they have, in my opinion, failed. The appeal should, therefore, be dismissed with costs.

TASCHEREAU J.—The appellants were plaintiffs in the court of *première instance.*

1887

FAIRBANKS v. BARLOW.

Taschereau J.

The respondents are the South Eastern Railway Company, William Farwell, Wm. C. Van Horne, and Warren R. Blodgett in their quality as trustees of the bondholders of the South Eastern Railway, who were defendants with Barlow, and the intervenant, James O'Halloran, a judgment creditor of Barlow. The plaintiffs allege that defendant Barlow obtained their endorsation to promissory notes to the amount of $50,000, and for their security, pledged to them ten locomotives then and still used and operated on the South Eastern Railway, but never delivered the locomotives to plaintiffs. That said locomotives are in the possession of said railway company or the trustees of its bondholders, and that plaintiffs having a lien on said locomotives are entitled to demand and have the same out of the possession of said railway company or said trustees, inasmuch as they have had to pay said notes; unless said defendants prefer to pay said sum of $50,000, interest and costs. They also allege that Barlow, who had received the money on said notes, was president and general manager of the South Eastern Railway, at the time, and that he has since absconded. Plaintiffs' action is accompanied with an attachment, *saisie-arrêt conservatoire*.

Plaintiffs action is based on the following documents (1):—

To this action the South Eastern Railway Company pleaded:—

1. A general denial.

2. That at the time when the plaintiffs allege that the foregoing letters of pledge were made to them by defendant Barlow, the ten locomotives claimed to have been pledged to plaintiffs, were the property of the South Eastern Railway Company, and not of Barlow, who had no property or ownership in said

(1) See p. 223.

1887

FAIRBANKS v. BARLOW.

Taschereau J.

locomotives. That as appears by said letters and plaintiffs' declaration, Barlow, in his transaction with plaintiffs, was acting solely in his private individual capacity, and not as an officer of the South Eastern Railway Company, and that any transactions which Barlow may have had with plaintiffs was without the knowledge, consent or authority of said railway company. They conclude that this attachment be quashed, and plaintiffs' action dismissed.

The plaintiffs have adduced a large amount of evidence to prove that the locomotives were Barlow's; and Barlow himself as a witness for plaintiffs, swears that six of them, at least, were his. But his own cross-examination and the evidence of defendant's witness, A. B. Chaffee, fully disposed of his pretentions. He was president and general manager of the company. All monies belonging to the company, whether derived from earnings or loans, were placed to his credit individually, and he disbursed them as he pleased. He was in the habit of buying for the company even real estate for right of way and other purposes, and taking the deeds in his own individual name. He appears to have taken bills of sale of the locomotives in question in this manner, but they came directly from the manufacturer to the company's road, the company paid freight, and never until Barlow, on or about the fifth August, 1883, absconded from this province, was any pretension made by Barlow or any one else, that these locomotives were not the property of the company. Plaintiffs allege in their declaration that they never obtained possession of the locomotives, but that they then (at the time of the institution of the action) were in possession of the defendants, the South Eastern Railway Company or the Trustees of its bond holders. There is no pretense that Barlow had any authority from the railway company to pledge the locomotives,

or that the railway company ever received a dollar of the proceeds of the promisory notes.

The question of the ownership of these locomotives seems to me quite immaterial if the determination of the present case, and on the general issue alone, the plaintiffs' action must fail.

By the very documents upon which the plaintiffs base their claim, it is patent that there was no sale by Barlow of these locomotives.

They moreover admit it, for their own declaration in this case is based on the ground that there was no sale to them. They do not claim these locomotives as their property, they do not revendicate them as theirs; they purely and simply allege that they have a lien upon them. That is as clear an admission as possible that they do not own them, and that they did not purchase them.

Now if these documents did not operate a sale, if they did not vest the ownership of these locomotives in the plaintiffs, did they operate as a pledge in their favour? Clearly not. Since there can be no pledge without the delivery of the article pledged in the hands of the pledgee. This delivery is of the essence of the pledge, and the pledgee has no privilege if the article is not in his hands.

The plaintiffs are therefore not entitled to the possession of these locomotives, and their action was rightly dismissed by the two courts below. There is no ground for the contention that their action can be maintained because they might be entitled as against Barlow to the specific performance of his obligations to deliver them up, the said locomotives; for the gist of their action against the South Eastern Railway and the Trustees, is that Barlow is not in possession of these locomotives.

As to the intervention, it was rightly allowed. O'Halloran had a clear right to intervene to protect

1887

FAIRBANKS v. BARLOW.

Taschereau J.

his interest as a creditor of both Barlow and the South Eastern. For him, it is quite immaterial whether these locomotives belong to the company or to Barlow, but it is of the utmost importance for him that the plaintiffs do not get them.

GWYNNE J.—Concurred with Taschereau J.

Appeal dismissed with costs.

Solicitors for appellants: *Church, Chapleau, Hall & Nicolls.*

Solicitors for respondent: *James O'Halloran, O'Halloran & Duffy.*

1885

*Nov. 25.

1886

*April 9.

THE LONDON AND CANADIAN LOAN AND AGENCY COMPANY (LIMITED) *et al*..... } APPELLANTS;

AND

GEORGE WARIN *et al*..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Navigation—Interference with—Public navigable waters—Water lots—Crown grants—Easement—Trespass.

W. was the lessee, under lease from the City of Toronto, of certain water lots held by the said City under patent from the crown, granted in 1840, the lease to W. being given by authority of the said patent, and of certain public statutes respecting the construction of the Esplanade which formed the boundary of said water lots.

Held, affirming the judgment of the court below, that such lease gave to W. a right to build as he chose upon the said lots, subject to any regulations which the City had power to impose, and in doing so to interfere with the right of the public to navigate the water.

Held also, that the said waters being navigable parts of the Bay of Toronto, no private easement by prescription could be acquired therein while they remained open for navigation.

APPEAL from a decision of the Court of Appeal for

---

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

1885

LONDON & CANADIAN LOAN CO. v. WARIN.

Ontario (1) affirming the judgment of the Queen's Bench Division (2) in favor of the plaintiffs.

The facts of the case are fully set out in the report in the Queen's Bench Division.

The action was for trespass by the defendants on a water lot of the plaintiffs in Toronto Harbor, the defence being that the defendants had acquired an easement by user, and that plaintiffs had no grant of the lot.

The jury gave a verdict with damages for the plaintiffs, and such verdict was sustained by the Queen's Bench Division, and by the Court of Appeal. From the judgment of the latter court the defendants appealed to the Supreme Court of Canada.

Arnoldi for the appellants.

We claim a right to the use of the water lot of the respondents in connection with vessels lying at the wharf on two grounds :—

First that we have acquired such right by an uninterrupted enjoyment of it for over twenty years.

And secondly, that these are public navigable waters over which we in Canada, with the rest of the public, have a right of navigation.

As to the first ground, the evidence is clear. It is impossible to regard the acts of Taylor as evincing anything except an intention to use the property under a claim of right.

It is claimed that interruption put an end to the possession. As to that see *Ladyman* v. *Grave* (3) ; *Flight* v. *Thomas* (4) ; Gale on Easements (5).

These cases show that interruption must be by act of a party who had a right to claim the land.

As to the second ground of our claim, it is contended that the respondents had a grant of the lot from the

(1) 12 Ont. App. R. 327.
(2) 7 O. R. 706.
(3) 6 Ch. App. 763.
(4) 11 A. & E. 699 ; affirmed 8 C. & F. 231.
(5) Page 31.

1885

LONDON & CANADIAN LOAN CO. v. WARIN.

crown, and it is private and not public property.

It is submitted that the conveyance granting water and land thereunder, is no more than a grant of so much land covered with water. Coke upon Littleton (1). So that the estate in the water would only be in accordance with the estate in the lands.

Stat. 23 Vic. ch. 22, sec. 35, only validates the Order in Council, and not the patent. Wilberforce on Statutory Law (2). Interpretation act provides that no patent right shall be interfered with. *Atty. Gen.* v. *Perry* (3).

The crown can give no rights to a party which would interfere with the public navigation of the harbor, and the grant was made subject to the public easements. Wharves could not be built to the water side as the sea is too heavy, and that no doubt was contemplated in making the grant. *Orr Ewing* v. *Colquhoun* (4). I submit too, that there should be a new trial on the ground of improper rejection of evidence and excessive damages.

Robinson Q.C. and *Galt* for respondents.

According to the contention of the appellants, we must practically abandon the use of our property.

The two arguments on the other side do not agree. If these are public navigable waters, anybody could go upon and over them, and they cannot claim any special right in regard to them. But under the prescription acts it must be property over which the party claiming title by user had no right to go.

Then are they public navigable waters? See *Hood* v. *Toronto Commrs.* (5); *Dyce* v. *Lady James Hay* (6)—referred to in Gale on easements; *Sowerby* v. *Coleman* (7); *Att. Gen.* v. *Chambers* (8). To make an easement there

(1) P. 46.
(2) Pp. 46 to 49.
(3) 15 U. C. C. P. 329.
(4) 2 App. Cas. 839.
(5) 34 U. C. R. 87.
(6) 1 Macq. H. L. Cas. 305.
(7) L. R. 2 Ex. 96.
(8) 4 De G. & J. 55; 5 Jur. N. S. 745.

must be a dominant and servient tenement which is not the case here. *Shuttleworth* v. *Le Fleming* (1).

If there is any doubt about the grant to us, it is set at rest by 23 Vic. ch. 32 sec. 35. See *Dixson* v. *Snetsinger* (2).

The use of our property was interfered with for nearly a year, so that the damages are by no means excessive.

The following additional authorities were referred to:—*Bright* v. *Walker* (3); *Livett* v. *Wilson* (4); *Mitchell* v. *Parks* (5).

Sir W. J. RITCHIE C.J.—In this case the judge directed the jury that the plaintiffs were entitled to recover because of the statute under which the Government has the power to make grants of water lots, and there is a patent from the crown granting the lots to the City of Toronto, and the City of Toronto granted the lots in controversy to Mr. Munson, and Mr. Munson leased it to the plaintiffs, and also because the defendants were guilty of a positive illegal act when they fastened their two boats to the side of their wharf, it having been admitted by Mr. Hamilton that they to a certain extent encroached on plaintiffs' lot. The learned judge then said:—

If the plaintiffs owned the lots, which I believe they did, the defendants were guilty of a positive trespass, because the use made by those two boats was neither for the purpose of trade nor navigation, but for the purpose of preventing the plaintiffs using their own property. Do not trouble yourself about the law, because my opinion is that the plaintiffs are entitled to recover. I shall ask you three questions.

Q. Did the defendants and those under whom they claimed exercise the approach over the plaintiffs' land under a claim of right? A. No.

Q. Did the defendants encroach on plaintiffs' property when the two vessels were fastened to the defendants' wharf? A. Yes.

(1) 19 C. B. N. S. 687.
(2) 23 U. C. C. P. 235.
(3) 1 C. M. & R. 211.
(4) 3 Bing. 115.
(5) 26 Ind. 354.

1886

LONDON & CANADIAN LOAN CO. v. WARN.

Ritchie C.J.

Q. Was the proposed erection made by the plaintiffs in a reasonable and proper use of their property? A. Yes.

The jury negatived the suppose easement claimed by the defendants. The Divisional Court sustained such finding, and the Court of Appeal found it impossible to say that the jury had erred. No good reason has been assigned in this court to justify our interference, for without the establishment of such an easement, and an interference therewith, it is clear defendants cannot succeed.

The combined effect of the crown grant and the subsequent legislation clearly gives a right to interfere with the navigation by building on or filling up the lots so granted. Until built on or filled up the public no doubt had the right to use the open waters for purposes of trade and navigation, and therefore it cannot be that such a user by any one individual would give him a prescriptive right against the owners, because it would not be a wrongful act against the owners.

In this case the lying of the vessels by defendants at their wharf was avowedly for the purpose of preventing plaintiffs using their property, defendants having built on their own property, and having as Chief Justice Wilson expresses it:—

> Turned their own lot to its full advantage, they claim now they cannot get the benefit of it, unless they are allowed to use part of plaintiffs' lot, which claim the plaintiffs resist.

He adds:—

> The verdict should strictly have been against the defendants in any event, according to the evidence, because they were making claim to the waters of the plaintiffs for the purpose of trade and commerce; but it was not for the purpose of trade and commerce that the defendants anchored the vessels "Annie Craig" and "Lillian" in the plaintiffs water. The general question of right was no doubt the principal question; but it was a little strange for the defendant to declaim against the plaintiffs for using their own waters not for the purpose of trade and commerce, in driving the piles for the support of the boat house they proposed to build upon them,

while the defendants were blockading the plaintiffs in their own waters.

The verdict should be against the defendants upon all the issues, and against them upon their counter claim as well. It is a claim of a very unreasonable kind which is made by the defendants. It is that they are entitled to use all their own waters and erections as they please, and that they are at liberty to use all the plaintiffs' land and water too, without interference or question by the plaintiffs, because they find it convenient for the purposes of their wharf, elevator and warehouse, although they thereby render the plaintiffs' property practically useless to them, or greatly reduce it in value, and that the plaintiffs must suffer that loss for the aggrandizement of the defendants, who never paid a farthing for the benefits and advantages which they claim.

And as Burton J. says :—

But assuming the right now claimed to have been established, upon the clearest evidence and upon a charge which was perfectly unexceptionable, I fail to see any evidence that the acts which are now complained of were done in the exercise of that right. The vessels were not crossing the plaintiffs lot in the exercise of the right claimed, but were deliberately moored and fastened to the wharves, and were encumbering the plaintiffs' lot. They were not there for the purpose of trade and commerce, but the defendants were taking the law into their own hands and adopted this rather high-handed and arbitrary mode of doing so. This is the view taken of it by the jury, and they have, I think, not unreasonably, marked their sense of such a mode of proceeding by giving substantial damages.

I can see no reasonable ground for our interfering as an Appellate Court, with the decision of the court below, and am of opinion that the appeal should be dismissed with costs.

I see still less reason why this court should do it.

FOURNIER, HENRY and TASCHEREAU JJ.—Concurred.

GWYNNE J.—The position taken by the defendants by way of defence to this action is utterly untenable. The defendants, the Loan Company, are owners in fee and the other defendants are in possession under them, of a piece of land covered with water, known as the east half of a certain water lot called water lot No. 17, situate on the south side of the Esplanade in the City of Toronto, by title derived

1886

LONDON & CANADIAN LOAN CO. v. WARIN.

Gwynne J.

from one George Munro deceased, and the plaintiffs are tenants of the west half of the same water lot under J. M. Warin who is the devisee thereof in fee under the will of the said George Munro; the southerly limit of this water lot, that is its limit on the water side, is a line drawn across the Bay of Toronto from a point near the site of the French Fort west of Toronto Garrison to Goderhams mills, as described in letters patent under the great seal of the late Province of Upper Canada, granted in the year 1840, which letters patent and the title to the lands covered with water thereby granted, including this water lot No. 17, were confirmed by two acts of parliament of the late Province of Canada, namely, 16 Vic. ch 289 and 23 Vic. ch. 2 sec. 35.

Now, to an action of trespass brought by the plaintiffs against the defendants for forcibly and wrongfully entering upon the plaintiffs' half of the said water lot, and breaking down certain fences of the plaintiffs thereon, and with vessels trespassing on the same, and forcibly preventing the plaintiffs from filling up the said water lot and enjoying the same, the defendants plead that at the time of the alleged trespasses complained of the defendants Hamilton were in possession of the said east half of the said water lot No. 17, under a contract for the purchase of the same made with the defendants, the company, who were the owners thereof in fee simple, and that the occupiers of the said east half of the said water lot for 20 years before this suit enjoyed as of right, without interruption, for the more convenient use, occupation and enjoyment of the said land of the defendants, a way for, in, and with, ships, vessels, schooners, tugs, and boats, from a public highway on the waters of the bay in front of the City of Toronto over the said land in the statement of claim claimed by the plaintiffs to the said water lot of the

1886

LONDON & CANADIAN LOAN CO. v. WARIN.

Gwynne J.

defendants, and from the said last mentioned water lot over the said land so claimed by the plaintiffs to the said public highway at all times of the year, together with the right to anchor all such ships, vessels, schooners, tugs and boats, and allow them to remain upon the lands so claimed by the plaintiffs during the time navigation is closed in each year, and also at other times for shelter or repairs or other cause of detention, as well as for the purpose of loading and unloading at all times of the year; and the plaintiffs on the occasion of the trespasses alleged in their statement of claim, and at other times, drove piles in the land claimed by the plaintiffs, and in that way and by other means and devices interfered with and obstructed the defendants in the use and enjoyment of the said way and the said rights, and the plaintiffs threaten, and intend to, and they will unless restrained from so doing, continue to interfere with and obstruct the defendants in the use and enjoyment of the said way and rights. What, in effect, the defendants assert by this plea is, that as appurtenant to the east half of this water lot No. 17, and the erections thereon, the defendants have acquired by prescription a perpetual easement and right of way from the waters of the bay in front of the City of Toronto, lying outside of the line known as the windmill line, across those waters of the bay, inside of that line, which cover the west half of the said water lot No. 17 to a wharf erected in the waters of the same bay situate on the east half of the same water lot, and have so made the west half of the said water lot No. 17 and the waters of the bay which cover it servient to the east half of the same water lot, but if the waters covering the west half of the said water lot be, as they in evidence appear to be, situate in the navigable portion of the Bay of Toronto, they are, although inside the windmill line, so long as the

1886

LONDON & CANADIAN LOAN CO. v. WARIN.

Gwynne J.

water lot remains unreclaimed or unimproved, equally open to all members of the public navigating the same, and no private easement therein can be acquired by any particular person by reason of his being the owner of an improved unreclaimed water lot or otherwise. To meet this view the defendants, by way of alternative defence, have pleaded that the lands claimed by the plaintiffs, that is to say the west half of the said water lot No. 17, are, and were at the time of the trespasses alleged in the statement of claim, covered by the waters of Lake Ontario or of the harbor of the City of Toronto, which is an inlet of said Lake Ontario, which were then, and had always theretofore been, and now are, public navigable waters flowing and being over and upon the said lands, and such waters were not at any time, and are not now, the property of the plaintiffs, and the defendants at the time of the alleged trespass, and before and since were entitled equally with the plaintiffs in exercise of the right as part of the public of Canada to the full and uninterrupted use and enjoyment of the said public waters flowing and being over and upon the lands claimed by the plaintiffs, and the plaintiffs wrongfully on the occasion of the alleged trespasses in the statement of claim mentioned, and at other times by the means stated in the statement of claim, and by driving piles in the lands claimed by the plaintiffs, so that the same stood up through the said public waters, and by other means and devices, interfered with and obstructed the navigation of the said waters, and the defendants in the enjoyment of the same, and if the defendants did any of the acts complained of, which they deny, they did so for the purpose of abating a public nuisance existing in the said waters and obstructing the navigation thereof, and which acts of the plaintiffs were also a nuisance and injury to the defendants, and hindered them from

the free enjoyment and use of the said public right of navigation. Neither of these contradictory defences is at all tenable; not the first, because the waters covering the water lots as long as they remain unreclaimed being navigable waters of the Bay of Toronto no private easement can be acquired in such waters which are equally open to all Her Majestys subjects to navigate upon; and not the second, because, although until reclaimed or enclosed the waters covering the water lots as granted are open to the public to navigate upon, still the right to reclaim them and to appropriate them to their own private purposes and uses by the grantees in the terms of the grants, which was the right which the plaintiffs were exercising and with which the defendants interfered, belongs to the grantees of the respective water lots and their heirs and assigns. The effect of the letters patent granting the water lots, as confirmed by the acts of Parliament, is to pass to the grantees, their heirs and assigns in fee simple, the land covered with water together with the right of reclaiming the water lots by filling them up wholly and making dry land of them up to the windmill line, or by erecting wharves, warehouses or other structures thereon at their will and pleasure within the terms and provisions of the letters patent and the confirming acts of Parliament. In view of the high handed and vexatious way in which the defendants interfered with the plaintiffs in the exercise of their undoubted rights, the damages awarded by the jury, although large, cannot be said to be excessive. The appeal must therefore, in my opinion, be dismissed with costs.

Appeal dismissed with costs.

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

Solicitors for Respondents: *Beatty, Chadwick Blackstock & Galt.*

1886 WILLIAM W. WHEELER, *et al.*.....APPELLANTS;

*Nov. 9.

AND

1887 JOHN BLACK *et al.*.....RESPONDENTS.

March 14. ON APPEAL FROM THE COURT OF QUEENS BENCH FOR LOWER CANADA (APPEAL SIDE).

Servitude—Barn erected over alley subject to right of access to drain —Aggravation—Art 557 *C.C.—Damages.*

In 1843, B. *at al* (the plaintiffs) by deed obtained the right of draining their property by passing a good drain through an alley left open between two houses on another lot in the town of St. Johns. In 1880, W. *et al.* (defendants) built a barn covering the alley under which the drain was constructed and used it to store hay, &c., the flooring being loose and the barn resting on wooden posts. In 1881 the drain needing repairs the plaintiffs brought an action *confessoria* against defendants as proprietors of the servient land, praying that they (plaintiffs) may be declared to have a right to the servitude constituted by the deed of 1843, and that the defendants be ordered to demolish such a portion of the barn as diminished the use of the drain, and rendered its exercise more inconvenient, and claiming damages; the defendants pleaded *inter alia* that there was no change of condition of the servient land contrary to law, and prayed for the dismissal of plaintiffs' action.

Held, Gwynne J. dissenting, that by the building of the barn in question, the plaintiffs' means of access to the drain had been materially interfered with and rendered more expensive, and therefore that the judgment of the court below ordering the defendants to demolish a portion of their barn covering the said drain, in order to allow the plaintiffs to repair the drain as easily as they might have done in 1843, when said drain was not covered, and to pay $50 damages should be affirmed.

Per Gwynne J., That all plaintiffs were entitled to was a declaration of the right to free access to the land in question for the purpose of making all necessary repairs in the drain as occasion might require, without any impediment or obstruction to their so doing being caused by the barn which had been erected over the drain, and that the action for damages was premature.

---

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

1886

WHEELER v. BLACK.

APPEAL from the judgment of the Court of Queen's Beench for Lower Canada (appeal side) maintaining the respondents action (1).

The question which arose on this appeal was whether the appellants, by building a barn in an alley in the town of St. Johns through which the respondents had a right to have a good drain, had aggravated the servitude so as to entitle the respondents to a judgment of the court ordering the demolition of a portion of the barn and to pay $50 damages.

The facts and pleadings sufficiently appear in the head note, report of the case in the court below (1) and in the judgments hereinafter given.

Robertson Q.C. for appellants, contended that as the evidence proved there is no solid floor in the barn and that the drain could be raised up and repaired in the barn, just as well as, if not better than, outside the barn, there had been no change of the condition of the servient land as meant by law. Citing art 557 C. C. Demolombe (2); Laurent (3); Dalloz Vo. Servitude (4); Sirez Code Annoté (5); Curasson Action Possesoires (6); Lepage Lois des bâtiments (7); Pardessus Servitudes (8). He also contended that the appellants were never put *en demeure*.

Geoffrion Q.C. for respondents.

The right of access to repair the drain is an essential part of the servitude, and that being so and the evidence clearly establishing that the building as it stands tends to diminish the use of our servitude, or at least to render its exercise more inconvenient, we are entitled under art. 557 C. C. to the judgment we have obtained. In any case our action being an action

(1) M. L. R. 2 Q. B. 139.
(2) 12 vol. p. 415 No. 893.
(3) 8 vol. 328.
(4) Nos. 1172 & 1173.
(5) Art. 701 par. 4.
(6) Pp. 290, 291, 337.
(7) 2 Part. ch. 4 art. 3 & 5.
(8) Ed. 1823 No. 70.

1887

WHEELER v. BLACK.

Ritchie C.J.

confessoire, the appellants cannot succeed in having it dismissed.

As to notice we protested when the barn was being built.

Sir W. J. RITCHIE C.J.—The present appellants in their factum say they desire to submit to this court but one question, namely: Admitting that the servitude in question exists and has been duly registered, does the record show, or is there any proof, that the present appellants, as owners of the servient land, have done any act tending to diminish the use of the servitude or render its exercise more inconvenient? This was the only question submitted to the court that rendered the judgment appealed from and the only one submitted to this court.

I think it clearly appears that the defendants have erected upon and over the site of this drain a building which, in my opinion, tends to diminish the use of the servitude and renders its exercise more inconvenient. It would seem that repairs are now necessary, and that the barn is an obstacle which actually interferes with making such repairs. If any damage was sustained by reason of the stoppage of this drain the person whose duty it was to repair it would be liable; at any rate, he has necessarily the right to enter and repair and is entitled to the opportunity and means of doing so whenever the necessity should arise, and, in my opinion, the erection of this barn over this drain, as the evidence shows it to have been constructed, necessarily obstructs the plaintiffs' right and deprives them of the same reasonable means of access that they would have had if the barn had not been erected. I cannot think the right to enter and repair this drain can, as is contended, depend on consent to be obtained for that purpose. Suppose the defendants or their tenant refused

1887

WHEELER v. BLACK.

Ritchie C.J.

leave, is the plaintiffs' cellar to remain full of water until the termination of a lengthy litigation? And where is the duty imposed on the plaintiffs to enter the defendants' barn, incur the expense of removing property that may be therein, taking up the floor, and generally removing all obstructions before being in a position to examine or open up the drain for repairs? Or, should repairs not be necessary for a lengthened period, and the plaintiffs allow the obstructions to remain for a sufficiently long time, are the defendants to be permitted to acquire by prescription or otherwise the right to maintain the barn as it is, and so to be in a position to resist any interference with it by the plaintiffs, or whoever may be the proprietor of the servitude?

Under these circumstances I think the appeal should be dismissed.

STRONG J.—I am also of opinion, for the reasons given by the majority of the court below, that the appeal should be dismissed. I cannot agree with the dissenting judgment of Mr. Justice Ramsay. The law governing this case is precisely identical with the law of England as appears by the case of *Goodhart* v. *Hyett* (1). That decision is entirely in point, and the law it lays down is precisely similar to that of the Province of Quebec.

FOURNIER, J.:—L'action *confessoria servitutis* intentée en cour inférieure par les présents Intimés, avait pour but de faire déclarer que le lot de terre des Appelants décrit en la déclaration en cette cause était assujéti au profit du lot des Intimés à une servitude d'égout, en vertu d'un acte de vente consenti en 1843 par Pierre Dubeau à feu John Black, créant cette servitude dans les termes suivants:

(1) 25 Ch. D. 182.

1887

WHEELER v. BLACK.

Fournier J.

Le droit de drainer la cave ou les caves du dit lot 171, en construisant et faisant passer un bon drain à travers le lot du dit Pierre Dubeau, situé dans la dite ville, entre les rues Richelieu et Champlain, connu sous la désignation du lot T, le dit drain devant passer au-dessous d'une allée entre les maisons sur le lot de Dubeau, allant d'une rue à l'autre.

Cet acte de vente, établissant la servitude en question, fut enregistré par sommaire le 6 octobre 1843, et le canal d'égout fut construit conformément à la stipulation contenue au dit acte, traversant la propriété de Pierre Dubeau pour aller déboucher dans le canal Chambly. Par acte de vente du 11 mars 1880, à eux consenti par un nommé John Hugh Wise, les Intimés achetèrent le lot de terre, pour le service duquel Pierre Dubeau avait créé la servitude en question en faveur de feu John Black. Cet acte fut aussi enregistré. Leur vendeur Wise était propriétaire en vertu de bons et valables titres.

Le 7 mars 1880, Louis Dubeau vendit aux Appelants le lot que Pierre Dubeau avait assujéti à la servitude d'égout en faveur de feu John Black. Les Intimés, depuis leur acquisition et leurs auteurs avant eux, ont toujours joui de leur droit de servitude sur ce dernier jusqu'à l'automne 1880, époque à laquelle les Appelants ont construit sur l'allée où passe l'égout une grange, qui les empêchait de faire au dit égout les réparations nécessaires. Ils ont conclu à des dommages et à la démolition de l'obstacle mis à leur paisible jouissance de la dite servitude.

Plusieurs plaidoyers ont été produits contre cette demande, mais les seuls qui méritent considération sont les suivants:—Que l'un des défendeurs, Coker, ayant cessé d'être l'un des propriétaires de l'immeuble servant, l'action ne pouvait être dirigée contre lui. 2o. Que l'acte de vente du 22 août 1843, n'avait pas créé une servitude réelle sur le lot des défendeurs, parce que les propriétés en question n'étaient pas con-

tiguës, mais, qu'au contraire, elles étaient séparées par un chemin public, et qu'en conséquence les Intimés et leurs auteurs n'avaient acquis qu'un droit personnel. 3o. Que la servitude en question étant un droit réel, elle devait être enregistrée, et l'enregistrement d'icelle renouvelée dans les délais fixés par la loi, mais que le renouvellement n'avait pas eu lieu, que le drain en question est inutile.

Les différentes questions soulevées par ces plaidoiries sont abandonnées par les Appelants, qui ont formellement déclaré ne soumettre à la considération de la cour que la seule question de savoir s'ils ont commis quelque acte tendant à diminuer la jouissance du droit de servitude ou à en rendre l'exercice plus incommode. Leur factum contient à ce sujet la déclaration suivante:—

The present appellant desires to submit to this court but one question:

Admitting that the servitude in question exists and has been duly registered, does the record show or is there any proof that the present appellants, as owners of the servient land have done any act tending to diminish the use of the servitude or render its exercise more inconvenient. This was the only question submitted to the court that rendered the judgment appealed from and the only one submitted to this honorable court.

La cause se trouve ainsi réduite à une seule question de fait, savoir, si la preuve a établi que le trouble apporté à la jouissance des Intimés par la construction d'une grange au-dessus du canal d'égout a eu l'effet de diminuer l'étendue de leur droit de servitude ou d'en rendre l'exercice plus incommode. Sur ce point de fait plusieurs témoins ont été entendus de part et d'autre.

Le passage dans lequel Pierre Dubeau avait accordé le droit de construire le canal d'égout est aujourd'hui entièrement obstrué par la construction d'une grange de 35½ pieds de largeur sur environ 90 à 100 pieds de longueur. Cette grange se trouve au-dessus du canal

1887

WHEELER v. BLACK.

Fournier J.

et doit partant nécessairement diminuer les facilités des Intimés pour la réparation et l'entretien de ce canal. Le témoin Oscame Prévost s'exprime ainsi à ce sujet :—

Il est possible qu'on pourrait lever le canal sous la grange en creusant en dessous de la grange, mais ce serait bien dispendieux ; il faudrait d'abord vider ce qu'il y avait dans cette partie de la grange qui couvre le canal ; ensuite il faudrait défaire le plancher, s'il y en a un, enlever la terre de surplus et la mettre en dehors de la grange, et refaire ensuite le plancher et remettre dans la grange les marchandises qui auraient pu en avoir été enlevées ; et c'est là le surcroit de dépense que la réparation de ce canal occasionnerait ; il faudrait renouveler ces dépenses là chaque fois que le canal viendrait en mauvais ordre.

Joseph Arpin dit :—

Si la grange était vide au moment où on aurait besoin de faire des réparations dans ce canal, je considère que cette grange n'apporterait aucun obstacle à ces réparations pourvu qu'on en permît l'entrée ainsi que l'ouvrage ; mais si le canal se trouvait à passer vis-à-vis une porte, sous une batterie, alors ce serait un obstacle sérieux à la confection de ces réparations."

François Dufour dit positivement que le canal d'égout de la maison de brique des Intimés passe sous la grange dans toute sa profondeur.

Les témoins des Appelants, parmi lesquels se trouve le père de Wheeler, disent qu'il serait facile, malgré cette construction, de réparer le canal. Wheeler dit :—

It would be very easy to take off that floor (le plancher de la grange). It would not cost more than ten cents.

Pierre Joubert dit :—

En ôtant le plancher de la grange, je pense qu'il serait facile de creuser en dessous de la grange pour y découvrir un canal qui serait là ; et il serait facile d'ôter le plancher.

Israël Daniel dit—

Qu'il serait facile suivant moi de creuser en dessous de la grange pour lever le canal d'égout, attendu qu'il n'y a pas sole et qu'il n'y a qu'une épaisseur de planche, et du moment qu'il n'y a pas de fourrage dans la grange ce ne sera pas plus difficile de creuser dans la grange que dehors.

C'est là toute la preuve offerte par les parties sur le seul point en contestation devant cette cour. Il en resort bien clairement qu'un changement considérable

dans l'état du terrain sujet à la servitude d'égout a été fait par les Appelants. Au lieu d'exercer leur droit sur un terrain vacant, n'offrant aucun obstacle aux excavations à faire pour découvrir le canal au cas de réparations à y faire, les Intimés auraient maintenant à pénétrer dans la grange des Appelants—ce qu'ils ne pourraient jamais faire sans une permission spéciale—et avant de faire aucune excavation ils auraient à lever le plancher de la grange, et si alors la grange contenait du foin ou autres effets, il faudrait avant d'y déposer la terre provenant de l'excavation, enlever ces articles, et remettre les choses dans le même état après les réparations faites. Il est évident que l'ouvrage serait plus considérable et plus dispendieux fait dans cette bâtisse que s'il devait être fait sur un terrain vacant. L'exercice du droit de servitude a été certainement diminué et rendu plus difficile par la construction de la grange. Le droit des Intimés de faire disparaître les obstacles apportés à leur jouissance est établi par l'article 557, C. C. Demolombe (1) dit à ce sujet :—

Lorsque le propriétaire du fonds servant, a fait un ouvrage quelconque qui a rendu l'exercice de la servitude plus incommode ou moins complet, il est tenu évidemment de remettre les lieux dans leur premier état, sans préjudice des dommages-intérêts auxquels il pourrait en outre, être condamné suivant les circonstances. Et il ne nous paraît pas douteux, qu'il ne pourrait pas alors en abandonnant le fonds assujéti, d'après l'art. 699, s'affranchir de l'obligation personnelle, qu'il a contractée par son quasi-délit envers le propriétaire du fonds dominant.

Il ne me parait pas douteux que l'appel doit être renvoyé avec dépens.

HENRY J.—I am of the same opinion. It has been proved that the drain was stopped. There is a cross-street and it is true that the stoppage may have been on that street, but while the barn remained over the drain the plaintiffs were prevented from opening it so

(1) Tome 12, nº 894.

1887

WHEELER v. BLACK.

Henry J.

as to ascertain where the stoppage really was, and I do not think it could be said that they were not entitled to damages, because it was not proved that the stoppage was in the drain.

The law is perfectly plain. The party would be entitled to remove the barn and everything in the way of opening the drain. But if he removed it he would have to do it at his own expense, and such a removal is very expensive. It makes no difference if the barn was so built as to be easily removed. That is not the question. We are trying the legal rights of the parties. They could agree on that themselves, but not having done so, the plaintiffs are entitled to the judgment of this court upon the legal question submitted.

Under all the circumstances, I think the plaintiffs are entitled to recover, because the use of the drain has been hindered. The only question is as to the amount of damages.

As to the demolition, I think the court had a right to make the order. There is no other way of getting at the drain until the barn is removed. The plaintiffs would have the right to remove it themselves, and if so, the court has a right to order its removal. It may be a hardship, but we have nothing to do with that. We must decide the case without regard to hardship. Although it was the defendants' own land, the record shows that the other party had the right of access without any interference whatever.

TASCHEREAU J.—The respondents, claiming to be the owners of immoveable property to which was attached a right of drainage through the property of the appellants, and to have been deprived of the enjoyment and possession of the said servitude by the construction of a large barn over the said drain, brought

1887

WHEELER v. BLACK.

Taschereau J.

the present action against the appellants to recover the sum of $300 damages for the loss and injury sustained thereby, and to have the property of the appellants declared to have been, and to be still subject to the said servitude, and the said appellants ordered to demolish the portion of the said barn which tends to diminish the use of the servitude and to render its exercise more inconvenient. The judgment of the court below granted the prayer of the complaint against the defendant Wheeler, but the other defendant Coker having sold to said Wheeler his undivided half in the property before the commencement of the action, but after the construction of the barn, only that portion of the prayer of the complaint against Coker was granted which asked that the defendants be condemned jointly and severally to pay damages to plaintiffs, by reason of both having erected the building which deprived them of the said servitude.

The appellants appealed from this judgment to the Court of Queen's Bench, which confirmed it with a slight modification in the manner of executing it.

Only one question was submitted to this court by the appellants. Does the record show, or is there any proof that the appellants, as owners of the servient land, have done any act tending to diminish the use of the servitude or render its exercise more inconvenient? So that the appellants rest their case purely and simply on a question of fact, upon which they have against them the finding of the two courts below. The law of the case is so clear that they could not but admit it. "The proprietor of the servient land, (says art. 557 C. "C.,) can do nothing which tends to diminish the use of "the servitude or to render its exercise more inconve-"nient." Does the proof establish that by building the barn in question the appellants have rendered for the respondents the exercise of the servitude in question

1887

WHEELER v. BLACK.

Taschereau J.

more inconvenient? The considérant of the Superior Court on this head is as follows:—

Considérant que dans l'espèce il appert par le preuve que les défendeurs ont dans l'automne 1880 érigé des constructions sur le fonds servant de manière à couvrir l'allée dont il était question dans le titre créatif de la dite servitude, ainsi que le canal d'égout s'y trouvant enfoui; et considérant que les défendeurs n'avaient pas le droit, dans les circonstances, de faire telle construction à l'endroit et de la manière sus indiquée, les demandeurs se trouvant dans l'impossibilité, à raison de la dite construction, de pourvoir à la réparation de leur canal d'égoût de la manière dont ils pouvaient le faire en vertu du titre créatif de la dite servitude, et de la manière dont les défendeurs devaient le souffrir en vertu du même acte.

This finding is entirely supported by the evidence, and I am of opinion that the appeal should be dismissed.

GWYNNE J.—The judgment of the Court of Appeal appears to me to go further than is warranted by the evidence. The evidence, in my opinion, fails to establish any right in the plaintiffs to have a judgment in their favor, ordering the demolition of any part of the barn which has been erected on the servient land.

It fails to establish that there has as yet arisen any necessity for the plaintiffs to open the drain under the barn for the purpose of repairing the drain in question. It may be that the obstruction in the drain which causes the damages to the plaintiffs' house of which they complain is, as it has been before found to be, in that part of the drain which is under the street, between the plaintiffs' tenement and that of the defendant Wheeler, so that there may have as yet arisen no necessity whatever for opening the drain under the barn; and if upon further investigation it should prove to be necessary to open and inspect that part of the drain, the evidence I think fails to establish that the barn, as it stands, would offer any obstruction which could not easily be overcome without the demolition of any part of it, or which could be said

to abridge or impair the plaintiffs' power to exercise their right of servitude. The floor of the barn is said to be made of loose boards not nailed down, at least in that part which is over the drain, which boards could be easily removed; and if the barn should be empty, or that part of it which is over the drain, when the plaintiffs should require to repair the drain in that part which passes under the barn, the evidence seems to show that the barn would offer no obstruction to the plaintiffs making all necessary repairs. No case is, I think, established to warrant at present the demolition of any part of the barn. Nor has any case been made out, in my opinion, to support the judgment for damages against the defendants for the mere erection of the barn. These damages can only be sustained upon the assumption that the mere erection of the barn, although it should offer no obstruction to making repairs in the drain has caused and constitutes an abridgment of the plaintiffs' right of servitude. This appears to me to be erroneous. If, when a necessity arises for repairing the drain under the barn, it shall be found that all necessary repairs can be made, and so that the servitude which the plaintiffs claim a right to can be fully exercised with the barn as it stands, it cannot be said that the barn has diminished the plaintiff's use of the servitude or has rendered its exercise more inconvenient. The award of damages is, in my opinion, altogether premature. I am of opinion, therefore, that the defendant Coker was, and is entitled to judgment in his favor, dismissing the plaintiffs' action against him with costs; and as to defendant Wheeler, I am of opinion that the ends of justice would be satisfied by a judgment simply declaring that the plaintiffs are entitled to maintain the drain in question, and to have free access to the piece of land of the defendant Wheeler

1887

WHEELER v. BLACK.

Gwynne J.

in question for the purpose of making all necessary repairs in the drain, as occasion may require, without any impediment or obstruction to their so doing being caused by the barn, which has been erected over the drain or otherwise; and as the defendant Wheeler has upon the record contested this right he should pay the costs of the action; but this appeal should be allowed, in my opinion, to the extent of making the above alteration in, and modification of, the judgment.

Appeal dismissed with costs.

Solicitors for appellants: *Robertson, Ritchie & Fleet.*

Solicitors for respondents: *Geoffrion, Dorion, Lafleur & Rinfret.*

1886

*Feb. 24, 25 & 26.

*May 17.

GEORGE H. FIELDING AND ANTHONY J. MANLEY (PLAINTIFFS) ..... } APPELLANTS;

AND

CHARLES F. MOTT, EDWARD ARCHIBALD, GEORGE W. STUART, ALEXANDER KENT ARCHIBALD, AND GEORGE A. LESLIE (DEFENDANTS) ..... } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA

Mines and Minerals - Mining lease—Application for—Right of entry—Conditions precedent—Conflicting titles to land.

Held, affirming the judgment of the court below, that where a mining lease is obtained over private lands in Nova Scotia the lessees must obtain from the owners of the land permission to enter either by special agreement or in accordance with the provisions of the mining act (1).

Mining leases may be granted in all districts whether proclaimed or unproclaimed.

A mining lease is not invalid because it includes a greater number

---

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

(1) R. S. N. S. 4th Ser. Ch. 9.

1886

FIELDING v. MOTT.

Ritchie C.J.

of areas than is provided by the statute such provision being only directory to the commissioner.

The issue of a lease cures any irregularities in the application for a license or in the license itself in the absence of fraud on the part of the licensee.

APPEAL from a decision of the Supreme Court of Nova Scotia (1), refusing to set aside a verdict for the defendants and order a new trial.

The action in this case was one of ejectment brought by the plaintiffs to obtain possession of certain mining lands in Nova Scotia of which they were lessees. The defendants also held leases of the lands in question and claimed also to be owners of the soil. The several grounds of objection to the leases granted to the defendants and also the grounds upon which the plaintiffs claimed to be entitled to possession of the lands are fully set out in the judgment of the court below delivered by Mr. Justice Thompson and reported in 6 Russ. p Geld. page 339.

Archibald for the appellants cited *Shipp v. Miller's Heirs* (2); *Burke v. Niles* (3); *Finlay v. Williams* (4).

Graham Q.C. and *Sedgwick* Q.C. for the respondents.

Sir W. J. RITCHIE C.J.—I think the judgment of the Supreme Court of Nova Scotia, as delivered by Thompson J. in this case, conclusive against the appellants. It appears to me that the law and the merits of the case are alike with the respondents. I had not on the argument, and have not now, any doubt as to the correctness of the conclusion arrived at by the court below and do not think I can, with advantage, add anything to what has been so clearly, forcibly and conclusively put forward by Mr. Justice Thompson in delivering the judgment in the court below.

(1) 6 Russ. & Geld. 339.
(2) 2 Wheaton 316.
(3) 2 Han. (N.B.) 166.
(4) 9 Cranch 164.

1886

FIELDING v. MOTT.

Strong J.

STRONG J.—I think the appeal should be dismissed for the reasons given by the court below.

FOURNIER, HENRY and TASCHEREAU JJ. concurred.

Appeal dismissed with costs.

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

Solicitors for respondents: *Meagher, Drysdale, & Newcombe.*

1887

*May 3.

ALEXANDER CASSELS (DEFENDANT)...APPELLANT;

AND

KENNEDY F. BURNS (PLAINTIFF).....RESPONDENT.

APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Ship and Shipping—Charter party—Damage to vessel—Repairs—Nearest port—Deviation—Breach of charter.

In September, 1882, a vessel sailed from Liverpool, G. B., for Bathurst, N. B., to load lumber under charter. Having sustained damages on the voyage she was taken to St. John, N. B., for repairs, and when such repairs were completed it was too late in the season to proceed to Bathurst. In an action against the owner for breach of charter party the jury found that the repairs could have been made at Sidney, C. B., in time to enable the ship to go to Bathurst.

Held, that the jury having pronounced on the questions of fact, and their verdict having been affirmed by the Supreme Court of New Brunswick, this court would not interfere with the finding.

Held, also, that under such finding taking the vessel to St. John was such an unnecessary deviation from the voyage as to entitle the charterer to recover.

APPEAL from a judgment of the Supreme Court of New Brunswick (1), sustaining a verdict for the plaintiff and refusing a new trial.

On the 12th September, 1882, Kennedy F. Burns, the plaintiff, chartered the defendants ship, "Her Majesty,"

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

(1) 25 N.B. Rep. 13.

1887

CASSELS v. BURNS.

to carry lumber from Bathurst, N. B., to Liverpool. The ship sailed for Bathurst some ten days after the charter being then in good repair and on the way out encountered heavy weather. When near Cape Scatterie, the eastern extremity of Cape Breton, the master of the ship decided that she would require repairs before going to Bathurst and took her to St. John to have such repairs made. Both Sidney and Port Hawkesbury were much nearer ports and if the repairs could have been made at either of those ports they would have been completed much sooner.

The ship went to St. John and seeing that it would be too late in the season to proceed to Bathurst after the repairs were finished the captain notified the plaintiff that the charter party would not be fulfilled and chartered her in St. John. The plaintiff thereupon brought an action for breach of the charter and obtained a verdict, the jury finding, in answer to questions submitted, that the repairs on the vessel could have been made at Sidney and completed in time to enable the vessel to load at Bathurst. The Supreme Court of New Brunswick refused a new trial. The defendant then appealed to the Supreme Court of Canada.

Skinner Q.C. for the appellant.

W. Pugsley for the respondent.

Skinner Q.C. having stated the nature of the appeal was stopped by the court.

Sir W. J. RITCHIE C.J.—I am afraid you cannot get along with this appeal. It has been laid down in this court, and in the Privy Council, that where a jury have passed on a question of fact, and their finding has been affirmed by the court, a court of appeal will not override it.

The repairs could have been made at Sidney and the jury have found that it was not necessary to go to St.

1887
CASSELS
v.
BURNS.
Ritchie C.J.

John and that had the ship gone to Sidney or Port Hawkesbury the repairs could have been made in time to enable her to carry out her contract. She put it out of her power to do that and I therefore think the court below was right upon the law and upon the facts as found by the jury.

Appeal dismissed with costs.

Solicitor for appellant: *C. N. Skinner.*

Solicitors for respondent: *Harrison & Rand.*

1887
* Oct. 27, 28.

DOMINION CONTROVERTED ELECTION ELECTORAL DISTRICT OF SHELBURNE.

THOMAS ROBERTSON.....APPELLANT

AND

JOHN WIMBURN LAURIE, *et al*.....RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Election Petition—Service of Copy—Extension of time—Discretion of Judge—R. S. C. ch. 9, sec. 10.

An order extending time for service of an election petition filed at Halifax from five days to fifteen days, on the ground that the respondent was at Ottawa, is a proper order for the judge to make in the exercise of his discretion under section 10 of ch. 9, R. S. C.

Semble, per Ritchie C.J. and Henry J., that the court below had power to make rules for the service of an election petition out of the jurisdiction.

Per Strong J.—An extremely strong case should be shown to induce the court to allow an appeal from the judgment of the court below on preliminary objections.

APPEAL from the decision of the Supreme Court of Nova Scotia, overruling certain preliminary objections presented by the appellant against an election petition filed against the appellant by the respondents.

The petitioner Laurie was a candidate at the election,

---

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

1887

SHELBURNE ELECTION CASE.

and resides in the County of Halifax, about two hundred miles from Shelburne. The other petitioner, Bowers, resides in Shelburne, in the County of Shelburne. The solicitors of the petitioners reside at Shelburne, about two hundred miles from Halifax.

The petition was filed at Halifax on the second day of May, 1887, in the afternoon. On the same day the petitioners' agent, at Halifax, telegraphed to the petitioners' solicitors, at Shelburne, informing them of the fact. An affidavit, which had been previously prepared, was immediately sworn to on the third day of May by the petitioner, John Bowers, for the purpose of obtaining an order to serve the petition out of the jurisdiction of the court, the appellant being then in the city of Ottawa. This affidavit was forwarded at once and reached Halifax on the morning of the fifth of May, and an application was immediately, on the same day, made to the Chief Justice for an order to serve the petition out of the jurisdiction, and to extend the same for service. This order was granted, and the documents were forwarded by the first mail to Ottawa and served on the appellant on the ninth of May, 1887.

On the 13th May, the appellant obtained an *ex parte* order to extend the time for presenting preliminary objections.

On the 23rd May, 1887, the appellant filed a notice of appointment of agent or appearance.

On the 28 May, 1887, the appellant filed preliminary objections, and amongst others the following:—

5. The service of said petition and of said notice and receipt was too late and made after the time limited therefor had expired, and was and is irregular and void, the said petition was presented on the 2nd of May, A.D. 1887, and the copy thereof and said notice and receipt not served on the respondent, Robertson,

1887

SHELBURNE ELECTION CASE.

until May 9th, A.D. 1887, and the order granted May, 13th, A.D. 1887, extending the time for service was improvidently granted and on insufficient grounds, and was void and irregular for the following reasons:—

"(*a*) At the time of the presentation of said petition the respondent Robertson, was, to the knowledge of petitioners, attending the present session of Parliament at Ottawa, and with reasonable diligence said petition, after presentation, could have been forwarded to Ottawa and served on said respondent personally, within five days after said presentation, and the application for an extension of such time, which was *ex parte*, disclosed no special circumstances or difficulty in effecting service, but on the contrary disclosed the fact that such application was made within three days of the presentation of said petition, with no attempt to serve said respondent up to that time, although from affidavits used in such application it appeared that the petitioners knew where such respondent was, and by the ordinary means of mail communication had ample time, had diligence been used, to serve said respondent at Ottawa within the five days.

"(*b.*) Said application for extension was made, and the order granting such extension was made *ex parte* on the application of petitioners three days after the presentation of said petition without disclosing any facts not known to them on the date of presentation, and without accounting in any way for not having attempted to effect service up to that time.

"(*c.*) When said petition was presented the respondent, Robertson, was, to the knowledge of petitioners, at Ottawa, in the County of Carleton, in the Province of Ontario, attending the present session of Parliament, holden at Ottawa, which was, and to the knowledge of the petitioners was, to continue in session, and the petitioners by reasonable diligence after presenting the

petition herein on May 2nd, could have forwarded the same by the ordinary mail conveyance to Ottawa, and procured service thereof easily within five days after presentation.

"(*d.*) The petitioners, on the application for the said extension and the said order, improperly concealed the foregoing facts set out in paragraph (*c*), and by reason of such concealment obtained said order."

On the 14th day of June. 1887, on motion of the petitioners, the preliminary objections were set down for hearing before the Chief Justice, on the 5th day of July, 1887, on which day the appellant moved on affidavit, and obtained an order to continue the hearing until the 25th day of July, 1887.

On the 5th day of August, 1887, a rule was taken by the petitioners to have the preliminary objections heard before the court in banco, on the tenth day of August, 1887.

On the 6th day of August, 1887, the appellant gave notice of motion before the court in banco, for the said tenth day of August, 1887, to set aside the order granted by the Chief Justice on the fifth day of May, 1887, and on the fifteenth August, the said preliminary objections were dismissed and set aside with costs.

The 20th rule of the rules of the Supreme Court of Nova Scotia, in relation to Controverted Elections, passed on the 26th day of April, 1887, is as follows:—

"When the party against whom any petition is filed "is not within the Province of Nova Scotia, the "petition and accompanying documents shall be "served in such a manner as one of the judges shall "direct."

R. W. Scott Q.C. for appellant contended that a copy of the petition was not served in time within five days after its presentation; that the order of the honorable the Chief Justice of Nova Scotia made in chambers,

1887

SHELBURNE ELECTION CASE.

extending the time for effecting service for the period of fifteen days from the seventh day of May, was not based "on any special circumstances" or "upon any difficulty in effecting service," and was therefore not warranted by the statute inasmuch as it is clear and undeniable:

First. That the petitioners knew the appellant was in Ottawa attending to his duties as a member of the House of Commons.

Second. That had the copy of petition been sent to Ottawa for service even up to noon on the day after the presentation of the petition, the service might have been effected on the fifth of May, leaving still two days to spare before the expiration of the five days allowed by the statute.

He also contended that the application for such extension of time was not made till the third day after the presentation of the petition—no effort having, in the meantime, been made to serve a copy on appellant, though it was well known at the time the petition was presented that appellant was in Ottawa.

Graham Q.C. for respondent contended that the extending the time for service was a matter of discretion of the judge, and this court ought not to interfere with the decision of the Supreme Court of Nova Scotia declining to overrule his exercise of discretion. *Wigney* v. *Wigney* (1); *Huggins* v. *Tweed* (2); *Golding* v. *Wharton* (3); *Re Merchant Banking Co.* (4); *In re Terrill* (5); *Watson* v. *Rodwell* (6).

Sir W. J. RITCHIE C. J.—I have not any hesitation in expressing my opinion in this case at once. I think that where the legislature has entrusted

(1) 7 Prob. Div. 177.
(2) 10 Chan. Div. 359.
(3) 1 Q. B. D 374.
(4) 16 Chan. Div. 635.
(5) 22 Chan. Div. 493.
(6) 3 Chan. Div. 380.

1887

SHELBURNE ELECTION CASE.

Ritchie C.J.

to a judge a discretion to be exercised by him, there should be strong and substantial reasons presented to warrant us in interfering with the discretion so exercised by him. And if after that discretion has been exercised, an application has been made to the full court, and that court with the knowledge of all the circumstances connected with the matter has confirmed the exercise of that power, there is still greater reason why this court should not interfere. I throw out of consideration altogether in this case the point raised as to the power of the Supreme Court of Nova Scotia to make rules in relation to the service of the presentation of the petition when the respondent is out of the province, and jurisdiction of the court in which the petition is filed. If I was called on to express an opinion at the moment, I would, as at present advised, think the court possessed such power. But in the view I take of the case, no necessity arises for expressing an opinion on that question. The circumstances of this case show in my opinion, that a very proper discretion was exercised by the learned Chief Justice in extending the time, having regard to the shortness of time, 5 days. Where the place where the party is to be served is so far from the Province of Nova Scotia as Ottawa, and where the transaction arose in Shelburne where the petitioners' agent is supposed to be, and in view of the possible interruption of the mail by accidents or otherwise, and that the party could not know whether the respondent was actually at the time in Ottawa or not (as we know that members are in the habit of often absenting themselves), and that the person to whom the letter is addressed might be out of town, having regard to considerations such as these, I cannot say the petitioners' agent did not exercise reasonable precaution in applying for an extension of time, or that the judge exercised a wrong discretion

1887

SHELBURNE ELECTION CASE.

Ritchie C.J.

in granting a reasonable delay for serving the copy of the petition. It was in the discretion of the judge to say what under the circumstances would be a fair time and this court should not, as I said before, without strong and substantial reasons interfere with the discretion of the judge, and I cannot say there are any of these strong and substantial reasons suggested in this case, but the contrary.

STRONG J.—I am also of opinion that this appeal should be dismissed. In the first place I consider the order was an exercise of discretion by the judge which is not properly a subject of appeal. But even if we treat it as an appealable decision, I am of opinion that it was in every respect a proper order to be made. The application for an extension of time was only a proper precaution to take having regard to the short delay allowed, and to the possibility of the respondent being absent from Ottawa when the papers reached that place.

It was held in the second Charlevoix case (1) that an appeal did not lie from judgments on preliminary objections. Subsequently to that decision, the law was altered, and an Act was passed authorizing such appeals. I think, however, from the circumstance that such an appeal as the present has been brought, that the Court ought to be astute to find reasons for disallowing appeals of this kind, which in the majority of cases will probably be brought merely for dilatory purposes.

FOURNIER J.—I concur in the appeal being dismissed with costs.

HENRY J.—I concur also on both points with the decision of the learned Chief Justice below and my

(1) 2 Can. S. C. R. 319.

1887

SHELBURNE ELECTION CASE.

Henry J.

colleagues. Service was required within a certain time, and I think the judges of the court below have power to make rules for service out of the jurisdiction. Under the circumstances I think it was positively necessary, and even if not this court should not interfere with the exercise of the judge's discretion.

TASCHEREAU J.—I am of the same opinion. Upon reading the papers in this case I never thought this a serious appeal.

Appeal dismissed with costs.

Solicitor for appellant: *N. H. Meagher.*

Solicitors for respondents: *White & Blanchard.*

EDWARD HACKETT.....APPELLANT;

AND

STANISLAUS FRANCIS PERRY.....RESPONDENT.

1887

*Oct. 23.

*Dec. 14.

ON APPEAL FROM THE DECISION OF MR. JUSTICE HENSLEY SITTING FOR THE TRIAL OF THE PRINCE COUNTY, P.E. I., CONTROVERTED ELECTION CASE.

Legislative Assembly—Disqualification—Enjoying and holding an interest under a contract with the Crown—What constitutes—39 *Vic. ch.* 3 *secs.* 4 *and* 8 *P. E. I.*

By commission or instrument under the hand and seal of the Lieutenant Governor of P. E. I., one E. C. was constituted and appointed ferryman at and for a certain ferry for the term of three years, pursuant to the acts relating to ferries, and it was by the commission provided that E. C. should be paid a subsidy of $95.00 for each year of said term. E. C. had given to the government a bond with two sureties for the performance of his contract. By articles of agreement between E. C. and S. F. P. (the respondent) E. C. for valuable consideration assigned to S. F. P. one-fourth part or interest in the ferry contract, and it was agreed that one-fourth part of the net proceeds or profits of said contract should be paid over by the said E. C. to the said S. F. P. or his assigns. At the time the agreement was entered into S. F.

---

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

1887

PRINCE COUNTY, P. E. I., ELECTION CASE.

P. was a member of the House of Assembly of P. E. I. having been elected at the general election held on the 30th June, 1886. Subsequently S. F. P. was returned as a member elect for the House of Commons for the electoral district of Prince County, P. E. I., and upon his return being contested;

Held, affirming the judgment of the court below, Taschereau J. dissenting, that, by the agreement with E. C., F. S. P. became a person holding and enjoying, within the meaning of section 4 of 39 Vic. ch. 3, P. E. I., a contract or agreement with her Majesty, which disqualified him and rendered him ineligible for election to the House of Assembly or to sit or vote in the same, and by section 8 of the said act, to be read with section 4, his seat in the assembly became vacated; and he was therefore eligible for election as a member of the House of Commons (1).

---

(1) 39 Vic. ch. 3 P. E. I.: 4. No person whosoever holding or enjoying, undertaking or executing directly or indirectly, alone or with any other, by himself or by the interposition of any trustee or third party, any contract or agreement with Her Majesty, or with any public officer or department, with respect to the public service of the Province of Prince Edward Island or under which any public money of the Province of Prince Edward Island is to be paid for any service or work, or who shall become surety for the same shall be eligible as a member either of the Legislative Council or of the House of Assembly, nor shall he sit or vote in the same, respectively; provided that nothing herein contained shall be construed to apply to any person holding a share in any incorporated Company.

5. If any person hereby disqualified or declared incapable of being elected a member, either of the Legislative Council or of the House of Assembly, is nevertheless elected and returned as a member, his election and return shall be null and void.

6. No person disqualified by the next preceding sections, or by any other law, to be elected a member of the Legislative Council or of the House of Assembly, shall sit or vote in the same respectively, while he remains under such disqualification.

7. If any person who is made by this act ineligible as a member of the Legislative Council or of the House of Assembly, or incapable of sitting or voting therein, respectively, does nevertheless so sit or vote, he shall forfeit the sum of two hundred dollars for every day he sits or votes, and such sum may be recovered from him by any person who will sue for the same by action of debt, bill, plaint or information in the Supreme Court of Judicature of the Province of Prince Edward Island.

8. If any member of the House of Assembly, or of the Legislative Council, by accepting any office, or becoming a party to any contract or agreement, becomes disqualified by law to continue to sit or vote in the same respectively, his election shall thereby become void and the seat of such member shall be vacated, and a writ shall

1887

PRINCE COUNTY, P. E. I., ELECTION CASE.

APPEAL from the decision of Mr. Justice Hensley dismissing the petition against the return of Stanislaus F. Perry, as a member of the House of Commons, for the electoral district of Prince County, in the Province of Prince Edward Island.

At the general election for the Dominion House of Commons held in the month of February last, the respondent and James Yeo, Esq., were returned as members duly elected to represent Prince County, Prince Edward Island, the respondent having a majority of 225 votes over appellant.

The petition was filed by the appellant, Edward Hackett, a candidate at the said election, claiming the seat now held by the respondent for the petitioner, on the ground that on nomination day and on election day, the respondent was not eligible to be elected, he being as it was alleged, a member of the Local House of Assembly for Prince Edward Island, and that under the Revised Statutes ch 13 secs. 1 and 2, the votes given for respondent are absolutely thrown away.

At the trial it was proved by the petitioner that a general election for the local house was held in the

---

forthwith issue for a new election as if he were naturally dead; but he may be re-elected if he be eligible under the first section of this act.

Canada Revised Statutes ch. 13 Sec. 1. No person who on the day of the nomination at any election to the House of Commons, is a member of any Legislative Council, or of any Legislative Assembly of any Province now included or which is hereafter to be included within the Dominion of Canada, shall be eligible as a member of the House of Commons, or shall be capable of being nominated or voted for at such election, or of being elected to or of sitting or voting in the House of Commons, and if any one so declared ineligible is nevertheless elected and returned as a member of the House of Commons, his election shall be null and void.

Sec. 2. If any member of a Provincial Legislature, notwithstanding his disqualification as in the next preceding section hereof mentioned, receives a majority of votes at any such election, such majority of votes shall be thrown away and the returning officer shall return the person having the next greatest number of votes, provided he is otherwise eligible.

1887

PRINCE COUNTY, F. E. I., ELECTION CASE.

month of June, A.D. 1886, and that at that election Mr. Perry was returned to represent a constituency for the local house; it was also proved that there had been no meeting of the local house up to the date of the general election for the Dominion House of Commons.

In answer to this case the respondent contended that before his nomination for the Dominion election he had removed his disqualification; first, by resigning his seat in the local house in the manner pointed out by the island statute, 39 Vic. ch. 3, and in support of this contention it was proved that the respondent gave to two members of the House of Assembly, under seal and properly executed, a resignation of his seat, and that these two members forthwith delivered to the Lieutenant Governor a notice of such resignation The judge at the trial held that respondent had not properly resigned his seat, as the Island Statute 39 Vic. ch. 3 had not provided for the resignation of a member in the interval between the dissolution of one general assembly, and the first session of the general assembly. This point, however, has since been settled by 50 Vic. ch. 1 sec. 1, P. E. I.

The respondent secondly contended that at the date of nomination his seat in the local house was vacated by reason of his holding and enjoying a share in a contract with the local government. In support of this contention the respondent proved that in the month of February, A.D. 1886, the Commissioner of Public Works for Prince Edward Island advertised for tenders for running of a ferry across Grand or Ellis River, which is a small river in the body of Prince County; that one Edward Crossman duly tendered, and his tender was accepted by the commissioner in writing on the face of the tender, (which was adduced in evidence). It was further shown that Crossman had obtained from the proper government officer a license

1887

PRINCE COUNTY, P. E. I., ELECTION CASE.

authorizing him to carry on the ferry; by the terms of this license (which was given in evidence) Crossman was bound to supply certain boats and assistance, also to run the ferry at certain hours, and only to take certain rates of ferriage stated in the license, and he was to receive in addition to the fees earned a sum of ninety-five dollars per annum from the government; the license was to last for three years, from the year A.D. 1886. It was shown that Crossman was actually carrying on the ferry. It was also shown that Crossman had given to the government a bond with two sureties, for the performance of his contract, (this bond was also put in evidence). Before nomination day the respondent purchased a one-fourth share of this contract and the profits of it; for this he paid $75, and Crossman gave him an assignment (also in evidence). The evidence showed that the purchase was actually a *bonâ fide* transaction, and, in fact, it was not attempted to be attacked on this ground.

The following are the material dates:—

Crossman's tender accepted 23rd March, 1886.

License to Crossman dated 4th August, 1886.

Bond for due performance, dated 1st April, 1886.

Assignment to Perry, dated 12th of February, 1887.

Local election held 30th June, 1886.

Perry's resignation, dated 11th February, 1887.

Notice to Lieutenant Governor, dated 11th February, 1887.

Nomination day for Dominion house, 15th February, 1887.

Election day for Dominion house, 22nd February, 1887.

The statute under which respondent's second contention arose is 39 Vic. ch. 3 P. E. I. (1).

Hodgson Q.C. for appellant, on the point upon which

(1) Ubi supra.

1887

PRINCE COUNTY, P. E. I., ELECTION CASE.

this appeal was decided.

The words of the fourth section are that the contract —that is the contract which is to disqualify—must be entered into "with Her Majesty or with any public officer," and the person who is disqualified must have entered into such contract. He may do it directly or indirectly, or by the intervention of a third party, but he must:—

(*a.*) Enter into a contract.

(*b.*) Enter into such contract with the Queen or a public officer.

Here Perry has entered into no contract with the Queen. He has not entered into any contract at all.

Apply this test to the case:—

If Perry sat and voted in the House of Assembly would he be liable to the penalties therefor under the 39 Vic. ch. 3 sec. 7?

I submit he would not be liable.

The two cases of *Miles* v. *McIlwraith* (1) and *Thompson* v. *Pearce* (2), (this latter case being relied on by Mr. Justice Hensley) establish that before a disqualification can exist, the parties, that is the member and the government, "must come immediately into contact," so "that the government could have held the" (disqualified member) "bound to them."

See also the case of *The Queen* v. *Franklin* (3).

In the present case, Perry does not come into contact with the government at all, nor can they hold him bound to them.

Moreover the appellant contends that section 4 (39 Vic. ch. 3) does not apply to a "member" of the legislature, but to the case of a "person" holding a contract at the time of his nomination, of whom it is declared, that he shall not be eligible as a member, that is, that

(1) 8 App. Cas. 120. (2) 1 B. & B. p. 25.
(3) L. R. Ir. 6 C. L. 239.

no person coming within the disqualification mentioned shall be eligible for election.

Section 8 mentions a "member" for the first time.

It (sec. 8) enacts that "any member of the House of Assembly by accepting any office or becoming a party to any contract or agreement, becomes disqualified," etc.

The respondent contends that section 8 must be read in connection with section 4. But even if this be so, then appellant submits that this is entirely in favor of appellant's contention, that section 4 only applies to a person becoming a party to a contract or agreement with the government; and the legislature, when enacting section 8, must have so considered it, for by section 8 it assumed a member to be disqualified upon these grounds only:—

1. "By accepting any office."

2. Or "becoming a party to any contract or agreement."

Has Perry, since he became a member of the House of Assembly, "accepted any office, or become a party to any contract?" He has certainly not accepted an office. It is not asserted by the respondent that he has. It is equally clear that he has not become a party to any contract with the government. Section 8 disqualifies by implication only, and outside of this section there is no other enactment in the statute by which a member vacates his seat by reason of entering into a contract. The learned judge also holds that a commission, appointing a ferryman, is of the same force and effect, and operates as a grant of the ferry itself. I submit that such a proposition is not law. The appointment of Crossman was, as the minute of the executive council expresses it, "one of personal trust and confidence." Upon Crossman's death, the right to ferry would not, as held by the learned judge, descend to his

1887

PRINCE COUNTY, P.E.I., ELECTION CASE.

heirs, but would terminate. If Crossman misconducted in his office, he would be liable to indictment. Comyn's Digest, Piscary, (B.) Ferry. The learned judge has decided otherwise, but he cites no authority supporting such a proposition.

It is needless to cite authorities shewing that nothing will be held to pass in a grant from the crown except by express words or necessary implication.

Woolley v. *The Attorney General of Victoria* (1).

It is urged that a bond was given by Crossman for the faithful performance of the duties of his office, but Perry was no party to that bond.

The fact of tenders having been invited, and Crossman's being the lowest does not affect the question. This could not enlarge Crossman's commission. He was not the less an appointee of the Lieutenant Governor.

Moreover, I must add that by order in council passed on the 28th February, 1887, the crown has refused to recognize him as a joint grantee of the ferry. How, then, can it be said he had a contract with the government? See *The Queen* v. *Smith* (2).

F. Peters for respondent:

The ferry license is in every sense a contract or agreement within the meaning of the statute; it was granted under the provisions of the Island statute 3 Will. 4, ch. 8, which by the second section authorizes the Lieutenant Governor "from time to time to let by tender * * * * the several ferries within this island," and by the third section authorizes the Lieutenant Governor to call for tenders for running said ferries, and to let any such ferry to the lowest tenderer, and to grant licenses for the same for three years, with a provision that the licensee shall enter into good and sufficient security for the fulfilment of his

(1) 2 App. Cas. 163. (2) 10 Can. S. C. R. 1.

duties.

I contend that the license in law amounted to a lease for three years; the words used in the statutes are "to let," words peculiarly applicable for the purpose of making a valid lease. Washburn on Real Property (1), shows that a right to run a ferry is an incorporeal hereditament and as such capable of being granted; if the license in this case amounts to a lease of an incorporeal hereditament it follows, we contend, that an assignment valid at law can be given.

The case of *Reg. ex rel. Patterson* v. *Clarke* (2), is a direct authority that a lease of a right to build a bridge (which is similar to the right to run a ferry) is a contract within the meaning of a disqualifying statute similar to the one now under consideration.

Apart from all authority we contend that this license contains every ingredient necessary to constitute a contract. By its terms the ferryman binds himself to perform certain specified work in a certain specified manner, and the government binds itself to pay him a certain sum for this work; both sides are mutually bound for three years; neither party can revoke the contract except that the governor can do so for misbehavior. It was argued by the appellant that the license was not a contract at all but was only a license personal to Crossman himself, granted to him because the government were supposed to place trust and confidence in him personally; we contend that this argument cannot be supported; the nature of the work is not such as required any personal trust, nor was the license granted on any such ground; it was granted simply because Crossman was the lowest tenderer, and the government protect themselves against its non-performance by bonds. It matters not to the government by whose hand the contract is performed, and in case of

(1) Book 2 ch. 1 sec. 2. (2) 5 P. R. (Ont.) 337.

1887

PRINCE COUNTY, P. E. I., ELECTION CASE.

non-performance the bond of course stood as a security to them.

Assuming that there existed a contract between Crossman and the government, Mr. Perry having purchased a share in this contract came within both the letter and the spirit of the fourth section above set forth, and his seat in the local house became vacated.

In construing this section it must be remembered that the object of the statute was to procure the independence of parliament by preventing members voting on matters in which they had any pecuniary interest. And this object could always be defeated if a member were allowed to enjoy the profits of a government contract held in the name of another person.

Sections 4 and 8 should be read together, and under these sections the respondent became disqualified to sit in the Local Assembly and therefore eligible to the House of Commons. *Royse* v. *Birley* (1); *Maidstone* Case (2); *Thompson* v. *Pearce* (3); *West* v. *Andrews* (4); *Davies* v. *Harvey* (5).

Hodgson Q.C. in reply contended that section 4 alone applies and that provides disqualification only for the person who becomes a party to a public contract.

Sir W. J. RITCHIE C.J.—I express no opinion on the question raised as to the construction of the provincial act with reference to the resignation of a member elect who resigns or seeks to resign between a general election and the first meeting of the legislature thereafter, it not being necessary to do so because I am of opinion that the ground on which the learned judge below dismissed the petition was correct, namely, that by purchasing a share in the ferry con-

(1) L. R. 4 C. P. 320.
(2) Rogers on Elections 13 ed. p. 744.
(3) 1 Brod. & Bing. 25.
(4) 5 B. & Ald. 328.
(5) L. R. 9 Q. B. 433.

tract Mr. Perry's seat in the Local Legislature became vacant by virtue of the fourth and eighth sections of 39 Vic. ch. 3 of the acts of Prince Edward Island. There can be no doubt that, as between himself and his assignee, Crossman had a right to assign a share or interest in the subject matter of this contract, and no question is raised as to the *bona fides* of the transaction in this case. By the assignment of a share in this contract, Perry, by the express terms of his agreement with Crossman, became entitled to participate in its profits and losses, and consequently to receive his share of the $95 of the public money annually to be paid for the performance of the contract. If any question arose in the legislature as to the proper performance of this contract, or as to the payment of the subsidy, what difference would there be in point of interest whether Crossman or Perry was called on to vote on either one or other of these questions, or any other question touching the contract, both being alike interested in any such vote? No authority is wanted, in my opinion, to show that Mr. Perry's case is within the terms of the statute. Larger words could not have been used to cover the case of persons interested in any way in any contract or agreement with Her Majesty, or with any public officer or department with respect to the public service of the Province of Prince Edward Island, or under which any public money of the province is to be paid for any services or work. I need only cite the language of Montague Smith and Brett JJ. in *Royse v. Birley* (1).

Montague Smith J. says:—

"The words "undertake and excute," in s. 1 clearly apply only while the contract is executory; and, though the other words "hold" and "enjoy" are more general, it seems to me they refer to holding a contract or enjoying a contract which is executory, that is, a contract under which something has to be done by the contractor,

(1) L. R. 4 C. P. 316.

1887

PRINCE COUNTY, P. E. I., ELECTION CASE.

Ritchie C.J.

either one act or recurring acts, and that he is only disqualified "during the time that he shall execute, hold, or enjoy" any such contract. The words "hold and enjoy" may have been inserted to meet cases where a contractor holding a contract did not himself execute it."

Brett J. :—

The next point is, whether it is necessary that, at the time when the person is elected, the contract, even supposing it is made with the government, should be executory. That depends upon the view to be taken of this first section. Now, the first part of that section applies to any person who shall "undertake, execute, hold or enjoy" any contract therein mentioned. To undertake a contract would seem to be to enter into it; the word "execute" would seem to refer to the case of a person who takes on himself the execution of a contract not originally made with him; the word "hold" to the case of a possible transfer of a contract which had been already made with some other person; and the word "enjoy" to the case of a person with whom the contract was not made, but who as *cestui que trust* is to enjoy the benefit of it. But then the second part of the section says that any such person shall be incapable of being elected "during the time he shall execute, hold, or enjoy any such contract." Now, for such person to be executing, it seems to me he should be in a position to be called upon to execute, and, if so, the words "hold" and "enjoy" would mean hold or enjoy in the same sense, *i.e.*, holding or enjoying a contract which the contractor may be called upon to execute, or under which there may be something still to be executed.

But then it is urged that section 4 does not apply to this case, but that section 8 read by itself alone governs it, and that the words of section 8 are not as large or comprehensive as those of section 4. I am very clearly of opinion that to give effect to section 8 the two sections must be read together. How are we to discover whose election shall become void and the seat vacated, (the language of one section being "by "becoming a party to any contract or agreement the "party becomes disqualified by law to continue to sit "or vote,") but by reference to the fourth section, which declares the disqualification and prohibits the sitting and voting? The whole act has but one object, namely, that of preventing undue influence and secur-

ing the freedom and independence of the legislature.

The case of the respondent is, in my opinion, not only within the express words, but also within the very spirit of the act. To hold otherwise than Mr. Justice Hensley did would simply be to ignore and frustrate the intention and object of the legislature, and, in fact, any other construction would, as the learned judge says, "let in the mischief which "it was intended to exclude." I am of opinion that it cannot be too strongly impressed on the courts of this Dominion, that all laws passed for securing the independence of the local legislatures as well as those for securing the independence of parliament should be "jealously maintained"; certainly not allowed to be frittered away so long as the respective legislatures or parliament deem it for the advantage of the public that persons who have any interest in any public contract should be absolutely disqualified from being elected, or sitting, or voting in the local assembly or in parliament.

I think the appeal should be dismissed with costs.

STRONG J.—This is an appeal from the decision of Mr. Justice Hensley dismissing the petition against the return of Stanislaus F. Perry as a member of the House of Commons, for the electoral district of Prince County, in the Province of Prince Edward Island.

The House of Assembly of Prince Edward Island was dissolved on the 5th of June, A.D. 1886, and a general election took place on the 30th June, following.

At that election the respondent, Perry, was elected a member for the first electoral district of Prince County.

The new House of Assembly met for the first time after the general election on the twenty-ninth day of March, 1887.

1887

PRINCE COUNTY, P. E. I., ELECTION CASE.

Strong J.

A general election for the House of Commons took place on the 22nd of February, 1887, and the appellant, the respondent, John P. Lefurgy and James Yeo, were candidates to represent the electoral district of Prince County.

Prince County elects two members, and James Yeo and the respondent were returned as elected by the returning officer.

The appellant filed a petition against the respondent's return on the ground that, being a member of the Provincial House of Assembly, he was not eligible as a member of the House of Commons, or capable of being nominated or voted for, and that it was the duty of the returning officer to return the appellant under ch. 13 Revised Statutes of Canada sec. 2 p. 191, on the ground that Perry was disqualified, and that the appellant had received the next highest number of votes.

The petition came on for trial before Mr. Justice Hensley. It was admitted that the respondent had been elected to the Provincial House of Assembly at the general election in June, 1886, and that the first meeting of that assembly did not take place until 29th March, 1887; but it was contended on the part of the respondent :—

1st. That Perry was not a member of the House of Assembly, because he had not been sworn in.

2nd. That he had resigned his seat.

3rd. That his seat had become vacant under the provisions of the fourth section of the Provincial Act, 39 Vic. ch. 3, 1876.

Mr. Justice Hensley dismissed the appellant's petition, sustaining the third contention of the respondent, but deciding the first two grounds in favor of the appellant. From this decision the appellant now appeals to this court.

As I am of opinion that Mr. Justice Hensley rightly

held that the respondent's seat in the assembly was vacated on the third ground before mentioned—the acceptance of an interest in a ferry contract with the Provincial Government—I do not feel called upon to express any opinion upon the question which was raised and argued both here and in the court below as to the legal sufficiency of the resignation, and I shall therefore say nothing on that head.

By the statute of Prince Edward Island 39 Vic. ch. 3 sec. 4 it is enacted as follows :—

No person whosoever holding or enjoying, undertaking or executing directly or indirectly, alone or with any other, by himself or by the interposition of any trustee or third party any contract or agreement with Her Majesty, or with any public officer or department, with respect to the public service of the Province of Prince Edward Island, or under which any public money of the Province of Prince Edward Island is to be paid for any service or work, or who shall become surety for the same shall be eligible as a member either of the Legislative Council or the House of Assembly, nor shall he sit or vote in the same respectively: Provided that nothing herein contained shall be construed to apply to any person holding a share in any incorporated company.

Sect. 5 is as follows :—If any person hereby disqualified or declared incapable of being elected a member, either of the Legislative Council or of the House of Assemby, is nevertheless elected and returned as a member, his election and return shall be null and void.

Sect. 6 is as follows :—No person disqualified by the next preceding sections, or by any other law, to be elected a member of the Legislative Council or of the House of Assembly, shall sit or vote in the same respectively, while he remains under such disqualification.

Sect. 8 enacts that if any member of the House of Assembly, or of the Legislative Council, by accepting any office or becoming a party to any contract or agreement, becomes disqualified by law to continue to sit or vote in the same, respectively, his election shall thereby become void, and the seat of such member shall be vacated, and a writ shall forthwith issue for a new election as if he were naturally dead; but he may be re-elected if he be eligible under the first section of this act.

On the 4th of August, 1886, the Lieutenant Governor of Prince Edward Island in exercise of his lawful powers in that behalf by a commission or instrument under his hand and seal, constituted and appointed

1887

PRINCE COUNTY, P. E. I., ELECTION CASE.

Strong, J.

one Edward Crossman to be the ferry-man at and for the ferry known and called "Ellis River or Grand River Ferry" for the term of three years from the 1st day of April, 1886, pursuant to the acts relating to ferries, and it was by the commission provided that the said Crossman should be paid a subsidy of $95.00 for each year of the said term. By articles of agreement bearing date 12th of February, 1887, and entered into between Edward Crossman and Stanislaus F. Perry, the respondent, Crossman assigned to the respondent one-fourth part or interest in the ferry contract, and it was thereby agreed "that a statement of "the expense and receipts of the said contract shall "be made up on the 1st day of January in each year "and one-third part of the net proceeds or profits of "said contract shall be paid over by the said Edward "Crossman to the said Stanislaus F. Perry, or his "assign." There can be no doubt but that there was a contract between the crown and Crossman in respect of the payment of the annual subsidy. This requires no demonstration for it is apparent on the face of the instrument itself. Then, was the effect of the assignment to the respondent to place him in the position of a person holding or "enjoying" an interest in this contract? The judgment of Brett J. in the case of *Royse* v. *Birley* (1) shows very clearly that the case of a person taking an interest under a contract with the crown by virtue of a transfer from the original contractor was intended to be met by the word "hold", and that a *cestui que trust* with whom the contract was not made, but who is entitled to participate in the benefits received by it, is properly one who "enjoys" the contract. This case is directly in point, therefore, and the reasoning and good sense of the construction which it authorises, warrants us in applying it in the present

(1) L. R. 4 C. P. 320.

case. I have no hesitation, therefore, in holding as Mr. Justice Hensley did that so soon as the assignment was perfected the respondent became a person "holding" and "enjoying" a contract or agreement with Her Majesty which disqualified him and rendered him ineligible for election to the assembly under section 4 of the statute before set forth. The fourth section, however, only applies to the case of disqualification for election; the material sections here are the sixth section which provides that a person becoming disqualified to be elected a member under the fourth section shall not sit or vote in the assembly, thus providing for the case of a member who acquires an interest in a contract after his election, and the eighth section which provides that:—

> If any member of the House of Assembly * * * by accepting any office or becoming a party to any contract or agreement becomes disqualified by law to continue to sit or vote respectively his election shall become void and his seat vacated.

It will be observed that the words of this section are "becoming a party to any contract;" can it be said that the respondent became a party to the ferry contract by taking the assignment? It seems to me very plain that this question must be answered in the affirmative. I construe the words "becoming a party" as referring to the acquisition of an interest in a contract in the manner mentioned in the fourth section. There is no doubt that by force of the sixth section all persons disqualified from being elected under the fourth section, are, when the act of disqualification occurs after they have been elected, incapacitated from sitting and voting, and there could be no possible reason for discriminating as regards the avoidance of the seat between two classes of persons, viz., between those whose subsequent disqualification proceeds from an original contract with the crown and those whose disability proceeds from the acquisition of an interest in

1887

PRINCE COUNTY, P. E. I., ELECTION CASE.

Strong J.

a contract already entered into by the crown with another person, the member thus becoming the holder or party enjoying a contract within the meaning of the fourth section. I am, therefore, of opinion that as the words becoming a party to a contract or agreement are large enough to comprehend all the classes of cases included in the fourth section, as well those where the interest in the contract is acquired derivatively as those in which it is an original agreement, the eighth section avoids the election and vacates the seat of members who subsequently to their election acquire such an interest in a contract or agreement with the crown as would, if they had held it at the time of election, have rendered their election illegal under section four.

The appeal must be dismissed with costs.

FOURNIER J.—In this case I entirely concur with the views expressed by the learned Chief Justice.

HENRY J.—This is an appeal from the judgment of Mr. Justice Hensley on issues raised by a petition in the election court of Prince Edward Island signed by the appellant against the election and return of the respondent as a member of the House of Commons of Canada for the electoral district of Prince County in the said province in February, 1887.

The petition charges that at the time of his nomination the respondent was duly elected a member of the House of Assembly of the province aforesaid, and was therefore ineligible as a candidate to be nominated or elected as a member of the House of Commons, and that on the said election day he was still a member of the said House of Assembly of Prince Edward Island.

The respondent did not answer the petition, but the allegations in the petition were put in issue by the statute.

At the hearing it was contended for the respondent

that at the time of his said nomination he was not a member of the assembly of Prince Edward Island.

First. That although duly elected as such member he had resigned his seat before his nomination as a member of the House of Commons; and

Secondly. That after his election as a member of the House of Assembly of Prince Edward Island, and before his nomination at the election now in question, he had become a party to a contract with the government of the said province, and therefore became immediately disqualified and his election as member of the House of Assembly aforesaid became void and his seat therein as such member vacated.

I will deal with the two issues raised in the order I have referred to them.

The decision of the first is to be considered under the provisions of the act of Prince Edward Island, 39 Vic. ch. 3 sec. 15 in connection with the Dominion statutes, 35 Vic. ch. 15 and 36 Vic. ch. 2, Revised Statutes ch. 13.

The fifteenth section of 39 Vic. ch. 3 reads as follows:—

If any member of the House of Assembly wishes to resign his seat in the interval between two sessions of the General Assembly, and there be then no speaker, or if such member be himself the speaker, he may address and cause to be delivered to any two members of the house the declaration before mentioned of his intention to resign, and such two members upon receiving such declaration shall forthwith notify the Lieutenant Governor thereof under their hand and seal, who is hereby empowered and required, within seven days after the receipt of such notification as aforesaid, to issue a writ for the election of a new member in the place of the member so notifying his intention to resign, and the member so tendering his resignation shall be held to have vacated his seat, and cease to be a member of the house.

The tender of resignation was made before the first meeting of the General Assembly of Prince Edward Island, after the respondent was returned as a member. The resignation bore date on the 11th February, and

1887

PRINCE COUNTY, P. E. I., ELECTION CASE.

Henry J.

the first meeting of the Assembly did not take place until some weeks afterwards.

Revised Statutes of Canada ch. 13 secs. 1 and 2 read as follows:—

Sec. 1. No person who, on the day of the nomination at any election to the House of Commons, is a member of any Legislative Council, or of any Legislative Assembly of any Province now included or which is hereafter included within the Dominion of Canada, shall be eligible as a member of the House of Commons, or shall be capable of being nominated or voted for at such election, or of being elected to or of sitting or voting in the House of Commons, and if any one so declared ineligible is, nevertheless, elected and returned as a member of the House of Commons, his election shall be null and void; 35 Vic. ch. 15 sec. 1; 36 Vic. ch. 2 sec. 1.

Sec 2. If any member of a Provincial Legislature, notwithstanding his disqualification as in the next preceding section hereof mentioned, receives a majority of votes at any such election, such majority of votes shall be thrown away and the returning officer shall return the person having the next greatest number of votes, provided he is otherwise eligible.—35 Vic. ch. 15 sec. 2.

We must in the first place decide whether or not the respondent having been elected and returned a member of the House of Assembly of Prince Edward Island, but who had not been sworn in before any meeting of that house, was a member subject to the operation of the two sections lastly quoted. Deciding that point in the negative would call for a dismissal of the petition. I am, however, of the opinion that a member elected and returned, as was the respondent, should be considered as affected by the provisions of the two sections mentioned. It is true a member so returned would be subject to the result of a petition against his election and return, and through which he might be unseated, but I do not think that objection should prevail.

The next question is as to his resignation. If then the respondent at the time of his nomination and election was subject to the provisions of the two sections of the Dominion act was, his position such as to authorize his resignation? The words in the disquali-

fying section of the Dominion act are: "No person "who on the day of the nomination at any election to "the House of Commons is a member of any Legisla- "tive Council, or of any Legislative Assembly." The words in the local act are: "If any member of the "House of Assembly wishes to resign his seat, &c." They are, therefore, in effect the same. The same construction of them is therefore necessary. If, then, the respondent at the time of his nomination was affected by the disqualifying provisions of the two sections, I think he occupied the same position when his resignation was tendered and acted upon according to the provisions of section 15 of the local act before recited. If not affected by either he would have been duly elected and returned even if he had not resigned his seat in the local house.

Having arrived at the conclusion that the respondent was entitled to resign his seat for the local house, could he do so before the first sitting of the legislature? The words of the fifteenth section are: "If any member of "the House of Assemby wishes to resign his seat in "the interval between two sessions of the General "Assembly, and there be no speaker, &c." What then is meant by "two sessions of the legislature." The provision is general, and unless some good reason can be found for the limited construction contended for should be construed accordingly. The only reason offered is one given by the learned judge who presided at the trial of the petition. I think, however, that the fact that the eighteenth section of the act which provides for the filling of vacancies occasioned by death or acceptance of office subsequent to a general election, and before the first meeting of the General Assembly does not necessarily affect the construction of section 15. On perusal of the act it appears to me that the legislature intended to provide for vacancies in all cases, so that when they should occur no time should

1887

PRINCE COUNTY, P. E. I., ELECTION CASE.

Henry J.

be lost in filling them; voluntary resignations might be made:—

First, by a member giving notice of it in his place in the house;

Second, by giving notice in writing to the speaker, either during the session or in the interval between two sessions, but in case of there being no speaker by giving notice to two members as was done in this case.

As a general rule there is always a speaker after the first meeting of the legislature—the exception some times but not very frequently is found. If it was intended to limit the operation of the fifteenth section to a case where a speaker had been elected, but the office had become vacant by death, or otherwise, apt words might have been used for that purpose; but those used are significant, "and there be then no speaker" would imply that the notice was intended to apply to every case where there was no speaker, either before one should be appointed or in case of a vacancy in the office after appointment.

Courts cannot of course add words to supply what may appear defective in an act, but that is not necessary. The words "in the interval between two sessions" are comprehensive enough; but being so, it is contended that the legislature intended the provision meant "in the interval between two sessions" of the same parliament. There is nothing in the act to suggest the limited construction, or rather to import into it words to produce that result. The section says in the interval between two sessions—that means, according to the words, between any two sessions whether of one parliament or two. If the legislature meant the provision to apply only in the limited sense it should and, no doubt, would have said so. It is enough for us to see that the provision covers the interval between one session and another and so apply it.

Having arrived at the conclusion that the respondent

1887

PRINCE COUNTY, P. E. I., ELECTION CASE.

Henry J.

was a member within the terms of the Dominion and local statutes, I must hold that the notice of resignation given to the two other members was regular and that for the reasons given the respondent had duly resigned his seat, and was, therefore, eligible to be nominated and returned as a member of the House of Commons.

I agree with the views of the learned judge whose judgment is appealed from as to the other issue for the reasons given by him in his judgment to which reference may be had.

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

TASCHEREAU J.—I would allow this appeal. I am of opinion, first, that Perry had not legally resigned his seat in the provincial house, when he was elected to the House of Commons in February, 1887. The words "in the inter-"val between two sessions of the General Assembly" in sec. 15, 39 Vic. ch. 3 (P. E. I.), do not mean "in the "interval between two parliaments." They mean "be-"tween two sessions of the same General Assembly."

Mr. Justice Hensley was with the petitioner, present appellant, on that point. The reasoning, in that same sense, *In re West Durham* (1) seems to me conclusive.

On the other point, whether by a contract with the government of Prince Edward Island Perry had ceased to be a member of the General Assembly, I am also with the appellant. There has been no contract or agreement between Perry and Her Majesty, so as to vacate his seat under sec. 8 of 39 Vic. ch. 3. There is no privity between him and the crown, and the crown cannot hold him bound to any agreement. *Miles* v. *McIlwraith* (1). Moreover the crown has repudiated any such agreement and refused to recognize him as grantee of this ferry.

Appeal dismissed with costs.

Solicitor for appellant: *Edward J. Hodgson.*

Solicitor for respondent: *Frederick Peters.*

(1) 31 U. C. Q. B. 404. (2) 8 App. Cas. 120.

1886
*Nov. 9.
1887
*June 20.

THE CENTRAL VERMONT RAILWAY CO. ..... } APPELLANTS;

AND

THE TOWN OF ST. JOHNS ..... RESPONDENT.

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

Railway bridge and railway track—Assessments of—Illegal—40 Vic. ch., 29, secs. 326 & 327—Injunction—Proper remedy—Extension of town limits to middle of a navigable river—Intra vires of local legislature—43 & 44 Vic. ch. 62 P. Q.

Held, reversing the judgment of the Court of Queen's Bench, (P.Q.,) Fournier and Taschereau JJ. dissenting, that the portion of the railway bridge built over the Richelieu river, and the railway track belonging to appellant's company within the limits of the town of St. Johns, are exempt from taxation under sections 326 and 327 of 40 Vic., ch. 29 P. Q., although no return had been made to the council by the company of the actual value of their real estate in the municipality.

2. That a warrant to levy the rates upon such property for the years 1880-83, is illegal and void and that a writ of injunction is a proper remedy to enjoin the corporation to desist from all proceedings to enforce the same.

As to whether the clause in the Act of Incorporation of the town of St. Johns, P.Q., extending the limits of said town to the middle Richelieu river, a navigable river, is *intra vires* of the legislature of the Province of Quebec, the Supreme Court of Canada affirmed the holding of the court below that it was *intra vires.*

APPEAL from a judgment of the Court of Queen's Bench for Lower Canada (appeal side) affirming the judgment rendered by the Superior Court.

The Central Vermont Railway Co., a body corporate, on the 19th day of December, 1884, presented a petition (*requête libellée*) addressed to any one of the judges of the Superior Court for Lower Canada, together with an affidavit in support of said petition, praying that a writ of injunction should issue addressed to the respondents, the town of St. Johns and to one F. X. Lanier, a bailiff, enjoining upon them to suspend all proceedings

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

1886

CENTRAL VERMONT RY. CO. v. TOWN OF ST. JOHNS.

upon a certain warrant of execution—distress warrant —issued by the said corporation of the town of St. Johns, against the appellants, for the collection of certain taxes upon one-half of appellants' railway bridge over the river Richelieu, its railway tracks and a wooden office, which said warrant had been placed in the hands of the said Lanier for execution, until such time as a further order should be made; and praying also that the seizure or execution, and all proceedings relative thereto, and acts in virtue of which taxes had been imposed against the appellants be declared illegal, null, and of no effect, and be annulled.

The grounds of complaint, as set forth in the petition for an injunction are the following:—

"The respondents have no authority or power to levy a tax upon the appellants:

"1st. Because the said bridge and approach are not situated within the limits and boundaries of said town, the clause of the act of incorporation of the said town fixing the limits of the said town in the middle of the Richelieu river is *ultra vires* and illegal, the said river being a navigable river, and therefore under the sole control of the Dominion Government of Canada, and by reason thereof, the said bridge not being subject to taxation within the meaning of the law;

"2nd. Because according to section 86 of their act of incorporation the said corporation of the town of St. Johns have no right to levy a tax upon immoveable property, but only *sur les personnes et les propriétés mobilières de la ville*, and the said railway bridge being an immoveable, and therefore not subject to taxation by said corporation;

"3rd. Because the said assessment rolls prepared by the assessors duly named by said corporation are illegal, exorbitant and irregular, so far as petitioners (appellants) are concerned, they being assessed for

1886

CENTRAL VERMONT RY. CO. v. TOWN OF ST. JOHNS.

property not belonging to them and not in their possession, to wit: for all the portion of railway tracks, materials etc., from Jacques-Cartier street to Longueuil street of said town of St. Johns, and this to the knowledge of said corporation, which although often urged to change and modify said assesssment rolls in so far as petitioners (appellants) are concerned, refused so to do and persisted in said valuation and still persist therein although legally and duly notified of its irregularity and illegality;

"4th and 5th. Because respondents have exceeded their powers in imposing said taxes, and in causing said warrant to be issued for the recovery of said taxes; and because the said warrant and seizure were issued illegally and are irregular, informal, null and void."

The respondents contested this petition by preliminary pleas and by demurrer and a contestation to the merits.

In their demurrer they alleged that the facts related in said petition do not disclose any ground for a writ of injunction; and in their plea or contestation to the merits, they contended that the allegations of appellants' petition are false; that in virtue of their charter, respondents have the right to impose taxes on all immoveables situated within the boundaries of said town, including that part of the said bridge situated within the limits of said town; that all the immoveables for which said appellants are assessed, are occupied by them and are entered in their name on the assessment roll of the said respondents and that no other proprietor thereof is known to the respondents; that the taxes in dispute have been regularly imposed by said respondents; that the assessment made by respondents is not exorbitant; that the warrant of execution has been regularly issued and that appellants had another and simple and inexpen-

sive remedy against said taxation according to the act of incorporation of the respondents, and that they ought to have availed themselves of that remedy within the three months after the homologation of the assessment roll of the respondents.

The respondents also pleaded the general issue.

L. R. Church Q.C. for appellants.

Robidoux Q.C. for respondents.

The statutes and authorities relied on are reviewed at length in the judgments hereinafter given.

SIR W. J. RITCHIE C.J.—The appeal in this case arose upon the following assessments by the respondents on the railway property of the appellant company.

OFFICE OF THE CORPORATION,
St. Johns, P. Q., Feby., 26th, 1884.

THE CENTRAL VERMONT RAILWAY COMPANY,
Dr. to the Corporation of the town of St. Johns,
Municipal taxes for 1883.

No. on roll.	Designation.	Street.	Ward.	Remarks.	Valuation.	At ½ c. on $.
A 122	1 wood office only.....	Lemoine	East..	.....	350	1 75
868	Railway tracks from E. Longueuil street to bridge...	.....	.....	.....	10000	50 00
869	Part of railway bridge within the limits of the town of St. John..	.....	.....	.....	10000	50 00
					20350	101 75
	Interest 3 months.....	.....	.....	.....	.....	1 50
	Arrears 1882..	.....	.....	.....	.....	148 41
	Interest 1¼ year.....	.....	.....	.....	.....	11 13
	Arrears 1881..	.....	.....	.....	.....	148 41
	Interest 2¼ year.....	.....	.....	.....	.....	20 03
	Arrears 1880..	.....	.....	.....	.....	107 16
	Interest 3¼ year.....	.....	.....	.....	.....	20 87
						$559 26

1887

CENTRAL VERMONT RY. CO. v. TOWN OF ST. JOHNS.

Ritchie C.J.

The contestation was in regard to the assessment on the railway tracks and part of railway bridge within the limits of the town of St. Johns.

Had this case turned on the question as to whether this bridge was or was not moveable property I should have had little difficulty in determining that question in the affirmative; so if it depended on the question as to the liability of the plaintiffs to taxation as occupiers of the bridge, and therefore of the land to which it was attached, and of which it therefore formed a part, I should have had but little difficulty in likewise determining that question in the affirmative; but the real point in controversy is whether or not anything more of the land on which the superstructure of the railroad is placed can be assessed in addition to the land itself, and it seems to me the legislature has carefully protected railways from any local assessment beyond the mere value of the land itself, apart from and independent of the value of the roadway with its superstructure.

The question then in this case arises under section 98 of the incorporation act of the respondents which imports into the charter certain sections of the "Town Corporation General Clauses Act" (40 Vic. ch. 29) sections 326, 327 & 370. By section 326 of the Towns Corporation General Clauses Act (40 Vic. ch. 29):—

> Every iron railway company or wooden railway company other than those mentioned in the fifth paragraph of the preceding section and possessing real estate in the municipality, shall transmit to the office of the council in the month of May in each year, a return showing the actual value of their real estate in the municipality other than the road, and also the actual value of the land occupied by the road estimated according to the average value of land in the locality. Such return must be communicated to the valuators by the secretary treasurer in due time.

And by section 327.

> The valuators in making the valuation of the taxable property in the municipality shall value the real estate of such company accord-

ing to the value specified in the return by the company. If such return has not been transmitted in the time prescribed, the valuation of all the immoveable property belonging to the company shall be made in the same manner as that of any other ratepayer.

This last section 327 is not in the Ontario Act, but though no return was made by the company, I cannot see that it makes any more property taxable than could be taxed under section 326, which I think in accordance with the decisions in Ontario, is confined to the lands occupied by the road, and does not include the superstructures.

Apart from the assessment on the bridge the assessment in this case would likewise be bad for assessing the railway track including the superstructure.

There is nothing whatever in my opinion in the objection that the 43 and 44th Vic., ch. 52, fixing the eastern boundary of the corporation of St. Johns at an imaginary line passing through the middle of the Richelieu river was *ultra vires* of the legislature of the Province of Quebec, and therefore unconstitutional.

The appeal in this case should, I think, be allowed.

STRONG J.—The decision of this appeal must depend on the construction to be placed on sections 326 and 327 of the Provincial Act, 40 Vic., ch. 29. By the 98 section of the Act, 43 and 44 Vic, ch. 62, for amending and consolidating the acts relating to the Incorporation of the town of St. Johns, these sections 326 and 327 of the former General Municipal Act are made part of the latter enactment.

These sections relate to the taxation of railways for municipal purposes and are as follows:—

Sec. 326. Every iron railway company or wooden railway company other than those mentioned in the fifth paragraph of the preceding section and possessing real estate in the municipality, shall transmit to the office of the council in the month of May in each year, a return showing the actual value of their real estate in the municipality other than the road, and also the actual value of the land occupied by the road estimated according to the average value of land in the locality,

1887

CENTRAL VERMONT RY. CO. v. TOWN OF ST. JOHNS.

Strong J.

Such return must be communicated to the valuators by the secretary treasurer in due time.

Sec. 327. The valuators in making the valuation of the taxable property in the municipality shall value the real estate of such company according to the value specified in the return by the company. If such return has not been transmitted in the time prescribed, the valuation of all the immoveable property belonging to the company shall be made in the same manner as that of any other ratepayer.

The proposition of the appellants is that under these provisions of the law, the respondents were not authorized to make the assessments which they have made of the appellants', property within the limits of the town of St. Johns, and that the taxes which they have levied by distress being based on these assessments are void. These assessments are of "the railway "tracks from East Longueuil street to the bridge and "part of railway bridge within the limits of the town "of St. Johns."

As regards the property assessed under the denomination of "Railway Tracks," it is manifest that by that description we must consider the superstructure of the permanent way, consisting of the ties and iron rails, to be included, and that we cannot treat it as restricted to the mere land on which the ties and rails are laid. And as regards the bridge, it is equally beyond controversy that the structure alone is included in the valuation of the assessors. By section 326 the return which a railway company is required to make is to be, first, of the value of the real estate in the municipality other than the road; and, second, of "the actual value of the land occupied by the road." The first question is, therefore, whether the words "land occupied by the road" authorises the taxation of the superstructure consisting of ties and rails.

There can, I think, be scarcely any doubt that it does not. This description of the property to be taxed, and which is to be estimated according to the average value of land in the locality, does as plainly as language can ex-

press it, confine the subject of taxation to the mere land, minus the rails and ties, laid upon it by the railway company. An analogous provision in the municipal law of Ontario has always received that construction, and without assuming that the decisions of the Ontario courts are in any way binding authorities on the learned judges of the court below, I may refer to the cases of *The Great Western Ry. Co.* v. *Rouse* (1), and *London* v. *G. W. Ry. Co.* (2) as giving sound reasons for such a construction, which I adopt in the present case.

Section 327 contains a provision for a valuation by the valuators of the municipality in case the railway company shall itself make no return of value within the time limited by the act, and enacts that in such case the valuation of "all the immoveable property "belonging to the company shall be made in the same "manner as that of any other ratepayer." It cannot, I think, be successfully contended that the words "all immoveable property belonging to the company" were meant to make that assessable by the valuators, which was exempted in the case of a return being made by the "company itself." There could be no reason for such a distinction, and I refer the use of the expression "all the immoveable property" to the circumstance, that by section 326 the immoveable property of the company was divided into two distinct categories, viz: (1) that other than the road; and (2) that occupied by the road. The words in question were, in my opinion, used as a comprehensive term including both the two classes of property previously distinguished.

As regards the bridge or so much of it as is within the limits of the municipality, I am of opinion that it is in no sense "land occupied by the road," and there is, therefore, no statutory authority whatever for its taxa-

(1) 15 U. C. Q. B. 168. (2) 17 U. C. Q. B. 262.

1887

CENTRAL VERMONT RY. CO. v. TOWN OF ST. JOHNS.

Strong J.

tion. The result must be that the assessment having included property not legally liable to taxation, and no distinction being made between such property and that which the statute does make liable, the whole tax is void.

The remedy adopted by the appellants comes within the literal terms of the statute 41 Vic. ch. 14 sec. 1 sub sec. 1, as being an act of a corporation beyond its powers, and I am, therefore, of opinion that this appeal should be allowed with costs to the appellants here and in both the courts below.

FOURNIER J.—Dans cette cause il s'agit de la légalité de taxes imposées par l'Intimée sur certaines propriétés en la possession de l'Appelante, dans les limites de la ville de Saint-Jean. L'une des propriétés taxées est la partie du pont construit sur la rivière Richelieu avec le quai d'approche et les piliers qui se trouvent situés dans les limites de la ville de Saint-Jean, à partir du rivage à aller jusqu'au milieu de la rivière Richelieu. L'autre est la partie du chemin de fer de l'Appelante située dans la dite ville de Saint-Jean à partir de la rue Jacques-Cartier à aller jusqu'à la rue Longueuil. Dans le rôle d'évaluation cette propriété est désignée sous les termes de "Railway track." La dernière est une construction en bois servant de bureau.

L'Appelante, qui a négligé d'adopter dans le temps fixé le recours à la cour Supérieure pour attaquer le rôle d'évaluation, essaie, au moyen d'un bref d'injonction, d'arriver au même but. Dans sa requête elle invoque entre autres les moyens suivants : 1° Que le pont n'est pas situé dans les limites de la ville parce que la clause de l'acte d'incorporation qui en fixe les limites au milieu de la rivière Richelieu est inconstitutionnelle, la dite rivière étant navigable et comme telle sous la juridiction exclusive du parlement du Canada ; 2° que la ville de

Saint-Jean n'a pas le pouvoir de taxer les propriétés immobilières, mais seulement les personnes et les propriétés mobilières de la ville ; 3° que le rôle de cotisation est illégal et exorbitant en ce qu'il taxe l'Appelante pour une propriété qui ne lui appartient pas et qu'elle ne possède pas dans la ville de Saint-Jean, savoir : le " railway track," la partie du chemin de fer à partir de la rue Jacques-Cartier à aller à la rue Longueuil ; 4° enfin illégalité du warrant d'exécution, etc.

L'Intimée a répondu qu'en vertu de sa charte elle avait droit de taxer toutes les propriétés immobilières situées dans ses limites ; que les propriétés pour lesquelles l'Appelante est cotisée sont occupées par elle et qu'elle en est la seule propriétaire connue. L'Intimée nie que l'estimation soit exorbitante, allègue la régularité du warrant, et que l'Appelante aurait dû dans les trois mois de la date du rôle d'évaluation prendre les procédés indiqués par l'acte d'incorporation pour attaquer le rôle.

Cette contestation soulève les questions suivantes : 1° La législature de Québec avait-elle le droit de fixer le milieu de la rivière Richelieu comme limite de la ville de Saint-Jean ? L'Intimée a-t-elle par sa charte le pouvoir de taxer les immeubles situés dans ses limites ? La cotisation du " railway track " de la rue Jacques-Cartier à la rue Longueuil est-elle légale ?

La première question quant au pouvoir de la législature de Québec de fixer les limites de la ville de Saint-Jean au milieu de la rivière Richelieu mérite à peine d'être examinée. S'il est incontestable que les rivières navigables sont pour les fins de la navigation sous le contrôle du parlement du Canada, il n'est pas moins vrai non plus que les provinces ont sur ces mêmes rivières le droit d'exercer tous les pouvoirs municipaux et de police, pourvu que leur législation n'apporte aucune entrave à la navigation. L'acte 43 et 44 Vic.,

1887

CENTRAL VERMONT RY. CO. v. TOWN OF ST. JOHNS.

Fournier J.

ch. 53, qui a étendu les limites de la ville de Saint-Jean jusqu'au milieu de la rivière Richelieu ne contient aucune disposition de nature à affecter les intérêts de la navigation.

En vertu de son acte d'incorporation la ville de Saint-Jean a non seulement le pouvoir de taxer les propriétés mobilières, mais son pouvoir s'étend aussi à taxer "all "lands, town lots, and parts of town lots whether there "be buildings erected thereon or not with all buildings "and erections thereon." La prétention contraire soulevée par l'Appelante est fondée sur une omission sans importance qui se trouve dans la version française de la section 86, laquelle déclare que "le dit conseil de "ville aura le droit de prélever annuellement sur les "personnes et les propriétés mobilières de la dite ville "les taxes ci-après désignées." Il est évident que ce n'est que par inadvertance que le mot "immobilières" a été omis à la suite du mot "mobilières." Si cette partie de la dite section devait se lire sans égard à ce qui suit, la prétention de l'Appelante aurait une apparence de plausibilité. Mais la même section continue de suite et dans la même phase, à désigner les taxes qui seront imposées, et la première indiquée est celle sur tous terrains, lots de ville ou portion de lot, etc., ce qui, malgré l'omission du mot "immobilières" dans la partie qui précède ne laisse aucun doute possible sur l'intention de conférer le droit de taxer les immeubles.

La version anglaise contient, il est vrai, le mot "*immoveable*" qui manque dans la première partie de la version française, mais cela ne peut constituer une différence affectant l'interprétation des deux textes, car tous deux confèrent évidemment le droit de taxer les immeubles. Si cette différence était susceptible de créer un doute, il faudrait, même dans ce cas, suivant l'art. 12, C.C., interpréter la section 86 de manière à lui faire remplir son intention évidente de fournir à la ville de

1887

CENTRAL VERMONT RY. CO. v. TOWN OF ST. JOHNS.

Fournier J.

Saint-Jean par la taxe sur les propriétés mobilières et immobilières les moyens nécessaires de mettre à exécution tous les pouvoirs qui lui sont conférés par son acte d'incorporation. Je conclus que le pouvoir de taxer les immeubles est clairement donné.

Indépendamment de cette objection au pouvoir de taxer de la municipalité, on a aussi soulevé la prétention que les ponts de chemin de fer étaient exemptés du paiement des taxes, et on a même contesté à ce genre de propriété la qualité d'immeuble. Ces deux prétentions me paraissent également mal fondées. Par l'effet du statut, la compagnie est devenue en possession légale de cette partie du lit de la rivière sur laquelle repose le quai d'approche et les piliers qui soutiennent la superstructure du pont. Cette construction faite pour perpétuelle demeure sur cette partie du lit de la rivière, à l'occupation de laquelle la compagnie a un titre légal, a eu l'effet de faire de l'ensemble du pont une propriété immobilière d'un caractère privé appartenant à la compagnie et dont une moitié se trouve dans les limites de la ville. Il est indifférent que le lit de la rivière soit, comme il a été décidé dans *Holman v. Green* (1) au sujet du havre de Summerside, la propriété du gouvernement fédéral ou du gouvernement provincial comme l'a décidé la cour du Banc de la Reine dans *Normand v. la Cie du Saint-Laurent* (2), il n'en est pas moins vrai que dans un cas comme dans l'autre, cette partie du domaine public appropriée en vertu des lois de chemin de fer de la Puissance, tout aussi bien qu'en vertu des lois provinciales sur le même sujet, a cessé, au moins pour tout le temps qu'elle sera employée au passage du chemin, de faire partie du domaine public, de même qu'un lot de terre concédé par la couronne cesse de faire partie de son domaine et devient propriété privée et comme telle sujet à toutes les taxes

(1) 6 Can. S. C. R. 707. (2) 5 Q. L. R. 215.

1887

CENTRAL VERMONT RY. CO. v. TOWN OF ST. JOHNS.

Fournier J.

et charges de la propriété privée. On arguerait donc inutilement pour soutenir que le pont n'est pas taxable, du fait qu'il est construit sur une partie du domaine public exempté de toutes taxes. Cette exemption est sans doute incontestable pour le domaine public, mais elle cesse d'exister lorsqu'il s'agit d'une partie de ce domaine devenue la propriété de particuliers. On ne peut pas plus appliquer à un pont ce privilège du domaine public qu'on ne le pourrait aux nombreux quais construits en eau profonde. Ces proprietés sont comme tous les autres immeubles sujets aux taxes imposées sur la propriété foncière.

Il est incontestable que le pont en question doit être d'après les lois de la province de Québec, comme d'après les décisions des tribunaux d'Ontario, *voir Niagara Falls Suspension Bridge Co. v. Gardner* (1), considéré comme une propriété immobilière et comme telle sujette à la taxe, à moins que l'on ne justifie d'une exemption.

Pour que le pont en question pût être reconnu exempt de taxe il faudrait trouver un texte de loi qui le déclare formellement, et il n'en existe pas à ma connaissance. Cette question intéresse à un très haut degré non seulement l'Intimée, mais encore toutes les municipalités, et elles sont nombreuses, dans les limites desquelles se trouvent des ponts de chemin de fer, et déclarer ce genre de propriété exempté de taxe, ce serait leur faire perdre un revenu considérable.

En vertu de la clause 98 de l'acte d'incorporation 43 et 44 Vic., ch. 62, la plus grande partie des clauses générales des corporations de ville sont rendues applicables à la dite ville de Saint-Jean.

Parmi ces clauses se trouvent les 326 et 327. La première ordonne aux compagnies de chemin de fer qui possèdent des biens-fonds dans la municipalité de transmettre au bureau du conseil, au mois de mai de chaque

(1) 29 U. C. Q. B. 194.

année, un état désignant la valeur réelle de ses propriétés immobilières dans la municipalité autre que le chemin, et aussi la valeur réelle du terrain occupé par le chemin d'après la valeur moyenne du terrain dans la localité. Cet état doit être communiqué à temps aux estimateurs. La seconde, 327, oblige les estimateurs à faire l'évaluation d'après l'état fourni par la compagnie et à défaut de transmission de cet état dans le temps prescrit ils sont obligés d'en faire l'estimation comme celle de tout autre contribuable.

L'état requis par ces dispositions n'ayant pas été fourni dans le temps prescrit, les estimateurs ont procédé à l'évaluation du pont et des autres propriétés au meilleur de leur jugement, en ayant toutefois le soin de n'évaluer que le terrain sur lequel passe ce chemin et non les travaux du chemin. Les estimateurs appelés comme témoins se sont expliqués à ce sujet dans leur témoignage de manière à faire disparaître le doute que l'on aurait pu soulever sur les expressions dont ils se sont servis. "Roadway" pour désigner le terrain acquis par la compagnie pour y passer son chemin ; ils disent positivement qu'ils ont fait la distinction voulue et n'ont pas taxé le chemin, c'est-à-dire les travaux du chemin.

Si maintenant l'Appelante trouve leur estimation trop élevée elle ne peut s'en plaindre à l'Intimée, dont les estimateurs ont agi avec bonne foi. Si l'état requis par la loi eût été fourni dans le temps voulu les estimateurs auraient été obligés d'en passer par la valeur déclarée par la compagnie.

Si l'estimation est trop élevée l'Appelante ne doit s'en prendre qu'à elle-même et doit subir la conséquence de sa négligence.

Après la confection de ce rôle, à l'homologation duquel l'Appelante n'a fait aucune opposition, elle avait encore en vertu de la sec. 200 des clauses géné-

1887

CENTRAL VERMONT RY. CO. v. TOWN OF ST. JOHNS.

Fournier J.

rales des corporations de ville, le pouvoir d'en faire prononcer la nullité pour cause d'illégalité, n'ayant pas adopté ce procédé dans le délai voulu le rôle est devenu finalement clos et ne peut plus être attaqué par le procédé auquel l'Appelante a eu recours.

L'Appelante a soulevé lors de l'argument devant la cour du Banc de la Reine des prétentions dont elle n'a fait aucune mention dans sa pétition. Une de ces prétentions est que l'acte 43 et 44 Vic., ch. 62 a créé une nouvelle corporation tout à fait différente et distincte de celle qui avait existé auparavant; que cet acte ne contenant aucune disposition pour maintenir en force le rôle de cotisation de 1880 les taxes de cette année-là ne pouvaient être recouvrées.

L'acte en question n'a pas créé une corporation nouvelle. C'est "un acte pour amender et consolider l'acte "d'incorporation de la ville de Saint-Jean et les divers "actes l'amendant." Ce dernier acte quant à la confection du rôle de cotisation et la perception des taxes n'est que la répétition de la loi antérieure copiée dans la nouvelle, et qui partant n'a cessé en aucun temps d'être en force. Il n'était donc pas nécessaire d'une disposition spéciale pour déclarer que le rôle fait antérieurement continuerait en force parce que la loi n'était pas changée sous ce rapport. Cette question a été décidée par cette cour dans la cause de *Sulte vs. Corporation de Trois-Rivières.* (1)

Je dois ajouter que dans le cas actuel cette question souffre moins de difficulté parce que les 7e et 117e clauses de l'acte 43 et 44 Vic., ch. 62 ont maintenu en force tous les règlements existants en déclarant:

Clause 7. Et tous les règlements, ordonnances, conventions, dispositions et engagements quelconques passés et consentis par le dit conseil ou le maire actuel ou leurs prédécesseurs en office, auront et continueront à avoir leur plein et entier effet, jusqu'à ce que les dits règlements, conventions et engagements aient été régulièrement

(1) 11 Can. S. C. R. 25.

rescindés et abolis,

Et la 117e clause déclare :

Si quelqu'un transgresse aucun règlement fait par le conseil de ville en vertu du présent acte ou des actes par le présent abrogés, ou se met en contravention, etc., etc., sera passible de l'amende et de l'emprisonnement à défaut de paiement de telle amende suivant que spécifié en aucun des dits règlements.

Ces dispositions sont clairement suffisantes pour maintenir en force non seulement les règlements existants en vertu des lois d'incorporation antérieures, mais même les rôles de cotisation et de perception qui n'ont d'effet légal qu'après avoir été confirmé par ordre du conseil.

La même réponse s'applique à l'objection faite à la légalité du warrant. La loi antérieure 22 Vic., ch. 106, sec. 37, § 3, donnait à la dite corporation dans le cas de défaut de paiement des taxes le pouvoir de les recouvrer par warrant.

Cette même disposition a été conservée par la section 101 de 43 et 44 Vic., ch. 62. Cette disposition existait également dans la 40 Vic., secs. 377 et 378. Ces pouvoirs n'ayant jamais cessé d'être en force les procédés faits en vertu d'iceux sont de même restés en vigueur. Les objections soulevées à cet égard sont sans valeur.

Pour se prévaloir de l'objection faite à la collection des intérêts dus sur le montant des taxes, si elle était fondée, l'Appelante aurait dû s'en plaindre par une opposition à la saisie conformément à l'article 952 du Code Municipal.

Je suis d'avis que l'appel doit être renvoyé avec dépens.

HENRY J.—This case comes by appeal from the Appeal Court of Quebec. The main question to be decided is: Whether rates levied by the municipal authorities of the town of St. Johns on a railway bridge of the appellant company over the Richelieu river—one-half of which is within the limits of the

1887

CENTRAL VERMONT RY. CO. v. TOWN OF ST. JOHNS.

Henry J.

town—for the year 1880 and the two following years were authorized by law? Provision for the assessment of railway companies by municipalities was made by sections 326 and 327 of the act 40 Vic. ch. 29; and it is upon the construction to be put on those sections and others that the rights of the parties herein are to be ascertained.

[The learned judge then read sections 326 and 327.]

It will then be seen that the municipal taxes on railway companies were limited to the real estate owned by the company in the municipality, other than the road and the actual value of the land occupied by the road, estimated according to the average value of land in the locality. Taxation otherwise was totally excluded.

The bridge in question is over a navigable river, and the title to the land over which it flows is in the crown held for public uses. The company by the erection of the bridge over it obtained and have no title whatever to the soil, and therefore it is not immoveable property of the appellant company. Such land is therefore not, as I think, real estate belonging to the company to which the act applies. The land under the bridge may be said to be land occupied by the road; but still it could not apply to the parts or portions of it occupied by the pillars of the bridge. The spaces under the circumstances could not be deemed as in the occupation of the company, when as to such spaces the maritime rights of the public remain unaffected by the superstructure. Nor do I believe the statute was ever intended to apply to such. What it meant was to authorize a tax on land belonging to companies exclusively occupied as the railroad, and I think we would be straining the provision in question to apply it to the bed of a navigable river.

That however is only incidentally necessary to be

considered, for the taxes were not levied on the land of the navigable river; but upon that half of the superstructure within the municipality. It is claimed because the land under the bridge is used by the company, that, although belonging to the crown, it is liable to taxation, and a question would arise if the land had been alone taxed; but it is further claimed that because the land is in the occupation of the company, the bridge built on is immovable property within the provisions of the section hereinbefore in part recited.

The law as to fixtures on immovable property is what should govern in this case, and if so, I cannot regard the bridge in question as one.

The question is raised as one determining the ownership of machinery or other property placed on immovable property to determine whether it belongs to a tenant or a landlord. Is the bridge in question of that necessarily permanent connection with the land under it, that it would become the property of a landlord at the end of a tenant's term? It cannot be contended that a tenant during his term could not remove anything placed or erected by him on the devised property that was not a fixture. During the term, therefore, such could not be deemed a part of the the real estate. A building erected upon blocks laid on the soil may be removed by the tenant. The bridge in question must I think be regarded in the same way and I can see nothing, and know no law, to prevent the company from removing it if desirous of so doing. How then can it be called immovable property, and if not how can it be rated as such? If the company failed to return a valuation of the immovable property in the municipality, the valuators could do more than tax immovable property, they could not tax movable property, nor could they in my opinion tax the bridge in question.

1887

CENTRAL VERMONT RY. CO. v. TOWN OF ST. JOHNS.

Henry J.

The statutes exempt the rails, ties, and everything else composing a railway, on or even below the level of the railway track, including masonry in culverts, bridges, and other erections on the immovable property of companies. Then why should not the bridge in question be exempt? If it had been built on land of the company liable to be taxed, the bridge would not be liable to taxation. Then why should the fact of its having been built over some other party's land, liable or not to be taxed, make the slightest difference? It may be said, however, that as an appeal is given by section 331 of 40 Vic. ch. 29 from the tax roll to the council of the municipality, the appellants not having taken such appeal and the roll having been homologated, they have no other remedy against the illegal assessment. Section 323 provides that:—

> It shall be the duty of the valuators in office to make annually, at the time and in the manner ordered by the council, the valuation of the taxable property of the municipality according to real value.

The duty of the valuators is, therefore, confined to taxable property, and it is from their acts as such valuators within the scope of their authority that any person feeling aggrieved may appeal. The homologation of the roll, therefore, in my opinion, affects only taxable property.

I am, for the reasons given, of opinion that the appellant company is entitled to the remedy by injunction as sought in this action, such remedy being within the provision of the statute of Quebec in relation to injunction, with costs.

TASCHEREAU J.—As to the contention that the act extending the limits of the town of St. Johns to the middle of the Richelieu river is unconstitutional, because the said river, being navigable, is under the exclusive control of the federal parliament, there is

1887

CENTRAL VERMONT RY. CO. v. TOWN OF ST. JOHNS.

Taschereau J.

nothing in it.

As to the second ground of appellants' petition, that movable property only is taxable by the charter of St. Johns, it is also untenable. By a misprint in the French version of the act the word immoveables has been left out, but the context of that version itself shows that immoveables are taxable, and the English version contains the word "immoveables." The appellants did not press this ground of their petition at the argument.

The third ground of the appellants' petition is that they are not proprietors, and not in possession of a part of the property assessed. On this the judge at the trial found, and his finding is fully supported by the evidence, that the company is in possession of all the property assessed.

Now section 370 of 40 Vic. ch. 29, which is part of the charter of St. Johns by section 98 thereof, specially provides that all municipal taxes may be collected from the tenant or occupant of the land.

The fourth, fifth and sixth grounds of the appellants' petition are general ones, that the corporation has acted illegally and beyond its powers in the assessment of the said property and in issuing the warrant of distress. Under these general allegations, the appellants take two distinct objections, one attacking the whole of the assessments for the four years, and the second one attacking the assessment of 1880 only. The first, which applies to all the taxes claimed on the part of the appellants' road on *terra firma*, is that only the land occupied by the road is taxable and not the road bed itself under section 326 of 40 Vic. ch. 29. This section reads as follows:—

Every iron railway company or wooden railway company possessing real estate in the municipality, shall transmit to the office of the council in the month of May in each year, a return showing the actual value of their real estate in the municipality other than the

1887

CENTRAL VERMONT RY. CO. v. TOWN OF ST. JOHNS.

Taschereau J.

road, and also the actual value of the land occupied by the road estimated according to the average value of land in the locality. Such return must be communicated to the valuators by the secretary treasurer in due time.

It is in evidence here that the company never sent to the corporation the return mentioned in this section and consequently according to the very next section of the said act, their property had to be taxed, as that of any other proprietor in the municipality, viz:—

The valuators in making the valuation of the taxable property in the municipality, shall value the real estate of such company according to the value specified in the return given by the company. If such return has not been transmitted in the time prescribed, the valuation of all the immovable property belonging to the company shall be made in the same manner as that of any other rate-payer.

We have been referred to the case of the *Great Western Co.* v. *Rouse* (1), in which it was held that only the land occupied by the railway and not the superstructure is taxable. But this case has no application here, because the statute of 1853, U. C. Assessment Act, 15 Vic. ch. 182 sec. 21 does not provide, as the Quebec statute I have cited does, that if the company fails to make a return to the council the valuation of all its immovable property shall be made as that of any other ratepayer. The two cases of the *Corporation of London* v. *The Great Western Railway Co.*, (2) decided under 29 and 30 Vic., ch. 53, sec. are distinguishable on the same ground.

Now as to the taxes of 1880;—

The appellants argue that for 1880 the respondent cannot claim the taxes, because the old corporation was abolished on the 24th July of that year, by 43 and 44 Vic., ch. 62, and the new one then came into existence.

I do not see any foundation for this contention.

The act 43 and 44 Vic., ch. 62, does not create a new corporation.

(1) 15 U. C. Q. B. 168. (2) 16 U. C. Q. B. 500 & 17 U. C. Q. B. 262.

1887

CENTRAL VERMONT RY. CO. v. TOWN OF ST. JOHNS.

Taschereau J.

The corporation of the town of St. Johns, as created by 22 Vic. ch. 106, (1858), under the very same name, is continued with extended powers and extended territorial jurisdiction. Section 7 specially enacts that all the officers then in office shall be continued until duly removed or the expiration of their functions, and as I read this clause, with all the powers and duties of their offices. This seems to me unquestionable. If the officers are continued, it must be with the view that they should fill the duties of their offices. Now this valuation of 1880 must have been made after the new act was in force and after the 24th July, since in express terms it includes that part of the bridge within the limits of the town and the bridge was not within the limits of the town before that act was passed. By section 23 of 22 Vic., ch 106, there was no special date fixed to make the roll. This was left to the council, though by 37 Vic., ch. 95, sec. 1, it had to be made every year. Now the appellants not having proved that the roll of 1880 was made before the 24th July, we must follow the rule *omnia præsumuntur ritè esse acta.*

But even if the roll had been made before the 24th July, as it is proved that even before the new act 90 feet of this bridge were within the limits of this municipality, and as the roll taxes part of the bridge within the municipality, we should read it as taxing these 90 feet.

As to the amount of the valuation we have nothing to do with it. No question on it can arise before us on a writ of injunction under section 1 of 41 Vic., ch. 14.

The enactments as to assessments in the new act did not come in operation until 1881, and the prior ones continued in force till then according to sections 8 and 11 of 49 and 50 Vic., ch. 95, which are re-enactments of the Interpretation Act, made in express terms

1887

CENTRAL VERMONT RY. CO. v. TOWN OF ST. JOHNS.

Taschereau J.

applicable to the charter of St. Johns by its last clause, no doubt to cover this point.

They read as follows:—

Sec. 8. When any provisions of a statute are repealed and others substituted therefor, the provisions repealed remain in operation until the provisions substituted become executory under the repealing statute.

Sec. 11. Unless the repealing statute otherwise provides all acts, proceedings or things done or begun and all rights acquired in virtue of the provisions of any statute afterwards repealed may be continued, completed, and exercised under such provisions, notwithstanding such repeal, by observing, in so far as applicable, the procedure set forth in the new act.

As to the distress warrant to levy taxes, the enactments of the new charter are similar to those of the first.

It has been urged on the part of the appellants that this bridge is not taxable at all. But this is erroneous. It is immovable property and therefore subject to taxation. See *The Niagara Falls Suspension Bridge* v. *Gardner* (1.)

Another objection taken by the appellants is that the interest accrued on these taxes could not be levied by warrant of distress. By sections 368 of 40 Vic. ch. 29, which is incorporated in the St. Johns charter, interest runs on all taxes from the date that they become due.

The appellants contention is that though for the taxes themselves a warrant of distress can issue the interest thereon is recoverable only by action. I cannot accede to this proposition. The interest is a part of the taxes due to the corporation, and it would require a very clear text, and a novel one it would be, to convince me that the mode to recover the capital is not the same as that to recover interest. In an analogous case, *Baker* v. *Kelly* (2) the judge delivering the judgment of the Superior Court of Minnesota said:

(1) 26 U. C. Q. B. 194. (2) 11 Minn. 480.

"I can see no reason why the interest and costs should "not follow the tax and be collected in the same "manner." Such is my view of the question.

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

GWYNNE J.—The assessments and rates made and imposed for the years in question from 1880 to 1883 inclusive, are, in my opinion, clearly illegal and void. By the 98th sec. of 43 and 44 Vic. ch. 62, intituled "An Act "to amend and consolidate the act of incorporation of "the town of St. Johns and the several acts amending "the same," it is enacted that sections 326 and 327 together with several other sections of The Town Corporation General Clauses Act 40 Vic. ch. 29 shall form part of 43 and 44 Vic. ch. 62. By these sections provision is made for the manner in which real estate, and prescribing what real estate, of railway companies, shall be assessed by the municipality in which such real estate is situated.

By these sections it is enacted. [The learned judge then read sections 326 and 327 (1).]

Now, the manner to be adopted with other ratepayers is prescribed by the 323 section, which declares it to be the duty of valuators to make the valuation of the taxable property of the municipality according to real value, and that they shall also make a valuation of the annual value of such property, and shall enter it on the roll in a separate column. In case the return is made by the company, as directed in the 326 section, the valuators shall adopt the valuation given by the company, but if no such return be made they shall value the taxable property according to their own estimate of its real value. It is in either case only the taxable property that is to be assessed.

(1) See pp. 307-8.

1887

CENTRAL VERMONT RY. CO. v. TOWN OF ST. JOHNS.

Gwynne J.

Now, these sections 326 and 327 owe their origin to the Lower Canada Municipal and Road Act of 1855, 18 Vic. ch. 100 sec. 4, which in its turn owes its origin to the Assessment Laws Consolidation Act of Upper Canada 16 Vic. ch. 182 sec. 21. Under this act it was decided by the Court of Queen's Bench for Upper Canada, when the late Sir John Robinson was Chief Justice of that court, in the case of *The Great Western Railway Co.* v. *Rouse* (1), that the language was too clear to admit of a doubt, and that it exempts, and that the intention of the act was clearly to exempt, all the superstructure, such as the iron, rails, bridges, &c., &c., from all liability to assessment, and that as to the roadway, all that is assessable is the land occupied by the railway, according to the average value of land in the locality; and further, that the decision of the County Court Judge (to whom an appeal had been taken) maintaining an assessment of superstructure was not final, the question not being as to over valuation of property liable to be assessed, but whether there was any authority to assess the superstructure at all; and in *London* v. *The Great Western Railway Co.* (2), it was held by the same court that as the municipality had no right to assess superstructure the objection could be taken in an action, although there had been no appeal taken to the County Court Judge; that the appeal given to the County Court Judge, whose decision thereon was by the statute made final, was only for over valuation of property liable to be assessed, and that the municipality could not, whatever the form of proceeding, recover a rate illegally imposed. These are, in my opinion, sound judgments which should be sustained. Now, in the present case it is shown in plain terms by the assessment rolls, that the assessments and rates which are objected to were imposed on superstructure, namely, on "railway tracks

(1) 15 U. C. Q. B. 168. (2) 17 U. C. Q. B. 264.

"from East Longueil to bridge," and for "part of railroad "bridge within the limits of the town of St. Johns."

The "railway tracks" so assessed consist not only of "the land occupied by the road," but of the wooden sleepers and the iron rail laid down thereon, which is what constitutes the "railway track." And as to the bridge, which appears to be across the river Richelieu, the bed of which is vested in the crown, and is, as such, exempt from taxation, it is a structure erected for no other purpose than to bear the iron rail, which with its supports constitute the track across the river. This structure takes the place of sleepers laid on level ground. The railway being required to cross the river (the bed of which is in the crown) had, of necessity, to be supported by a structure different from that which is required to support the rails on land. The bridge, therefore, which is erected over the bed of the river which is vested in the crown, is in all its parts superstructure and constitutes the "railway track" over the river, and the statutable direction to estimate the value of the land occupied by the road according to the average value of land in the locality is wholly inapplicable to such a structure. Then it is clear by the 79th section of 43 and 44 Vic. ch. 62, that the process given to have the valuation or assessment rolls reviewed at the instance of persons considering themselves aggrieved by the assessment, applies only to cases of complaint as to excessive valuation, of assessable property. But the rates, which are here objected to, having been wholly illegally imposed that is to say, imposed upon property not liable to assessment, the warrant to levy rates so imposed, is void as *ultra vires* of the corporation of St. Johns, and the proceeding by injunction to restrain the enforcement of such warrant is an appropriate remedy expressly given by the statute 41 Vic. ch. 14 of the Province of Quebec.

1887

CENTRAL VERMONT RY. CO. v. TOWN OF ST. JOHNS.

Gwynne J.

I can see no objection to the limits of the town being extended to the middle of the river by a provincial statute, and my judgment proceeds upon the assumption that they are effectually so extended.

For the reasons already given the appeal should, in my opinion, be allowed with costs and the judgment of the Superior Court should be varied thus: Considering that there is error in the judgment of the Superior Court and that the assessments made and rates imposed for the years 1880 to 1883 inclusive, are illegal and void, as having been made on the railway track, and on the railway bridge crossing the river Richelieu, so far as the same are within the limits of the town of St. Johns, which being superstructure only and not "land occupied by the roadway" were not liable to be assessed and rated; and considering that the warrant to levy such illegal rates is illegal and void, order the said warrant to be quashed and enjoin the corporation to desist from all proceedings to enforce the same with costs (*distraits*) to the petitioners' solicitors.

Appeal allowed with costs (1).

Solicitors for appellants: *Church, Chapleau, Hall & Nicolls.*

Solicitors for respondents: *Robidoux & Fortin.*

1887

*May 7.

*June 22.

ANTOINE LEGER (DEFENDANT).....APPELLANT;

AND

PAUL FOURNIER (PLAINTIFF).....RESPONDENT.

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

Sale à réméré—Term—Notice—Mise en demeure—Res judicata Improvements.

Held, affirming the judgment of the Court below, where the right of redemption stipulated by the seller entitled him to take back

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

(1) Leave to appeal to Her Majesty's Privy Council has been granted.

1887

LEGER v. FOURNIER.

the property sold within three months from the day the purchaser should have finished a completed house in course of construction on the property sold, it was the duty of the purchaser to notifiy the vendor of the completion of the house, and in default of such notice, the right of redemption might be exercised after the expiration of the three months.

There was no *chose jugée* between the parties by the dismissal of a prior action on the ground that the time to exercise the right of redemption had not arrived, and the conditions stipulated had not been complied with.

APPEAL from a judgment of the Court of Queen's Bench for Lower Canada (appeal side) (1) affirming the judgment of the Superior Court maintaining plaintiff's action. (2).

The respondent was proprietor of real estate, No. 428 of St. Antoine Ward, in the city of Montreal, with a brick house and stone foundation in course of completion and divers materials to be used for this object. The appellant, a contractor, undertook its completion for the price of $3,000, exacting as security a pledge of the property and materials. This pledge was executed by way of a direct sale or conveyance of the land, buildings and materials, executed by notarial deed of 24th April, 1879.

At the same time a private writing *contre-lettre* was signed by the appellant, by which he bound himself to reconvey the property to plaintiff on receipt of $3,000, within three months from the date of the final completion of the work, in accordance with the verbal agreement made between the parties on this point.

The *contre-lettre* is as follows :—

A Monsieur Paul Fournier, Entrepreneur Menuisier, de la Cité de Montréal.

MONSIEUR :—

Je m'engage par les présentes à vous rétrocéder à raison de la somme de trois mille piastres que vous me paierez comptant lors de la confection du dit acte de rétrocession en un seul paiement en aucun temps durant l'espace de trois mois à compter du jour que j'aurai terminé les bâtisses en voie de construction le lot No. 428 quatre cent vingt-huit au plan et au livre de renvoi officiel pour le

(1) M. L. R. 3 Q. B. 124. (1) M. L. R. 1 S. C. 360.

1887
LEGER
v.
FOURNIER.

quartier St. Antoine en la Cite de Montréal, laquelle bâtisse je m'engage compléter et parachever suivant les conventions verbales faites entre nous au sujet de leur confection et parachèvement, mais ce délai expiré je serai complètement libre du présent engagement.

Je demeure avec respect,

Votre dévoué serviteur,

ANTOINE LEGER.

Montréal, 24 Avril 1879.

The respondent by his action claimed that appellant had agreed to complete said house for the sum of $3000, and that he, respondent, reserved his right to redeem said property within three months from its completion, according to the private writing given to him by appellant, that he was still within the delay to exercise his right of redemption, inasmuch as the work required to be done according to agreement was not completed, and that even if such work was completed, appellant was bound to notify respondent of its completion, and that such notice was never given.

Nevertheless, to avoid any further difficulty, respondent tendered through a notary, on the 1st June, 1883, the amount of $3,000, together with the sum of $246.15, declaring his readiness to pay any further amount if appellant was entitled to the same for costs of appeal in a case between the parties, if the appellant executed a deed of reconveyance of the property, which he refused to do.

The respondent moreover alleged that he was prepared and willing to pay appellant, and offered to deposit the said sums, and prayed that appellant be condemned to execute such a deed of reconveyance on payment of such sums, and that in default of his complying with such order that the judgment of the court stand in lieu of such reconveyance.

Appellant pleaded:—

1. An exception of *res judicata*, the judgment in a former suit instituted by respondent, which he alleged was to the same effect as the present action.

2. A plea, alleging that the buildings had been

completed for more than three months, to wit, since 1879, to the knowledge of respondent, and that the latter was too late and without right to claim the redemption of said property

3. A plea of general denial.

4. A plea of claim for improvements, to wit: That appellant, without admitting respondent's rights in the premises, urged that such rights could not be exercised, without his being paid the sum of $1,010 for the price and value of useful and material improvements which he has made in good faith after the lapse of time to redeem the property, and which had increased its value to double that amount; such improvements were specifically detailed in the plea and a separate statement fyled.

The Superior Court (Hon. Mr. Justice Jetté) rejected appellant's pleas, including his claim for improvements, and granted the prayer of respondent's demand, ordering appellant to execute a deed of retrocession within fifteen days, and in default of his so doing, the judgment to be considered as respondent's deed, upon his depositing the sum of $3,000 and the costs of his former action.

On appeal the Court of Queen's Bench for Lower Canada, appeal side, affirmed the judgment, but allowed $40 to appellant for improvements.

The evidence as to improvements is reviewed in the reports of the case in the courts below. In the prior action the tender made by respondent was $2,600, and in that case the court held that the tender made was insufficient, and that the time had not arrived to exercise the right of redemption.

Sir W. J. RITCHIE C.J.—No question of law that I can discover arises in this case, the controversy is one of fact pure and simple. The Superior Court and the Court of Appeal are unanimous as to the result at which they have arrived on the evidence in this case,

1887

LEGER v. FOURNIER.

Ritchie C.J.

and I can discover nothing to justify me in saying that the conclusion at which they arrived is wrong, or that the judgment of the Court of Appeal should be reversed or interfered with.

STRONG J.—I entirely adopt the opinion of the court below, and for the reasons given in that court, I am of opinion that the appeal should be dismissed.

FOURNIER and HENRY JJ. concur in dismissing the appeal with costs.

TASCHEREAU J.—I am of opinion that the judgment of the Court of Appeal should be varied by ordering $302 for the three last items of his bill of claim, to be paid to appellant by respondent instead of $40. No costs in this court nor in court of appeal.

GWYNNE J. concurred with Taschereau J.

Appeal dismissed with costs.

Solicitor for appellants : *F. C. de Lorimier.*

Solicitors for respondent : *Laflamme, Laflamme & Richard.*

1887

*Mar. 8.

*May 2.

THE CONNECTICUT & PASSUMPSIC RIVERS RAILROAD CO. (PETITIONERS EN NULLITÉ DE DECRET)..... } APPELLANTS;

AND

JOHN L. MORRIS (ADJUDICATAIRE).....RESPONDENT.

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

Execution—Sale of railway shares en bloc—Arts. 595, 599 *C. C. P.*

Where a number of shares of railway stock were seized and advertized to be sold in one lot, neither the defendant nor any one interested in the sale requesting the sheriff to sell the shares separately, and such shares were sold for an amount far in excess of the judgment debt for which the property was taken

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

1887

CONNECTICUT & PASSUMPSIC RIVERS RY. CO. v. MORRIS.

into execution, such sale in the absence of proof of fraud or collusion was held good and valid.

APPEAL from the judgment of the Court of Queen's Bench for Lower Canada (appeal side) (1) reversing the judgment of the Superior Court maintaining a petition *en nullité de décret.*

This was a petition *en nullité de décret* by the appellants, creditors of one Barlow, defendant, to set aside a sheriff's sale of a number of shares in the Montreal, Portland, & Boston Railway Company seized as belonging to him. The seizure was made by execution issued in the suit of *O'Halloran* v. *Barlow* to levy $1,002.52, interest and costs, and 7,924 paid up shares of the par value of $100 each were seized and sold *en bloc* to respondent for $12,010. This sum was at once paid to the bailiff, who the same day signified to the said company the sale and adjudication of the shares, as required by law.

The petitioner prayed that the writ be declared to be null, and the secretary treasurer ordered not to transfer the shares.

In answer to the petition the respondent contended:

1st. That the sale of the shares *en bloc* was perfectly legal.

2nd. That the proceedings and conduct of the sale were regular and legal, and that even if there had been any irregularity, which is denied, it was waived and acquiesced in by the respondents.

3rd. That the sale of the shares *en bloc* was to the advantage of the defendant Barlow and his creditors.

OHalloran Q.C. for appellants and *Geoffrion* Q.C. and *Hatton* for respondent.

The judgment of the court was delivered by—

TASCHEREAU J.—We are of opinion that this appeal should be dismissed. Art. 599 of the C. P. R. enacts that no demand for the annulling or rescinding of a sale of moveables under execution can be received against a

(1) M. L. R. 21 Q. B. 303.

1887

CONNECTICUT & PASSUMPSIC RIVERS RY. CO. v. MORRIS.

Taschereau J.

purchaser who has paid the price, saving in the case of fraud or collusion. Now here, the purchaser, Morris, has paid the price of the adjudication, and no fraud or collusion is alleged by the appellant. How could we in the face of such a clear enactment, maintain the appellants' petition to set aside this sale? It is true that art. 595 enacts that the sale must not proceed beyond the amount necessary to satisfy the debt, but if the officer conducting the sale does proceed to sell more than necessary, is that a cause of nullity as against a *bonâ fide* purchaser? I do not think so, nor has the appellant cited any authority to support such a contention. By art. 598 the ownership of the moveables adjudged is transferred by the adjudication. At the very moment, upon his paying the price, the purchaser is vested with the ownership of what he has bought. That is the general policy of the law, as regards moveable property. On this I refer to Rodière *procédure civile*, (1), where the author under art. 622 of the Code Napoleon, which also enacts that he should not proceed further than necessary to pay the execution debt, says, "The sale termi- "nated, the defendant or any third party cannot for "any cause trouble the purchaser, because as to move- "ables, possession is a title." The only recourse (he adds,) that the defendant or third parties have, is against the officer or the execution-creditor.

Against a *bonâ fide* purchaser at a judicial sale of moveables, I take the law to be that there is no such thing as a petition to set aside the sale for the reason here invoked by the appellants. Even, if the seizure or the sale has been utterly illegal, the purchaser is protected. Bioche, *dictionnaire de procédure* (5), cites numerous authorities for that proposition. *On ne peut dépouiller des adjudicataires de bonne foi*, Bioche says.

Appeal dismissed with costs.

Solicitor for appellant: *George F. O'Halloran.*

Solicitor for respondent: *J. C. Hatton.*

(1) Vol. 2 p. 233. (2) Vo. Saisie Exc. No. 302.

NICHOLAS GARLAND (DEFENDANT)...APPELLANT; 1887

AND *Nov. 18 & 19.

JOSEPH A. GEMMILL (PLAINTIFF)....RESPONDENT. *Dec. 20.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Copyright—Infringement of—Sources of information—Statutory form of notice of—Decree, form of.

The publisher of a work containing biographical sketches cannot copy them from a copyrighted work, even where he has applied to the subjects of such sketches and been referred to the copyrighted work therefor.

In works of this nature where so much may be taken by different publishers from common sources and the information given must be in the same words, the courts will be careful not to restrict the right of one publisher to publish a work similar to that of another, if he obtains the information from common sources and does not, to save himself labor, merely copy from the work of the other that which has been the result of the latter's skill and diligence.

The notice of copyright to be inserted in the title page of a copyrighted work is sufficient if it substantially follows the statutory form (1). Therefore the omission of the words "of Canada" in such form is not a fatal defect, and, even if a defect, such defect is removed by sec. 7 sub-sec. 44 of the Interpretation Act (2).

Depositing in the office of the Minister of Agriculture copies of a book containing notice of copyright before the copyright has been granted does not invalidate the same when granted.

APPEAL from a decision of the Court of Appeal for Ontario affirming the judgment of the Chancellor of Ontario (3) in favor of the plaintiff.

---

*PRESENT—Strong, Fournier, Henry, Taschereau and Gwynne JJ.

(1) The form required by 38 V. c.88 s.9 is as follows; "Entered according to Act of Parliament of Canada in the year by A. B. in the office of the Minister of Agriculture."

(2) R. S. C. ch. 1 sec. 7 sub-sec. 44. That section is as follows;—"Whenever forms are prescribed slight deviations therefrom, not affecting the substance or calculated to mislead, shall not vitiate them.

(3) 12 O. R. 139.

1887

GARLAND v. GEMMILL.

A suit was brought by the plaintiff Gemmill against the defendant Garland for infringement of a copy-right of the former, and for an injunction to restrain the defendant from publishing or selling the book alleged to be such an infringement.

One Henry J. Morgan was the compiler and publisher of a book called the "Canadian Parliamentary Companion, 1862," and in 1872 he assigned all his right and title in the copyright of said book to C. H. Mackintosh. Mackintosh during the years 1877, 1878, 1879, 1880 and 1881, issued further editions of the said book and similar books copyrighted as "The Parliamentary "Companion, 1862," and "The Canadian Parliamentary "Companion, 1874" under the style or title of "The "Canadian Parliamentary Companion and Annual "Register" for the particular year.

On the 7th July 1882, the said Mackintosh assigned to the plaintiff all his right and title to the alleged copyrights in "The Canadian Parliamentary "Companion 1862," "The Canadian Parliamentary "Companion 1874," and in the several editions of "The "Canadian Companion and Annual Register" for the years 1877 to 1881 inclusive, and the plaintiff afterwards published and copyrighted the "Canadian Parliamentary Companion, 1883."

The defendant, Garland, was the publisher of a work entitled "The Parliamentary Directory and Statistical "Guide, 1885," which Gemmill claimed to be a piracy of his books, and the publication by Garland was the cause of the present suit.

At the hearing in the Chancery Division the defendant, in addition to denying the charge of piracy, attacked the plaintiff's copyright on two grounds.

First, that before obtaining such copyright the plaintiff printed the book with notice thereon, that the copyright had been obtained and deposited two copies

under sec. 7 of the Copyright Act of 1875, (38 Vic. ch 88) which it was claimed subjected him to a penalty under sec. 17 of said act and avoided the copyright. Secondly, because the notice required by sec. 9 of the said act to be inserted on the title page or page following of every copy of the book issued was defective, such notice being as follows:—"Entered according to the Act of Parliament, in the year one thousand eight hundred and eighty three, by J. A. Gemmill, in the office of the Minister of Agriculture" omitting the words "of Canada" after the word "Parliament."

The learned Chancellor overruled both objections, the first because, though it might possibly subject the publisher to a penalty it did not invalidate the copyright, and the second because the form used was a sufficient compliance with the act; and he granted an injunction restraining the defendant from publishing, etc., his above mentioned book or any copies or future editions thereof containing matter pirated from any of the plaintiff's works.

The defendant appealed, and claimed that the Chancellor at the hearing had restricted the infringement to the plaintiff's book published in 1883, and if the defendant was liable at all the injunction should not go beyond that. The Court of Appeal, however, affirmed the decision as it stood. The defendant then appealed to the Supreme Court of Canada.

W. Cassels Q. C. and *Walker* for the appellant.

In 1862 the respondent obtained a copyright, and his book was issued in subsequent years without the notice of copyright required by the statute. That made the matter contained in the book public property, and the book issued in 1883 was a mere reproduction of such matter with a few pages of new matter interlarded. It is submitted that the book of 1883, therefore, is not properly a subject of copyright.

1887

GARLAND v. GEMMILL.

The omission of the words "of Canada" in the notice of copyright required by sec. 9 of the Copyright Act, 38 Vic., ch. 88 will, it is submitted, vitiate the copyright of the respondent. He is only entitled to his monopoly upon a strict construction of the statute giving it to him.

Without the interpretation act, R. S. C., ch. 1, sec. 7, sub-sec. 44, it is clear that this omission would be fatal. *Jackson* v. *Walker* (1); *Wheaton* v. *Peters* (2); *Donaldsons* v. *Becket* (3); and the notice required by section 9 of the Copyright Act is not a form within the meaning of the Interpretation Act.

The book copy-righted in 1883 was merely a repetition of the former matter, and the authorities are clear that the protection must be confined to the new matter.

The latest case on the subject of copyright is *Pike* v. *Nicholas* (4); which follows *Cary* v. *Kearsley* (5). Both these cases support the contention of the defendant in this case.

The American authorities also are generally in our favor. Law's Dig. (6); Bump. on Copyright (7); and see Slater on Copyright (8); *Black* v. *Murray* (9); referred to in Slater p. 53.

After a work has once gone to the public neither the author nor any other person can copyright the same matter on the same plan by making a few alterations or additions. *Thomas* v. *Turner* (10); *Langlois* v. *Vincent* (11).

Arnoldi for the respondent:

The omission complained of in the notice of copy-

(1) 29 Fed. Rep. 15.
(2) 8 Peters, 591.
(3) 4 Burr. 2408.
(4) 5 Ch. App. 251.
(5) 4 Esp. 168.
(6) P. 259.
(7) P. 358.
(8) P. 37.
(9) 9 Sess. Cas. 3 ser. 353.
(10) 33 Ch. D. 292.
(11) 18 L. C. J. 160.

right is immaterial. Nobody could be misled by it and if it is a defect it is cured by the Interpretation Act.

It has been found by the Chancellor, and is apparent on examination, that the defendant's book is a slavish copy of that of the plaintiff, and the decree for an injunction should stand.

The following authorities were relied on. Slater on Copyright (1); *Morris* v. *Wright* (2); *Morris* v. *Ashbee* (3); *Kelly* v. *Morris* (4); Coppinger on Copyright (5); *Bickford* v *Hood* (6).

The judgment of the court was delivered by GWYNNE J.—The decree made in this cause not only restrains the defendant from selling the book published by him and known as *The Parliamentary Directory and Statistical Guide of* 1885 but also from publishing or selling any future edition thereof, or containing matter copied or pirated from the books of the plaintiff known as the "Canadian Parliamentary Companion for the years 1862, 1874, 1877, 1878, 1879, 1880, 1881 or 1883;" of all of which works, except the last, the plaintiff is now proprietor by assignment from the authors thereof, and from publishing or selling any book containing any portions, passages or extracts taken or colorably altered from the plaintiff's said books, and from copying from the plaintiff's said books or any edition thereof in the preparation of or for the purpose of assisting in the preparation of any future edition of the defendant's said book, or any other book. The learned Chancellor of Ontario, before whom the case was tried, having made a very careful comparison of the new matter appearing in the plaintiff's "Canadian Parliamentary Companion

(1) P. 5 and cases cited; p. 199.
(2) 5 Ch. App. 279.
(3) L R. 7 Eq. 34.
(4) L. R. 1 Eq. 697.
(5) 2 Ed. pp. 178, 203, 242-3.
(6) 7 T. R. 620.

1887

GARLAND v. GEMMILL.

Gwynne J.

" of 1883," with the defendant's book of 1885, and having come to the conclusion that much in the latter book, had been copied and pirated from the plaintiff's book of 1883, made no comparison between the defendant's book and the " Canadian Parliamentary Com- " panions published in the said years prior to 1883," of which, and of the rights of the author's thereof therein, whatever those rights were, the plaintiff is the assignee. The learned Chancellor in his judgment says :—

Inhibiting the use by the defendant of the parts first published in the plaintiff's edition of 1883, will so substantially interfere with the whole of the defendant's publication of 1885, that it is not necessary to prosecute the enquiry further, as to whether there is copyright in the parts of the plaintiff's book which were published in the editions of 1874 to 1881.

The defendant appealed from the above decree to the Court of Appeal for Ontario upon various grounds of objection, which have been renewed before us, that court having dismissed his appeal. The question before us must be limited to an enquiry as to the piracy of matter contained in the plaintiff's " Canadian Par- " liamentary Companion of 1883" ; for assuming the previous books published in the years mentioned in the decree to have been registered as required by the copyright act in force in those respective years, still the defendant contends that if there be any matter contained in his book which can be found also in the books published in the years prior to 1883, of which the plaintiff is the assignee, such matter was obtained by the defendant and the authors of those respective books from common sources, some of those sources having been, as is admitted, books previously published by the authors whose rights the plaintiff has purchased as regards the years mentioned in the decree but which previous books such authors had not registered as required by the Copyright Act, and in which therefore they had acquired no copyright.

This branch of the defence not having been entered into and adjudicated upon by the learned Chancellor the decree should not have dealt with it as if it had been entered into and adjudicated upon against the defendant. In works of this nature, where so much may be taken from common sources and where much of the information given, if given correctly, must be given in the same words we must be careful not to restrict the right of the defendant to publish a work similar in its nature to that of the plaintiff if, in truth, he obtains the information from common, independent sources open to all and does not, to save himself labor, merely copy from the plaintiff's book that which has been the result of his skill, diligence and literary attainments. We must be careful not to put manacles upon industry, intelligence and skill in compiling works of this nature.

The parts which the learned Chancellor has found, and as I think corectly found to have been copied by the defendant from the plaintiff's "Canadian Parliamentary Companion of 1883," consist of short biographical sketches of some of the members of the Parliament of Canada. It must, I think, be admitted, that the defendant set about the compiling his work in a perfectly legitimate manner by addressing circulars to each member of Parliament, requesting him to furnish a short sketch of his life for publication in the defendant's work. If all the gentlemen who received these circulars had answered them by writing in their own language, short sketches of their lives, and had sent them to the defendant for publication in his book, he would have had as much right to have published these sketches in the language in which they were sent to him, or in an abridgment thereof prepared by himself, as the plaintiff had to publish like sketches furnished to him, although the language in which both

1887

GARLAND v. GEMMILL.

Gwynne J.

sketches might be expressed should be very similar; but unfortunately for the defendant, it appears that several of the gentlemen who had received the defendant's circular, instead of furnishing him with the biographical sketches he had asked for, replied to the effect that they had already supplied such a sketch to the plaintiff for publication and which was published in his book. The defendant conceiving this sufficient authority to entitle him to take from the plaintiff's book the biographical sketches of such gentlemen as so referred him to the plaintiff's work, did copy them from the plaintiff's book, and thus, ignorantly perhaps but not the less actually, was guilty of the piracy of which the plaintiff has accused him. To the extent of the matter so copied the plaintiff has established his right to have an injunction.

In view of the nature of the respective works of the plaintiff and defendant the plaintiff will obtain all the protection he is entitled to if the decree should be, and I think that it should be, in the form of the order for injunction in *Lewis* v. *Fullarton* (1); and which was followed in *Kelly* v. *Morris* (2); namely "The Court "doth order" and adjudge that the defendant, etc, (as "in decree) be and he is hereby restrained and "enjoined from further printing, publishing selling "or otherwise disposing of any copy or copies of a "book called '*The Parliamentary Directory and* "*Statistical Guide*, 1885, containing any articles or "article, passages or passage copied, taken or colorably "altered from a book called *The Canadian Parliamen-* "*tary Companion*, 1883," published by the plaintiff.

Upon the point as to the alleged defective entry in the plaintiff's book of the information required by the statute to be given of his copyright being reserved, by reason of the omission of the words "of Canada" after

(1) 2 Beav. 14. (2) L. R. 1 Eq. 167.

the words "of the Parliament," I am of opinion that there is nothing in this objection. The object of the insertion of the entry is to give information to the world that the work is copyrighted, and that by reference to the office of the Minister of Agriculture the precise date from which such copyright runs may be ascertained. The entry as published in the plaintiff's book is sufficient for that purpose and, as I think, is sufficient independently of the enactment contained in sub-section 44 of sec. 7 of the Interpretation Act of 1886; but if the entry was defective, apart from that act, such defect is, in my opinion, removed by the above section. The references to the cases decided upon the English Act have no application as they relate to a provision in the English Act, not in our act.

Neither is there anything in the objection that the copies deposited in the office of the Minister of Agriculture, under the provision of the statute in that behalf, contained the entry of information as to copyright being secured, which is required to be inserted in every copy of every edition of a copyrighted book published during the term secured. The clause requiring such deposit to be made merely requires that two copies of the author's book shall be deposited in the office of the Minister of Agriculture, etc. Now the insertion of the entry (required to be inserted in the several copies of every edition published during the term secured,) in the copies supplied to the office of the Minister of Agriculture, cannot deprive them of their character of being the book of the author who is desirous of securing his copyright. The entry in the copies supplied to the Minister of Agriculture shows that the work is printed and ready for publication, but the point sought to be established is, that it proves that the work was published before the copyright was

1887

GARLAND v. GEMMILL.

Gwynne J.

secured, and so that the copyright was lost. This may perhaps be said to be an ingenious, but it seems to be rather a very fallacious argument. Our judgment, I think, should be that the decree varied as above be affirmed with costs to be paid the plaintiff, and the appellant must pay the costs of the appeal, as he has failed on the material points. The decree being so varied, the appeal will be dismissed with costs.

Appeal dismissed with costs.

Solicitors for appellants: *Walker & McLean.*

Solicitors for respondents: *Ferguson & Gemmill.*

1887

*Nov. 15, 16.

*Dec. 15.

THE CONFEDERATION LIFE ASSOCIATION (DEFENDANTS) ..... } APPELLANTS;

AND

MARY ELEANOR MILLER AND OTHERS (PLAINTIFFS) ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Life Insurance—Application for policy—Declaration by assured—Basis of Contract—Warranty—Misdirection.

An application for a life insurance policy contained the following declaration after the applicant's answers to the questions submitted:—"I, the said George Miller, (the person whose life is to be insured) do hereby warrant and guarantee that the answers given to the above questions (all which questions I hereby declare that I have read or heard read) are true, to the best of my knowledge and belief; and I do hereby agree that this proposal shall be the basis of the contract between me and the said association, and I further agree that any mis-statements or suppression of facts made in the answers to the questions aforesaid, or in my answers to be given to the medical examiner, shall render null and void the policy of insurance herein applied for, and forfeit all payments made thereon. It is also further agreed that should a policy be executed under this application, the same shall not be delivered or binding on the association until the first premium thereon shall be paid to a duly authorized

---

*PRESENT.—Strong, Fournier, Henry, Taschereau and Gwynne JJ.

1887

CONFEDERATION LIFE ASSOCIATION v. MILLER.

agent of the association, during my lifetime and good health. I, (the party in whose favor the assurance is granted), do also hereby agree that this proposal and declaration shall be the basis of the contract between me and the said association."

Held,—affirming the judgment of the court below, that this was not a warranty of the absolute truth of the answers of the applicant, but that the whole declaration was qualified by the words "to "the best of my knowledge and belief."

At the trial the jury were charged that if there was wilful misrepresentation, or such as to mislead the company, they should find for the defendants, but that if the answers were reasonably fair and truthful to the best of the knowledge and belief of the applicant, their verdict should be for the plaintiffs.

Held, a proper direction.

APPEAL from a decision of the Court of Appeal for Ontario (1) affirming the decision of the Queen's Bench Division (2) by which a verdict for the plaintiffs was sustained and a new trial refused.

The action in this case was upon a policy of insurance effected by George Miller deceased for $10,000. Payment was resisted by the company on the ground of the policy and the application, which was made a part of the contract, containing untrue statements, and suppressing material facts.

To the questions answered in the application, the insured made this declaration:—

"I, the said George Miller, (the person whose life is to be insured) do hereby warrant and guarantee that the answers given to the above questions (all of which questions I hereby declare that I have read or heard read) are true, to the best of my knowledge and belief; and I do hereby agree that this proposal shall be the basis of the contract between me and the said association, and I further agree that any mis-statements or suppression of facts made in the answers to the question aforesaid, or in my answers to be given to the medical examiner, shall render null and void the policy of insurance herein applied for, and forfeit all

(1) 14 Ont. App. R. 218. (2) 11 O. R. 120.

1887

CONFEDERATION LIFE ASSOCIATION v. MILLER.

payments made thereon. It is also further agreed that should a policy be executed under this application, the same shall not be delivered or binding on the association until the first premium thereon shall be paid to a duly authorized agent of the association during my life time and good health. I, (the party in whose favor the assurance is granted) do also hereby agree that this proposal and declaration shall be the basis of the contract between me and the said association. Dated at Markham this 5th day of December, 1883."

He was examined by the Medical Officer, who sends in his report containing answers to seventeen questions which he gives after his examination of the applicant.

At the foot of his report is written, "I hereby certify that I have made true, full and complete answers to the questions propounded to me by the examining physician, and I agree to accept the policy when issued on the terms mentioned in the application, and to pay the association the premium thereon.

(Sd.) GEORGE MILLER,
Applicant.

WITNESS: J. R. TABOR, Examining Physician.

The witness to this declaration, Dr. Tabor, died before the action, and there is no evidence of his examination of the applicant.

It was contended by the company that this declaration was an absolute warranty of the truth of the statements in the application and the policy, and if any of such statements were untrue in fact the policy was void.

Among the statements made by the insured were the following:—

(*a.*) That none of his brothers or sisters ever had pulmonary or any other constitutional disease.

(*b.*) That he had no serious illness, local disease or personal injury, except a broken leg in childhood and

an illness of three days from cold.

(*c.*) That his usual medical attendant was Dr. Tabor and that he had been attended by him for a cold, and that he had not required the services of a physician, except as aforesaid, for the past seven years or for any serious illness during that period.

(*d.*) That he had not consulted any other medical man except one Dr. Aikins, who examined him while suffering from the cold.

(*e.*) That no material fact bearing upon his physical condition or family history had been omitted in the foregoing questions and the answers thereto.

As to (*a.*) It was contended that two of the brothers of the insured had pulmonary disease as the evidence showed that they had been troubled with spitting of blood, though neither of them was proved to have died from the cause which produced it.

As to (*b*) the evidence showed that the deceased had been injured by being thrown from a load of hay some four years before the insurance for which he had brought an action and received $200 in settlement.

As to (*c*) and (*d*) it appeared that the deceased had at one time consulted Dr. Aikins, of Toronto, who said there was nothing the matter with him, but gave him some medicine.

At the trial the jury were directed to consider whether or not the statements by the deceased were wilfully false, and made to induce the company to grant the policy, or if he was guilty of wilful misrepresentation or concealment, in which case they should find for the defendants; but if the answers were reasonably fair and truthful to the best of the knowledge and belief of the applicant, they should give a verdict for the plaintiffs. A verdict was given for the plaintiffs.

Shortly after the trial the company obtained further evidence, in the shape of declarations made by the

1887

CONFEDERATION LIFE ASSOCIATION v. MILLER.

applicant himself early in the spring of 1884, showing that at that time and for some months previous he was suffering from congestion of the lungs. The declarations were made by the applicant in order to obtain an extension of time within which to perform homestead duties upon certain lands pre-empted by him in Manitoba, and were obtained by the company from the Department of the Interior.

In Michaelmas Term, 1885, the defendants obtained an order *nisi* to set aside the verdict and to enter a verdict for the company or for a new trial, upon the grounds briefly of misdirection and discovery of new evidence.

The motion to make absolute the order *nisi* was argued in the same term, before the Chief Justice Wilson and Mr. Justice Armour, and judgment was delivered in the following Hilary Term. The Chief Justice was of opinion that there should be a new trial, while Mr. Justice Armour was of opinion that the verdict should stand; and the court being divided the order *nisi* was discharged with costs.

An appeal from this judgment to the Court of Appeal was dismissed with costs. The company then appealed to the Supreme Court of Canada.

S. H. Blake Q. C. and *Beaty* Q. C. for the appellants.

The company has the right to have true answers to all the questions put. It is no answer to say that this can only apply to material questions, for the insurers have a right to fix the standard of materiality for themselves, and aver that the questions in the application are material by requiring them to be answered.

The courts below have not construed the contract between the insurers and the insured, but have made a new contract by saying that, to avoid the policy, the mis-statements or suppressions must be wilfully and knowingly made. The company can make any con-

tract they see fit, and have a right to insist on its performance.

Anderson v. *Fitzgerald* (1) is a leading case on this subject. The judgments of their lordships in that case put forward the principles we are contending for here, and the correctness of which cannot be disputed.

In the case of *Fowkes* v. *Manchester &c. Ass. Ass.* (2), the declaration was very different. The test there was whether or not there was fraudulent concealment, or a designedly untrue statement, those words being used in the declaration signed by the assured, and the court held that the company had made that the basis of the contract.

In the *London Assurance* v. *Mansel* (3) the policy was declared void. In answer to the usual question as to other applications for insurance, the applicant said that he was already insured in two other offices suppressing the fact that he had made application elsewhere and had been refused.

We would refer also to *Canning* v. *Farquhar* (4); *Thomson* v. *Weems* (5); *Huckman* v. *Fernie* (6); *Geach* v. *Ingall* (7); *Phoenix Life Ins. Co.* v. *Raddin*, (8); *Cazenove* v. *British Equitable Ass. Co.* (9).

Dr. McMichael Q. C. and *McCarthy* Q. C. for the respondents.

There is a distinction between a suppression and an omission. The former implies an intention to conceal something which the party considers of importance, but a party seeking insurance must be at liberty to exercise a discrimination as to omissions in answering so general a question as that relating to serious injury in this case. If he is bound to state every injury he

(1) 4 H. L. Cas. 484.
(2) 3 B. & S. 917.
(3) 11 Ch. D. 363.
(4) 16 Q. B. D. 727.
(5) 9 App. Cas. 671.
(6) 3 M. & W. 505.
(7) 14 M. & W. 95.
(8) 120 U. S. R. 183.
(9) 6 C. B. N. S. 437.

1887

CONFEDERATION LIFE ASSOCIATION v. MILLER.

has ever received, no doubt the policy is forfeited; but if he can discriminate, it is for the jury to say whether the discrimination was properly exercised or not.

In the case of the *Connecticut Mutual* v. *Moore* (1), the insured had received several severe injuries of which he made no mention in his application, but the policy was not held void.

A new trial is asked on the ground of discovery of new evidence. The evidence in question was known to the defendants before the trial, and they had made efforts to get it, but they did not ask for a postponement of the trial. That a new trial will not be granted in such a case, see *McDermott* v. *Ireson* (2), following *Scott* v. *Scott* (3); *Fawcett* v. *Mothersell* (4); *The Queen* v. *McIlroy* (5); *Murray* v. *Canada Central* (6).

That absence of witnesses is not ground for a new trial, where post-ponement is not asked for, see *Edwards* v. *Dignam* (7); *Turquand* v. *Dawson* (8).

As to the objection that the verdict was against the weight of evidence, see *Metropolitan Ry. Co.* v. *Wright* (9), explaining *Solomon* v. *Bitton* (10).

As to interfering with the discretion of a court below, see *Jones* v. *Tuck* (11); *Bickford* v. *Howard* (12); *Eureka Woolen Mill Co.* v. *Moss*, (13); *Connecticut Mutual Life Insurance Co.* v. *Moore* (14); *Black* v. *Walker* (15); where the authorities are collected in the judgment of Mr. Justice Taschereau.

The injuries and accidents contemplated by the question in the application must be such as would

(1) 6 App. Cas. 644.
(2) 38 U. C. Q. B. 1.
(3) 9 L. T. N. S. 454.
(4) 14 U. C. C. P. 104.
(5) 15 U. C. C. P. 116.
(6) 7 Ont. App. R. 646.
(7) 2 Dowl. 622.
(8) 1 C. M. & R. 709.
(9) 11 App. Cas. 152.
(10) 8 Q. D. B. 176.
(11) 11 Can. S. C. R. 197.
(12) Cassel's Dig. 163.
(13) 11 Can. S. C. R. 91.
(14) 6 App. Cas. 644.
(15) Cassels's Dig. 459.

1887

CONFEDERATION LIFE ASSOCIATION v. MILLER.

tend to shorten the applicant's life. The company do not desire information as to any trifling injury which does not effect the general health of the applicant. The case of *Insurance Co.* v. *Wilkinson* (1) is on all fours with the present case. To a question as to receiving serious injury, &c., in the same words as in the application here, the applicant answered no. On the trial of an action on the policy, evidence was given that the insured had fallen from a tree and received considerable injury. The jury were directed to find whether that fall had caused a permanent injury, or if all the effects of it had passed away, and it was held a proper direction.

Then as to the real point in the case, that of the construction of the contract.

I cannot agree with the proposition that knowledge and recollection are entirely distinct. I cannot be charged with knowledge of something which I may have once known, but have forgotten. *Kelly* v. *Solari*(2).

Ambiguous contracts are to be construed most strongly against the insurance companies. *Notman* v. *Anchor Insurance Co.* (3); *Anderson* v. *Fitzgerald* (4); *Fowkes* v. *Manchester* (5).

STRONG, FOURNIER and HENRY JJ. concurred in the judgment prepared by Mr. Justice Gwynne.

TASCHEREAU J.—I concur, but not without strong doubts as to one point, that is, as to the Scarborough accident, and the names of those doctors who attended Miller for it. That this was considered at the time by Miller to be a serious accident is unquestionable. Mr. Justice Armour says it was a severe accident, but not a serious one. Why not serious? Because three years

(1) 13 Wall. 222.
(2) 9 M. & W. 54.
(3) 4 Jur. N. S. 712.
(4) 4 H. L. Cas. 484.
(5) 3 B. & S. 920.

1887

CONFEDERATION LIFE ASSOCIATION v. MILLER.

Taschereau J.

later when he applied for this policy he thought he had fully recovered from it. But does it not happen that the consequences of an accident of that nature are felt sometimes in after life, and break out years later, and long after the party thought he had fully recovered from its effects? All the judges in the courts below are of opinion that Miller should have mentioned this accident. That he knew of it when he applied for this policy the jury could not but answer affirmatively if the question had been directly put to them. It is said that the jury have found that though he knew of it yet, to the best of his belief, he did not think it serious. But was the company not entitled to judge of that before issuing the policy? And does the evidence support the finding that this was not a serious accident? Can this be called a trifling ailment, like a tooth ache, a slight cold, that cannot be expected to be remembered or mentioned? Is one who applies for an insurance not bound to remember an accident of this kind?

If it was not for the case of *Moore* v. *The Connecticut Mutual* I would have dissented. And yet, perhaps, in that case, as I gather from the concluding remarks of the judgment, the Privy Council would have granted a new trial if it had been contended for in the courts below.

GWYNNE J.—This is an action upon a policy of insurance upon the life of one George Miller, the application for which, signed by the said George Miller, is made part of the policy. This application contained certain questions put to the applicant by the defendants, and his answers thereto, the truth of which is guaranteed in a clause prepared by the defendants themselves and inserted at the foot of the answers in the following terms:—

1887

CONFEDERATION LIFE ASSOCIATION v. MILLER.

Gwynne J.

I, the said George Miller, do hereby warrant and guarantee that the answers given to the above questions, (all which questions I hereby declare that I have read or heard read) are true *to the best of my knowledge and belief*, and I do hereby agree that this proposal shall be the basis of the contract between me and the said association, and *I further agree that any mis-statements, or suppression of facts, made in the answers to the questions aforesaid*, or in my answers to be given to the medical examiner, shall render null and void the policy of insurance herein applied for, and forfeit all payments made thereon. It is also further agreed that should a policy be executed under this application the same shall not be delivered or binding upon the association until the first premium shall be paid to a duly authorized agent of the association during my life and good health. I do also hereby agree that this proposal and declaration shall be the basis of the contract between me and the association.

A policy having been issued upon this application, and the assured having died, this action was brought to recover the amount insured by the policy to which, the defendants pleaded a defence relying upon the alleged untruth of several of the answers to the questions in the application. It is only necessary to refer to a few of these questions and answers.

1st. To a question:—

How many brothers have you had—how many are living—what are their ages—what is the state of their health—how many are dead—and at what age and of what disease did they die?

The applicant answered the last part of the question by saying that:—

A brother had died at 17 years of age, but of what disease he had died he could not say—that he was overgrown.

The alleged breach of warranty relied upon as regards this answer in the defendants statement of defence, is

That his "(the applicant's)" said brother who died at 17 years of age, did, in fact, die of *consumption or some other pulmonary disease as said George Miller well knew and concealed from the defendants.*

2nd. To a question:—

Have you ever been addicted to the excessive or intemperate use of alcoholic or other stimulants—tobacco, opium, chloroform or other narcotics?

The applicant answered

1887

CONFEDERATION LIFE ASSOCIATION v. MILLER.

Gwynne J.

No.

And 3rd, to a question:—

Are you now affected with any disease, disorder or ailment, or are you aware of any symptoms of any?

He answered:—

No, except a cold.

In their statement of defence the defendants, by way of alleged breach of warranty contained in the answers to these two questions, say that

The said George Miller was, in fact, when he made said application, suffering from constitutional ailment of the lungs, and had suffered from hemorrhage—was of dissipated habits, and addicted to the immoderate use of intoxicants, *all of which he concealed and caused the medical examiner to conceal from the defendants.*

4th. To a question:

Have you had any serious illness, local disease or personal injury?

The applicant answered:—

Broken leg in childhood—confined to bed three days from a cold.

By way of a breach of warranty in this answer, the defendants allege

That it was untrue, and that prior to said application for insurance and in or about the spring of 1880, the said George Miller fell from a load of hay and seriously injured himself, for which he sued the corporation of the Township of Scarborough and they paid him several hundred dollars damages.

The defendants conclude their statement of defence with the following averment:—

The mis-statements and suppressions of fact as aforesaid, and the irregular habits and the impaired state of health of the said George Miller, were material to the risk undertaken by the defendants, and were material to be known by the defendants upon the negotiation for the said policy, and by reason of such misstatements and suppressions of facts the said policy was and is and should be declared to be null and void.

The contention of the appellants is, that however qualified the first sentence in the warranty may be by reason of the use of the words:

To the best of my knowledge and belief;

The subsequent words, namely:

And I further agree that any mis-statements, or suppressions of facts made in the answers to the questions aforesaid, &c., &c., shall

render null and void the policy,

1887

CONFEDERATION LIFE ASSOCIATION v. MILLER.

Gwynne J.

are absolute and have the effect of avoiding the policy if there be anything stated in the answers not absolutely according to the fact however ignorantly and unintentionally such erroneous statement should be made, or if anything should be omitted which ought to have been stated however ignorantly and unintentionally such omission should occur, notwithstanding in fact that the applicant might have believed all his answers to have been strictly true in every particular; the contention being that the qualification, that his answers were true *according to the best of his knowledge and belief*, is not imported into the latter sentence in the warranty. The question is raised as a ground of objection to the learned judge's charge in directing the jury, that if they thought there was anything in the answers which was calculated to mislead the defendants, and induce them to enter into the contract when they otherwise would not have done it, then their verdict should be for the defendants, but that if on the other hand they should think the answers reasonably fair and truthful to the best of the knowledge and belief of the man, their verdict should be for the plaintiffs.

The question before us is really reduced to the fourth of the above questions, for as to the other answers the defendants in their statement of defence allege them to have been wilfully false with intent to deceive the defendants, and there can be no objection successfully taken to a judge's charge which submits the issue to the jury in the manner and form in which it is framed by the defendants themselves. Moreover, there was, in truth, no evidence in support of the positive averments made by the defendants in their statement of defence, upon which averments they rested their contention, as to the absence of truth in the applicant's answers to the 1st, 2nd and 3rd questions above extracted.

1887

CONFEDERATION LIFE ASSOCIATION v. MILLER.

Gwynne J.

Now as to the answer to the 4th of the above questions. The question relates to matters which are more or less matters of opinion. A person may have been ill several times, indeed few persons grow up to manhood without being ill from several diseases to which childhood and youth are subject, and yet when grown up, be quite unable to say whether his illness, during his suffering under any of those diseases, was *serious*. So he may have received several personal injuries during his passage from childhood to manhood without knowing any of them to have been, and without any of them having, in fact, been *serious*. If the jury in the present case had been asked: Had the applicant as matter of fact received any *serious* personal injury? they should have been told that it would not be every personal injury which would be *serious*, and as regards the particular one pleaded by the defendants as having been received by the applicant, that if its effects had all passed away, leaving behind no trace injurious to health, it was not *serious* within the meaning of that term in the question. That it was not at all serious, the doctor who attended Miller while suffering under it gave most unequivocal testimony; it was, however, contended by the learned counsel for the defendants, that the jury should have been told that the applicant's own evidence in his action against the Township of Scarborough was *conclusive* evidence that the injury was a *serious* one within the meaning of that term in the question. No authority in support of this contention was cited, nor is there any foundation for it in reason, for whatever opinion the sufferer may have formed of the serious nature of the injury at the time it was received, his experience of four years more without suffering from any continuing ill effects, might well have satisfied him that it had not been serious, and that his first im-

pression had been erroneous.

Now upon this point the learned judge, in plain terms, drew the attention of the jury to the statement of the applicant, as made by him four years' before his application for the policy in his action against the Township of Scarborough, and added:—

You have also heard the evidence that was given by Dr. Lapsley as to the nature of the injury. It is true you have heard—and Mr. Blake urged that point very strongly—if a person makes a statement he cannot be surprised if that statement is used against him afterwards to its fullest extent. You have heard all the evidence as regards the injury.

And he directed them to say whether the answers given, in view of such evidence, can be said to be fairly true to the best of the man's knowledge and belief, or was the answer a wilful misrepresentation. The question had, I think, been better put in two questions, namely: 1st. Was the injury referred to in point of fact a *serious* injury in the sense involved in the question, namely, an injury the evil effects of which had not passed away and was injurious to the health of the applicant for insurance? If they should answer this question in the negative it would not be necessary to go further, but if in the affirmative then that they should say:

2nd. Whether the injury was in that sense *serious* to the knowledge and belief of the applicant? If the jury had adopted, as it is most probable they did, the evidence of Dr. Lapsley, who attended the applicant for the injury, they must have answered the first question in the negative. But I am of opinion that the learned judge rightly construed the warranty in holding that the subsequent clause relied upon by the defendants was qualified equally as the preceding one. In so far as personal injury is concerned, the answer in substance is:—

To the best of my knowledge and belief, I have had no serious personal injury other than a broken leg in childhood,

1887

CONFEDERATION LIFE ASSOCIATION v. MILLER.

Gwynne J.

Now this statement being qualified by the words "to the best of my knowledge and belief" can only be untrue, if the contrary to what is stated be the truth—namely, that to his knowledge and belief he had received some other serious personal injury than that stated. Whether that was so or not was for the jury to say, and the learned judge left to them all the evidence from which they might infer what was the knowledge and belief of the applicant upon the point in question. The rule of construction is that the language of the warranty being framed by the defendants themselves the warranty must be read in the sense in which the person who was required to sign it should reasonably have understood it, and it is impossible to conceive that a person who was interrogated as to his knowledge and belief in respect of the matters enquired into could have understood that notwithstanding that he should answer the questions put to him truly, according to the utmost of his knowledge and belief, he should nevertheless forfeit his policy if through ignorance the facts as stated by him should not prove to be absolutely true, apart altogether from his knowledge and belief. However, the evidence of Dr. Lapsley warranted the jury in finding, and this, I apprehend, is what they intended to find by their verdict, that in point of fact the injury spoken of and relied upon by the defendants was not a *serious* one whatever might have been Miller's opinion of it at the time he received it. The appeal must therefore, in my opinion, be dismissed with costs.

Appeal dismissed with costs.

Solicitors for appellants: *Beaty, Hamilton & Cassels.*

Solicitors for respondents: *McMichael, Hoskin and Ogden.*

THE ATTORNEY GENERAL OF BRITISH COLUMBIA..... ..... } APPELLANT;

AND

THE ATTORNEY GENERAL OF CANADA..... ..... } RESPONDENT.

1886
*Nov. 29.

1887
*Dec. 13.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

B. N. A. Act sec. 92 *sub-sec.* 5, *ss.* 109 *&* 146—47 *Vic. ch.* 14 *sec.* 2 *(B. C.)*—*Provincial public lands—transfer of to Dominion of Canada—Effect of—Precious metals—Claim of Dominion Government to.*

By section 11 of the Order in Council passed in virtue of sec. 146 of the B. N. A. act, under which British Columbia was admitted into the Union it was provided as follows:-

And the Government of British Columbia agree to convey to the Dominion Government, in trust, to be appropriated in such manner as the Dominion Government may deem advisable in furtherance of the construction of the said railway, (C. P. R.) a similar extent of public lands along the line of railway throughout its entire length in British Columbia, not to exceed however twenty (20) miles on each side of the said line, as may be appropriated for the same purpose by the Dominion Government from the public lands of the North-West Territories and the Province of Manitoba.

By 47 Vic. ch. 14 sec. 2 (B. C.) it was enacted as follows:—From and after the passing of this act there shall be, and there is hereby granted to the Dominion Government, for the purpose of constructing and to aid in the construction of the portion of the Canadian Pacific Railway on the mainland of British Columbia, in trust, to be appropriated as the Dominion Government may deem advisable, the public lands along the line of railway before mentioned, wherever it may be finally located to a width of twenty miles on each side of the said line, as provided in the Order in Council, sec. 11, admitting the Province of British Columbia into confederation.

A controversy having arisen in respect of the ownership of the precious metals in and under the lands so conveyed, the Exchequer

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

1886

ATTY. GEN. OF BRITISH COLUMBIA v. ATTY. GEN. OF CANADA.

Court, upon consent and without argument, gave judgment in favor of the Dominion Government. On appeal to the Supreme Court:

Held, affirming the judgment of the Exchequer Court, Fournier and Henry JJ. dissenting, that under the order in council admitting British Columbia into confederation and the statutes transferring the public lands described therein, the precious metals in, upon, and under such public lands are now vested in the crown as represented by the Dominion Government.

APPEAL from the judgment of the Exchequer Court rendered in favor of the respondent upon a stated case between the Attorney General of Canada and the Attorney General of British Columbia. The stated case was as follows:—

"The Attorney General of Canada alleges, and

"The Attorney General of British Columbia denies:

"That the precious metals in, upon and under the "public lands mentioned in section 2 of the act of the "Legislature of British Columbia, 47 Vic. ch. 14, inti- "tuled, 'An Act relating to the Island Railway, the "Graving Dock and Railway Lands of the Province,' "are vested in the crown as represented by the Gov- "ernment of Canada, and not as represented by the "Government of British Columbia.

"A controversy having arisen in respect of the "premises, it is submitted for the decision of the said "court pursuant to the provisions of 'The Supreme "and Exchequer Court Act,' and the act of the Legis- "lature of British Columbia, 45 Vic. ch. 2, intituled, "'An Act to amend the act respecting the Supreme "Court of Canada and the Exchequer Court of "Canada.'"

The judgment appealed from is as follows:—

"The special case herein coming on to be heard be- "fore this court this day, in presence of counsel as well "for the Attorney-General of Canada, as for the Attorney- "General of British Columbia, whereupon and upon "reading the said special case, and hearing what was

"alleged by counsel aforesaid, this court did order and "adjudge, that the precious metals in, upon and under "the public lands mentioned in sec. 2 of the act of the "Legislature of British Columbia, 47 Vic., ch. 14, in- "tituled "An Act relating to the Island Railway, "the Graving Dock and Railway Lands of the Pro- "vince" are vested in the crown as represented by the "Government of Canada, and not as represented by the "Government of British Columbia."

The Orders in Council and statutes upon which the controversy arose are fully set out in the judgments hereinafter given.

The decision of the Exchequer Court was taken by consent and without argument, in order to facilitate the bringing of the case directly to the Supreme Court.

McCarthy Q.C. for the appellant:

The object of the grant of these public lands was to enable the Dominion Government to assist the Canadian Pacific Railway; it was not for the purpose of handing them over as forming part of the territory over which the Dominion legislature exercise control as over the North-West Territories, but to aid in the construction of the Canadian Pacific Railway.

[TASCHEREAU J.—If the lands had been granted to the Canadian Pacific Railway Co., is it admitted the gold and silver mines would belong to British Columbia?]

Yes, that point is admitted. By section 10 of the terms of union, the provisions of the British North America Act are made applicable to British Columbia, as if it had been one of the Provinces originally united, and by section 146 of the British North America Act the terms of union have the same effect as if enacted by the Imperial Parliament.

By section 92 of the British North America Act, par. 5, the management and sale of the public lands of the Province, and of the timber and wood thereon,

1886

ATTY. GEN. OF BRITISH COLUMBIA. v. ATTY. GEN OF CANADA.

are preserved to the Province. So also, by sec. 109, it is distinctly enacted that "all lands, mines, minerals "and royalties belonging to the several Provinces "... shall belong to the several Provinces ... "... subject to any trusts existing in respect there- "of, and to any interest other than that of the Province "in the same."

We contend, therefore, that the words "public "lands," in the terms of union, in the B. N. A. Act, and in the section under discussion, do not include mines or minerals; the words have their ordinary significance only, and are so dealt with in the B. N. A. Act, and as not including mines or minerals, or royalties. Where the latter are intended to be dealt with, apt and precise words are used so as to designate them as a subject matter wholly distinct from public lands.

The prerogative right of the crown to gold and silver found in mines will not pass under a grant from the crown unless by apt and precise words the intention of the crown be expressed that it shall pass, and the prerogative rights of the crown can be affected only by express words. The great case of Mines (1), followed by *Woolly* v. *Attorney-General of Victoria* (2), and cases there cited. See also *Attorney-General of Ontario* v. *Mercer* (3) as to construction of sec. 109 of the British North America Act. Now, the Province, though it has conveyed this railway belt to the Dominion has not excised that tract of land from the Province; it remains part of the Provincial territory, subject to Provincial legislation. If it does not so remain, or if, in other words, the Dominion Government is to be treated in a better manner than an ordinary grantee from the crown, the argument carried to its legitimate conclusion would eliminate the railway belt from the bound-

(1) 1 Plow. 310 (2) 2 App. Cas. 166.
(3) 8 App. Cas. 767.

aries of the Province. In the different land laws from time to time passed by the colony and the Province, provision has invariably been made in reservation of the right of free miners to enter *sub modo* upon lands alienated by the crown, and to mine therein for the precious metals. Vancouver Island Land Proclamation, 1862, sec. 32, No. 9, Appendix Revised Statues ; Proclamation No. 15, Appendix, Revised Statutes, ss. 4 and 14 ; Pre-emption Consolidation Act, 1861, No. 21, Appendix Revised Statutes, ss. 16, 17 and 25 ; Land Ordinance, 1865, No. 24, Appendix, Revised Statutes, ss. 40 and 56 ; Land Ordinance, 1870 ; No. 144, Revised Statutes. ss. 48 and 50 ; " Land Act, 1875," ss. 80 and 81 ; " Land Act, 1884," ss. 64 and 65. So also the colonial and Provincial mining laws have made similar provision. " Gold Mining Ordinance, 1865," ss. 15 and 16 ; " Gold Mining Ordinance, 1867," ss. 22 and 23 ; and " Mineral Act, 1884," ss. 22 and 23. The Provincial land laws also authorize the taking of water from streams passing through private property for irrigating or manufacturing purposes, and prescribe that no person shall have the right to water, whether it flow naturally through or past his land or not, unless the right be recorded and exercised. These are Provincial laws applicable to all lands in the Province. Why is the Dominion not to be subject to them as regards the railway belt ? The title paramount is in us. Lands both within and without the belt are subject to escheat to the Province and not to the Dominion—for the belt is only conveyed to the Dominion in trust for railroad purposes ; and when the Dominion, in furtherance of that trust, have sold the land it loses further interest therein. The purchaser holds it from the Province, and subject to its title paramount. *Regina* v. *St. Catherines Milling Co.* (1).

(1) 10 O. R. 196 ; 13 Can. S. C. R. 577.

1886

ATTY. GEN. OF BRITISH COLUMBIA v. ATTY. GEN. OF CANADA.

Section 13 of the terms of union provides that the Local Government shall, from time to time, convey to the Dominion Government, in trust for the use and benefit of the Indians, tracts of land of such extent as it has hitherto been the practice of the British Columbia Government to appropriate for that purpose.

Here is an undertaking made with reference to a well-known policy, the establishment of reserves for Indians. But the British Columbia Government never reserved the minerals for the Indians, yet, consistently, the Dominion should contend that the word "lands" in this section mentioned also includes the precious metals.

It was because the railroad belt did not contain much land fit for settlement, and of that so fit much had been alienated by the Province, that the Legislature granted to the Dominion three and a half millions of acres of land in the Peace River country, mentioned in sec. 7 of the act referred to in the case.

In the same act there is, by sec. 3, a grant of lands on Vancouver Island to the Dominion, to aid in the construction of a line of railway from Esquimalt to Nanaimo. This grant is in express terms made to include all minerals, though it may be open to doubt whether the precious metals are included within the term "minerals." This express grant of the minerals excludes the notion that under the grant of the mainland belt, in which no mention of them is made, they were intended to be included. This argument is fortified by reason of the whole of this act, 46 Vic cap. 14, having been arranged between the Dominion and the Province; *vide* Sir Alexander Campbell's report and the memorandum of arrangement between him and the Premier of the province, dated 20th August, 1883, set out in the report.

The judicious administration of the minerals would

not produce revenue in excess of the cost of administration. Neither the mining laws of the province, nor the mining regulations of the Dominion, are calculated to produce more revenue than would be sufficient to cover the cost of administration; while, however, it is true that the more liberal the conditions are under which mining may be followed, the greater will be the number of persons engaged in that industry, with corresponding advantage indirectly to both the Dominion and the province.

It was not until the 8th of March, 1884, that the Dominion made any mining regulations (see p. 71, Orders in Council, Statutes of Canada, 1884). Most of those regulations are transcripts of the provincial mining laws, but in some particulars, notably in quartz claims, there is a great difference; and though it may be of no service to point out that the Provincial regulations are more conducive to the prosecution of mining industries than the Dominion, yet if the argument as to what is politic and convenient is to have any effect, it may be urged how extremely impolitic it would be to have a strip of land administered for mining purposes by one set of regulations and adjacent lands governed by another set. The limits of the 20-mile belt have not yet been ascertained, and miners have something else to do than to enquire whether a proposed location is to be governed by Dominion or Provincial legislation, or whether a mining claim is within or without the railroad belt.

The incongruity of such a dual system is more apparent when the Dominion regulations, 68-75, are considered. They profess to establish a court to determine mining disputes (involving, possibly, scores of thousands of dollars), when the constitution of such courts remains, under sec. 92 of the British North America Act, with the Province.

1886

ATTY. GEN. OF BRITISH COLUMBIA v. ATTY. GEN. OF CANADA.

Lastly, it is difficult to understand how the Dominion can receive the railway belt other than a *quasi* corporation, and for the purposes mentioned in the terms of union. The lands were provincial public lands vested in Her Majesty. They were transferred by the province without any words indicating the parting with any prerogative or sovereign incidents, and rights of escheat remain. The Queen cannot convey to herself, and no words are employed which even remotely suggest that Her Majesty's prerogative or sovereign rights in the railway belt or those general powers of legislation preserved to the province by section 92 of the British North America Act, have been transferred to the Dominion. The latter, it is submitted, could only have been done by an amendment to or modification of that act by the Imperial Parliament.

Burbidge Q.C. for the respondent :

The conveyance to the Dominion Government by sec. 2 of 47 Vic. ch. 14 was of "certain public lands" not for the use of the Canadian Pacific Railway Company, but "to be appropriated as the Dominion Govern- "ment may deem advisable," in other words to deal with them as they pleased. Mr. Campbell's report strengthens this view. British Columbia does not dispute that the Dominion Government is entitled to the base metals. The question on this appeal will have to be decided upon principle without reference to decided cases as there is no federal constitution similar to ours.

In the United States there is one case which can throw some light on this question. *Moore* v. *Smaw* (1) over ruling *Hicks* v. *Bell* (2). The question is also discussed in Rogers on Mines and Minerals (3). This is a question of title and not one of the relative powers

(1) 17 Cal. R. 200. (2) 3 Cal. 219.
(3) 2 Ed. Ch. 4 pp. 102, 124.

1886

ATTY. GEN. OF BRITISH COLUMBIA v. ATTY. GEN. OF CANADA.

of the Local Legislature and of the Dominion Parliament over the lands and minerals. It is possible such a question may arise, it was tried to put it as part of this case whether the mining regulations of British Columbia or of the Dominion should govern, but this was left out and we only want a decision upon the question of title.

The present case is not the case of a grant of land by the crown to a subject. The title to the land and to the minerals has at all times been in the crown; and the statute of British Columbia, 47 Vic. ch. 14, amounts to nothing more than a declaration that lands of which the crown theretofore was seized in the right of the Province of British Columbia, should thereafter remain vested in the crown in the right of the Dominion of Canada, and the interest in the Government of Canada would thereafter be as great as the interest of the government of British Columbia was before the passing of the act referred to.

In the grant of the lands in aid of the Esquimalt and Nanaimo Railway, the grant is stated to include all coal, coal oil, ores, stones, clay, marble, slate, mines, minerals and substances whatsoever thereupon, therein and thereunder.

The difference in the language used in the grants in the different cases, indicates that in the two cases of the Railway Belt and the Peace River lands it was the intention that the crown should stand seized thereof in as large an interest for the Government of Canada as that in which it had previously stood seized thereof for the Province of British Columbia; while in the case of the Esquimalt and Nanaimo Railway, in which the Government of Canada was simply a medium through which the lands would be transferred to the Esquimalt and Nanaimo Railway, it was not the intention to give the company any interest in the precious

1886

ATTY. GEN. OF BRITISH COLUMBIA v. ATTY. GEN. OF CANADA.

metals in the lands mentioned, and therefore the minerals which it was proposed to convey were enumerated, omitting the precious metals.

It is quite clear that none of the reasons on which "The Great Case of Mines" was decided can be urged in favor of the contention of British Columbia. It is therefore submitted that Her Majesty is now seized of the said lands in the right of the Dominion for an as large and the same estate as that of which she was formerly seized in the right of British Columbia, and that she does not stand seized thereof for the Dominion, subject to a sovereign or prerogative right of the Province of British Columbia in the precious metals.

The learned counsel cited and relied on Blanchard & Weeks on Mines and Minerals (1); Rogers on Mines and Minerals (2); Bainbridge on Mines and Minerals (3); Chitty on Prerogatives of the Crown (4).

Sir W. J. RITCHIE C.J.—By the 11th paragraph of the Order in Council, under which British Columbia was admitted into the union, it is provided:—

And the Government of British Columbia agree to convey to the Dominion Government, in trust, to be appropriated in such manner as the Dominion Government may deem advisable in furtherance of the construction of the said railway, a similar extent of public lands along the line of railway throughout its entire length of British Columbia (not to exceed, however, twenty (20) miles on each side of the said line) as may be appropriated for the same purpose by the Dominion Government from the public lands of the North-West Territories and the Province of Manitoba: Provided that the quantity of land which may be held under pre-emption right or by crown grant within the limits of the tract of land in British Columbia, to be so conveyed to the Dominion Government, shall be made good to the Dominion from contiguous public lands; and provided further, that until the commencement, within two years, as aforesaid, from the date of the Union, of the construction of the said railway, the Government of British Columbia shall not sell or alienate any further portions of the public lands of British Columbia in any other

(1) P. 82.
(2) P. 247.
(3) Pp. 122, 128, 367.
(4) P. 145.

1887

ATTY. GEN. OF BRITISH COLUMBIA v. ATTY. GEN. OF CANADA.

Ritchie C.J.

way than under right of pre-emption requiring actual residence of the pre-emptor on the land claimed by him. In consideration of the land to be so conveyed in aid of the construction of the said railway, the Dominion Government agree to pay to British Columbia, from the date of the Union, the sum of $100,000 per annum, in half-yearly payments in advance.

On the 8th of May, 1880, the Legislature of British Columbia passed the following statute:—

An act to authorize the grant of certain public lands on the mainland of British Columbia to the Government of the Dominion of Canada for Canadian Pacific Railway purposes:—

Her Majesty, by and with the advice and consent of the Legislative Assembly of the Province of British Columbia enacts as follows:—

1. From and after the passing of this act, there shall be, and there is hereby, granted to the Dominion Government for the purpose of constructing and to aid in the construction of the portion of the Canadian Pacific Railway line located between Burrard Inlet and Yellow Head summit, in trust, to be appropriated in such manner as the Dominion Government may deem advisable, a similar extent of public lands along the line of railway before mentioned (not to exceed twenty miles on each side of the said line), as may be appropriated for the same purpose by the Dominion from the public lands of the North West Territories and the Province of Manitoba, as provided in the order in council, section 11, admitting the Province of British Columbia into confederation. The land intended to be hereby conveyed is more particularly described in a despatch to the Lieutenant Governor from the Honourable the Secretary of State, dated the 31st day of May, 1878, as a tract of land lying along the line of said railway, beginning at English Bay or Burrard Inlet and following the Fraser River to Lytton; thence by the valley of the River Thompson to Kamloops; thence up the valley of the North Thompson, passing near to Lake Albreda and Cranberry, to Tête Jaune Cache; thence up the valley of the Fraser River to the summit of Yellow Head, or boundary between British Columbia and the North West Territories, and is also defined on a plan accompanying a further despatch to the Lieutenant Governor from the Secretary of State, dated the 23rd day of September, 1878. The grant of the said land shall be subject otherwise to the conditions contained in the said 11th section of the terms of union.

2. This act shall not affect or prejudice the rights of the public with respect to common and public highways existing at the date hereof within the limits of the lands hereby intended to be conveyed.

1887

ATTY. GEN. OF BRITISH COLUMBIA v. ATTY. GEN. OF CANADA.

Ritchie C.J.

3. This act may be cited as "An Act to grant public lands on the mainland to the Dominion in aid of the Canadian Pacific Railway, 1880."

In August, 1883, the Hon. Sir Alexander Campbell, Minister of Justice, visited British Columbia, and adjusted with the Provincial Government certain matters in difference between the two Governments, which adjustment led to the passage of the Provincial statute referred to in the case.

The following is a copy of the statute :—

47 Vic. ch. 14. An act relating to the Island Railway, the Graving Dock, and Railway Lands of the province.

[19*th December*, 1883.]

WHEREAS negotiations between the Governments of Canada and British Columbia have been recently pending, relative to delays in the commencement and construction of the Canadian Pacific Railway, and relative to the Island Railway, the Graving Dock, and the Railway lands of the province.

And whereas, for the purpose of settling all existing disputes and difficulties between the two governments, it hath been agreed as follows :—

The agreement is then set out at length and the act proceeds :—

Therefore Her Majesty, by and with the advice and consent of the Legislative Assembly of the Province of British Columbia, enacts as follows :—

1. The hereinbefore recited agreement shall be and is hereby ratified and adopted.

2. Section 1 of the Act of the Legislature of British Columbia, No. 11 of 1880, intituled "An act to authorize the grant of certain public lands on the mainland of British Columbia to the Government of the Dominion of Canada for Canadian Pacific Railway purposes," is hereby amended so as to read as follows :—

From and after the passing of this act there shall be, and there is hereby granted to the Dominion Government for the purpose of constructing and to aid in the construction of the portion of the Canadian Pacific Railway on the mainland of British Columbia, in trust, to be appropriated as the Dominion Government may deem advisable, the public lands along the line of railway before mentioned, wherever it may be finally located, to a width of 20 miles on each side of the said line, as provided in the Order in Council, sec. 11, admitting the Province of British Columbia into Confederation ; but nothing in this section contained shall prejudice the right of the

province to receive and be paid by the Dominion Government the sum of $100,000 per annum, in half yearly payments in advance, in consideration of the lands so conveyed, as provided in sec. 11 of the Terms of Union; provided always, that the line of railway before referred to shall be one continuous line of railway only, connecting the seaboard of British Columbia with the Canadian Pacific Railway now under construction on the east of the Rocky Mountains.

1887

ATTY. GEN. OF BRITISH COLUMBIA v. ATTY. GEN. OF CANADA.

Ritchie C.J.

3. There is hereby granted to the Dominion Government, for the purpose of constructing, and to aid in the construction of a railway between Esquimalt and Nanaimo, and in trust to be appropriated as they may deem advisable (but save as is hereinafter excepted), all that piece or parcel of land situate in Vancouver Island, described as follows:—

Then follows a description of the land and in addition No. 7:—

7. There is hereby granted to the Dominion Government three and a half million acres of land in that portion of the Peace River district of British Columbia lying east of the Rocky Mountains and adjoining the North West Territories of Canada, to be located by the Dominion in one rectangular block.

On the argument of this case it was not contended on the part of the Province of British Columbia that the lands mentioned in section 2 of the act of British Columbia, 47 Vic. ch. 14, did not pass to the Dominion government. The sole question raised and argued is, as to the right to the precious metals in, upon or under those lands.

The principle acted on in the construction of grants or conveyances to private persons, namely, that by a grant of land from the crown the precious metals would not pass unless the intention of the crown that they should pass was expressed in apt and precise words, is in no way, in my opinion, applicable to the present case. This is not to be looked upon as a transaction between the crown and a private individual, or to be governed by principles applicable to transfers between private parties. This was a statutory arrangement between the government of the Dominion and the government of British Columbia, in settlement of a constitutional question between the two governments, or rather,

1887

ATTY. GEN. OF BRITISH COLUMBIA v. ATTY. GEN. OF CANADA.

Ritchie C.J.

giving effect to, and carrying out, the constitutional compact under which British Columbia became part and parcel of the Dominion of Canada, and as a part of that arrangement the government of British Columbia relinquished to the Dominion of Canada, as represented by the Governor General, all right to certain public lands belonging to the crown, or to the Province of British Columbia as represented by the Lieutenant Governor; it was a statutory transfer or relinquishment by the Province of British Columbia of the right of that province in or to such public lands to the Dominion of Canada, to be managed, controlled and dealt with by the Dominion government in as full and ample a manner as the provincial government could have done, had no such act been passed, and, in my opinion, having the same force and effect as if the British North America Act, instead of declaring that the several provinces should retain all their respective public property, &c., and that all lands belonging to the several provinces should continue to belong to the several provinces, there had been engrafted thereon an exception of certain portions of such public lands which should belong to the Dominion government. This, it seems to me, is just what the legislature of British Columbia intended to do and did do. There was no necessity for any grant or conveyance; in fact there could be no grant or conveyance from the crown to the crown. The title to the land was never out of the crown, but was in the crown as represented by the Lieutenant Governor of British Columbia; and when the Legislature of British Columbia granted to the Dominion of Canada the interest the Province of British Columbia had in these public lands the right to deal with, and dispose of, the lands which belonged to the Province of British Columbia passed, by operation of the statute, to the use and control of the

1887

ATTY. GEN. OF BRITISH COLUMBIA v. ATTY. GEN OF CANADA.

Ritchie C.J.

Dominion government as represented by the Governor General, to be dealt with by the Dominion government in all respects as the Province of British Columbia could have done, the title to the lands, as I said before, continuing throughout in the crown, the disposal of the lands or the right of dealing with that title being simply transferred from the government of British Columbia to the government of the Dominion, and consequently whatever control over, or right or interest the Province of British Columbia had in, these lands when subject to the control of the government of British Columbia ceased by the legislation of British Columbia, and such control, rights and interest were thereby transferred to the government of Canada in as full and ample a manner as they had been held and enjoyed by the Province of British Columbia.

The only reservation or limitation on the Dominion Government in the appropriation of public lands along the line of railway is to be found in the second section of the act of British Columbia, passed on the 8th of May, 1880, which provides that "this act shall not "affect or prejudice the rights of the public with respect "to common or public highways existing at the date "thereof within the limits of the lands hereby intended "to be conveyed." Beyond this I can discover no exception or reservation, narrowing or limiting the right of the crown, as represented by the Dominion Government, from that possessed by the Government of British Columbia as representing the crown previous to the transfer, and therefore, in my opinion, the prerogative rights of the crown in such public lands simply continued in the crown as represented by the Dominion of Canada instead of in the crown as represented by the Government of British Columbia.

If we look at the negotiations which preceded the final arrangement as set out in the act it will, I think,

1887

ATTY. GEN. OF BRITISH COLUMBIA v. ATTY. GEN. OF CANADA.

Ritchie C.J.

appear tolerably clear, as a matter of fact, that it was the intention of the Government of British Columbia that the mines should pass to and be under the control of the Dominion Government. This appears to me to be indicated in the British Columbia minute of council, dated 10th February, 1883, and transmitted to the Government of Canada on the same day. The council having had under consideration the subject of the dry dock, railway lands and the Island railway, reported, after dealing with the dry dock question and after discussing the Island railway question and affirming the obligation of the Dominion Government to build it as a part of the Canadian Pacific Railway, the committee proceeded to discuss the subject of the railway lands of British Columbia, and the report *inter alia*, says :—

That the committee by an order in council of 4th May, 1880, stated that in the event of railway work being actively prosecuted the application of the Dominion government through Mr. Trutch contained in Mr. Trutch's letter of the 14th April, 1880, should receive a liberal consideration, and suggested that the lands which might be considered valueless for agricultural or economic purposes should be defined, and that the Dominion government should indicate the lands which might be desired in lieu of the valueless lands, and to state how the Dominion government proposed to deal with them. That Mr. Trutch replied to this order by a letter dated 8th May, 1880, to which no reply appears to have been given.

It is admitted that a very considerable portion of the lands included in the railway belt, and of the lands contiguous to those lands which have been dealt with by the province, consist of impassable mountains and rocky lands useless for agricultural purposes.

The committee feel satisfied that a settlement of this question will conduce to the best interests of the province and enable the country to settle up.

And the committee go on to say :—

That the land on the east coast of Vancouver Island has been continuously withheld from settlement since July, 1873, up to the present time, and the development of that fertile tract of country abounding in mineral wealth has been retarded to an incalculable extent, and the commercial and industrial interests of an important section of the province have been prejudicially affected to a serious

1887

ATTY. GEN. OF BRITISH COLUMBIA v. ATTY. GEN. OF CANADA.

Ritchie C.J

degree.

The committee therefore recommend as a basis of settlement between the Governments of the Dominion and the province of the railway and railway lands question. that the Dominion Government be urgently requested to carry out its obligation to the province by commencing at the earliest possible period the construction of the Island Railway, and complete the same with all practicable despatch; or by giving to the province such fair compensation for failure to build such Island railway as will enable the government of the province to build it as a provincial work and open the east coast lands for settlement and that the Dominion Government be earnestly requested to take over the Graving Dock at Esquimalt, upon such terms as shall recoup and relieve the province of all expense in respect thereof, and to complete and operate it as a Federal work, or as a joint Imperial and Dominion work, and the committee further recommend that in lieu of any expensive and dilatory method of ascertaining the exact acreage of lands alienated within the railway belt and otherwise rendered unavailable, there be set apart for the use of the Dominion, a tract of land of 2,000,000 acres in extent to be taken up in blocks of not less than 500,000 acres in such localities on the main land as may be agreed upon, the land to be taken up and defined within two years, and that it be one of the conditions that the Dominion Government in dealing with lands in this province shall establish a land system equally as liberal both as to mining and agricultural industries, as that in force in this province at the present time, and that no delay take place in throwing open the land for settlement.

The committee advise that the recommendations be approved, and that a copy be forwarded to the Honorable Secretary of State for Canada.

What is the meaning of this last paragraph if it is not that the Government of British Columbia knew and intended that, in dealing with the public lands in the province, the Dominion Government was to have the control of such public lands including both mining and agricultural industries connected therewith? And how could they deal with the mining industries if no interest in, or control over, the mines passed to the Dominion Government? That apart from this when the public lands of the province, set apart by the Legislation of the Province of British Columbia for the construction of the Canadian Pacific Railway, ceased by such Legislation to belong to that province that

1887

ATTY. GEN. OF BRITISH COLUMBIA v. ATTY. GEN. OF CANADA.

Ritchie C.J.

province necessarily ceased to have any interest in the mines under these lands, because the province only obtained an interest in the mines by reason of their being part and parcel of the public lands of the province; when therefore, the public lands in question ceased to be the public lands of the province the mines forming part of such public lands, as a necessary consequence, ceased to belong to the province. No doubt the mines might have been reserved to the province, but such not having been the case they passed to the Dominion as part and parcel of the public lands granted to them by the Province of British Columbia.

FOURNIER J.—La question soulevée en cette cause est de savoir à qui du gouvernement fédéral ou du gouvernement local de la Colombie-Anglaise appartient la propriété des mines de métaux précieux dans les terrains octroyés par le dernier gouvernement au premier, pour la construction du chemin de fer Pacifique du Canada.

S'il s'agissait ici des droits de la Couronne aux mines d'or et d'argent dans une concession faite à un particulier, la question ne souffrirait aucune difficulté. Elle a été réglée depuis longtemps par les décisions, en Angleterre, qui sont considérées comme faisant loi à cet égard. et particulièrement par celle de *The Great Case of Mines* (1) Voir la même cause discutée dans l'édition de 1878 par Brown, du traité de Law of Mines and Minerals (2) de Bainbridge.

Dans une cause de *Wooley* v. *The Attorney General* (3) of Victoria, Sir James W. Colville en rendant le jugement s'est exprimé ainsi : —

Now, whatever may be the reasons assigned in the case of Plowden for the rule thereby established, and whether they approve themselves or not to modern minds, it is perfectly clear that ever since that decision it has been settled law in England that the prerogative

(1) Plow. 310. (2) Pp. 122, 128.
(3) 2 App. Cas. 163, 168.

1887

ATTY. GEN. OF BRITISH COLUMBIA v. ATTY. GEN. OF CANADA.

Fournier J.

right of the crown to gold and silver found in mines will not pass under a grant of land from the crown, unless by apt and precise words the intention of the crown be expressed that it shall pass

La loi anglaise à cet égard fait indubitablement partie de la loi de la Colombie. Ainsi le principe énoncé dans ce jugement "that the prerogative right "of the crown to gold and silver found in mines will "not pass under grant of land from the crown, unless "by apt and precise words the intention of the crown "be expressed that it shall pass," doit recevoir ici son application.

Dans le fait que la concession n'est pas faite à un particulier, mais en apparence à la Couronne par la Couronne, on a cru trouver un argument qui donne la solution de la question. En effet, a-t-on dit, il serait absurde que Sa Majesté pût traiter ou contracter avec elle-même. Le savant conseil de l'intimé prétend que Sa Majesté étant toujours investie du droit aux terres et aux mines, la 47 Vict. ch. 14 n'a pas d'autre effet que celui de déclarer que les terres dont la Couronne était jusqu'alors investie au nom de la Colombie-Anglaise seraient à l'avenir investies (*vested*) dans la Couronne pour la Puissance du Canada. C'est tout simplement énoncer la question soumise et non la résoudre.

Dans notre système de gouvernement Sa Majesté, comme chef de l'exécutif fédéral et provincial, doit être considérée comme présente dans chaque gouvernement où elle possède les droits et prérogatives qui lui sont attribués par l'Acte de l'Amérique Britannique du Nord. Comme chef de ces divers gouvernements elle ne doit y être considérée non comme présente en sa qualité de Reine de l'Empire Britannique, mais seulement comme la Reine, n'exercant que les droits et prérogatives qui lui sont attribués par les lois et la constitution de chaque gouvernement. Il n'est pas vrai en pratique de dire que Sa Majesté, comme chef de l'exécutif fédéral, est la même personnalité légale que Sa Majesté comme chef du pouvoir exécutif provincial, car on ne

1887

ATTY. GEN. OF BRITISH COLUMBIA v. ATTY. GEN. OF CANADA.

Fournier J.

peut pas la séparer des attributions particulières et souvent contradictoires que la constitution lui reconnaît. Partant il n'y a aucune anomalie et encore moins d'absurdité à dire que la Reine, représentée par l'exécutif provincial de la Colombie, puisse traiter ou contracter avec la Reine représentée par l'exécutif fédéral, sans que, par ce fait, aucun de ces gouvernements ne soit exposé à perdre ou gagner un avantage quelconque. Ils ne seront liés que par les conventions arrêtées entre eux. Elle les représente tous deux dans les limites de leurs pouvoirs respectifs, et dans le fait ce sont les deux gouvernements qui traitent ensemble avec l'assentiment de Sa Majesté.

La proposition générale absolue et sans restriction énoncée par le savant conseil de l'intimé, que "The "title to land and to the minerals has at all times been "in the crown," pourrait être vraie s'il ne s'agissait que de propriétés appartenant à Sa Majesté en vertu de sa prérogative royale, mais appliquée aux propriétés dont Sa Majesté est investie en vertu d'un statut provincial, elle n'est vraie qu'avec la modification des restrictions apportées par le statut ou par celles que pourrait y mettre la législation de la province.

Par la sec. 92, ss. 5, de l'Acte de l'Amérique Britannique du Nord, la vente et l'administration des terres publiques et des bois et forêts appartiennent à la province. La section 109 va plus loin et déclare que non-seulement les terres, mais que les mines et minéraux et *royautés* appartiendront aussi aux provinces. Le langage de ces sections fait voir que le législateur ne pensait pas que la propriété des mines aurait été tacitement transférée avec le sol, puisqu'il en a fait le sujet d'une disposition à part. En outre par la décision de cette cour, confirmée par le Conseil privé, dans la cause de *Mercer* v. la *Reine* (1), l'expression *royauté* dans la section 109 a été interprétée comme comprenant les

(1) 5 Can. S. C. R, 538.

1887

ATTY. GEN. OF BRITISH COLUMBIA v. ATTY. GEN. OF CANADA.

Fournier J.

prérogatives royales au sujet de la propriété. Les mines d'or et d'argent appartiennent donc par l'acte constitutionnel aux provinces dont les gouvernements respectifs ont seuls le droit d'exercer la prérogative royale à cet égard. Cette prérogative ne peut en conséquence être cédée ou modifiée que par un acte du pouvoir législatif ou exécutif des gouvernements provinciaux aliénant en termes précis et spéciaux cette prérogative.

Dans le traité intervenu entre les deux gouvernements au sujet de l'entrée de la Colombie dans la Confédération Canadienne, ou dans la législation respective des deux gouvernements au sujet de l'octroi des terres pour aider à la construction du chemin de fer du Pacifique, trouve-t-on quelque dispositions ou expressions comportant une cession expresse des mines d'or et d'argent, en même temps que les terres. Pour s'en assurer il est nécessaire de référer aux principales transactions des deux gouvernements à ce sujet.

Par la sec. 11 des conditions arrêtées par les deux gouvernements, le gouvernement fédéral s'est obligé, dans deux ans de l'acte d'union, à faire commencer la construction du chemin de fer du Pacifique qui était une des conditions mises par la Colombie à son entrée dans la Confédération.

De son côté le gouvernement de la Colombie, pour aider à la construction de ce chemin, s'obligeait dans les termes suivants :—

To convey to the Dominion Government, in trust, to be appropriated in such manner as the Dominion Government may deem advisable in furtherance of the construction of the said railway, a similar extent of public lands along the line of railway, throughout its entire length in British Columbia, not to exceed, however, twenty (20) miles on each side of said line, as may be appropriated for the same purpose by the Dominion Government from the public lands in the North-West Territories and the Province of Manitoba: Provided, that the quantity of land which may be held under pre-emption right or by crown grant within the limits of the tract of land in British Columbia to be so conveyed to the Dominion Government

1887

ATTY. GEN. OF BRITISH COLUMBIA v. ATTY. GEN. OF CANADA.

Fournier J.

shall be made good to the Dominion from contiguous public lands; and, provided further, that until the commencement, within two years as aforesaid from the date of the union, of the construction of the said railway, the Government of British Columbia shall not sell or alienate any further portions of the public lands of British Columbia in any other way than under right of pre-emption, requiring actual residence of the pre-emptor on the land claimed by him. In consideration of the land to be so conveyed in aid of the construction of the said railway, the Dominion Government agree to pay to British Columbia, from the date of union, the sum of one hundred thousand dollars per annum, in half-yearly payments in advance.

Plus tard, la législature de la Colombie, pour donner effet à son obligation mentionnée dans la sec. 11 ci-dessus citée, a passé l'acte 43 Vict. ch. 11, contenant la disposition suivante :—

The lands being granted to the Dominion Government for the purpose of constructing and to aid in the construction of the portion of the Canadian Pacific Railway line located between Burrard Inlet and Yellow Head Summit, in trust, to be appropriated in such manner as the Dominion Government may deem advisable.

Par la 2e sec. de l'acte 47 Vict. ch. 14, de la Colombie, il est décrété ainsi qu'il suit :—

From and after the passing of this Act there shall be, and there is hereby granted to the Dominion Government for the purpose of constructing and to aid in the construction of the portion of the Canadian Pacific Railway on the mainland of British Columbia, in trust, to be appropriated as the Dominion Government may deem advisable, the public lands along the line of the railway before mentioned, wherever it may be finally located, to a width of twenty miles on each side of the said line, as provided in the Order in Council, section 11, admitting the Province of British Columbia into Confederation.

Le proviso qui termine cette section ne peut aucunement affecter la question sous considération.

Par ce dernier acte, sec. 3, il est aussi accordé au gouvernement fédéral comme aide à la construction du chemin de fer d'Esquimalt à Nanaïmo, en fidéicommis, une certaine étendue de terre y décrite avec cette déclaration :—

And including all coal, coal oil, ores, stones, clay, marble, slate, mines, minerals and substances whatsoever thereupon, therein and thereunder.

La sec. 7 en accorde une autre dans les termes suivants :—

There is hereby granted to the Dominion Government, three and a half million acres of land in that portion of the Peace River District of British Columbia lying east of the Rocky Mountains and adjoining the North-West Territory of Canada, to be located by the Dominion in one rectangular block.

Cette législation a été adoptée par le parlement fédéral en vertu de l'acte 47 Vict. ch. 6. La sec. 11 de cet acte pourvoit à l'administration des terres dans cette région le long de la ligne du chemin de fer, et la sec. 12 à celle des terres dans la région de la Rivière à la Paix.

A part de la correspondance entre les deux gouvernements au sujet des retards et des difficultés survenus dans l'exécution des conditions de la sec. 11 du traité, tels sont les principaux actes législatifs à consulter pour définir la nature de l'octroi fait par le gouvernement de la Colombie au gouvernement fédéral.

La Colombie faisant de la construction du chemin de fer du Pacifique une des principales conditions de son entrée dans la Confédération, a fait, comme c'est assez l'usage, des concessions de terres, en fidéicommis, au gouvernement fédéral pour en assurer la construction. Bien que cette condition se trouve dans un traité où il s'agissait de grands intérêts politiques et gouvernementaux, il n'en est pas moins évident que la transaction au sujet des terres n'est que la cession d'un avantage matériel pour assurer la construction du chemin de fer et qu'elle doit être interprétée d'après les termes qui ont établi ce contrat, sans égard aux autres parties de ce traité qui ont rapport aux arrangements politiques entre les deux gouvernements. On ne peut en conclure, comme le fait le savant conseil de l'intimé, que le statut de la Colombie 47 Vict. ch. 14 n'est au fond qu'une déclaration que les terres, dont la Couronne était saisie pour le bénéfice de la Colombie, seraient à l'avenir investies dans la Couronne pour le bénéfice du

1887

ATTY GEN. OF BRITISH COLUMBIA v. ATTY. GEN. OF CANADA.

Fournier J.

gouvernement fédéral et que l'intérêt de ce dernier gouvernement serait à l'avenir, aussi grand que celui de la Colombie après la passation de cet acte. Ceci n'est qu'une induction qu'aucune expression du statut ne peut justifier. Il faut donner aux termes employés toute leur signification légale et rien de plus. L'idée qu'un gouvernement s'est trouvé substitué entièrement aux droits de l'autre dans les terres octroyées n'est qu'une pure supposition que repousse les expressions employées pour faire la concession.

Dans le traité, sec. 11, l'obligation est "to convey to "Dominion Government, &c., &c., a similar extent of "public lands," dans l'acte 43 Vict. ch. 11, "lands being "*granted* to the Dominion for the purpose, &c., &c.," dans la 47e Vict. ch. 14 (Colombie) sec. 2, "there shall "be, and there is hereby granted to the Dominion Gov- "ernment, in trust, &c., &c., to be appropriated as the "Dominion Government may deem advisable, the *public* "*lands* along the line of the railway, &c., &c." Dans la sec. 7 de ce dernier acte les expressions sont: "There is hereby granted to the Dominion Government, three and a half million acres of land, &c., &c." On voit que dans toutes les expressions employées pour faire l'octroi, il n'en est pas une seule qui comporte l'idée qu'il y ait autre chose que la terre qui soit octroyée. Toutes les expressions sont claires, précises, n'accordant qu'une seule chose, la terre, et ne laissent aucune place au doute. D'après le principe reconnu du droit anglais que l'octroi de la terre n'entraîne pas la concession de la prérogative royale au sujet des mines, il n'y a donc pas eu dans le cas présent d'octroi des mines. Ce principe doit être appliqué à l'interprétation des octrois faits par statut, de même qu'à ceux faits administrativement à des particuliers, car il est de principe que la prérogative royale n'est jamais affectée par un statut, à moins qu'il n'en soit fait une mention expresse. Dans tous les statuts cités, à l'exception d'un, et dans

1887

ATTY. GEN. OF BRITISH COLUMBIA v. ATTY. GEN. OF CANADA.

Fournier J.

tous les documents officiels concernant cette affaire, on ne trouve rien qui puisse justifier la prétention que la prérogative royale devait ou pouvait être affectée par les octrois de terres. Deux principes indiscutables s'opposent donc à ce que les mines de métaux précieux soient considérées comme ayant passé au gouvernement fédéral,—d'abord, le principe que l'octroi de terres n'entraîne jamais la prérogative au sujet des mines, ensuite, que la prérogative ne peut jamais être affectée que par une loi qui en fait mention spéciale.

J'ai dit qu'il n'y avait qu'une seule exception dans le langage employé par les divers statuts, c'est celle que l'on trouve dans la sec. 3 de la 47 Vic. ch. 14 (Colombie), au sujet de l'octroi de terres pour le chemin de fer d'Esquimalt à Nanaimo, elle est en ces termes :—

And including all coal, coal oil, ores, stones, clay, marble, slate mines, minerals, and substances whatever thereupon, therein and thereunder.

Si l'on pouvait interpréter ces termes comme suffisants pour opérer la concession des mines d'or et d'argent, cela prouverait du moins que la législature savait en faire la différence, et que lorsqu'elle voulait les concéder elle employait un langage suffisant à cet effet. Cette exception ne ferait que confirmer la règle que la propriété des mines ne peut être transférée que par une concession spéciale. Mais elle n'a même pas été faite par cette disposition.

Si l'on peut référer à la correspondance qui a amené un arrangement final entre les deux gouvernements, on acquerra la conviction que l'idée de réclamer les mines d'or et d'argent est de date récente, et qu'elle n'existait pas lors des négociations qui ont eu lieu au sujet des divers octrois en question. Le but, en effet, était d'obtenir une aide efficace pour la construction du chemin, et pour cela on comptait sur des terres d'une valeur réelle, et non pas sur une valeur aléatoire comme celle des mines. Aussi voit-on dans divers documents cités qu'il y est toujours question de terres

1887

ATTY. GEN. OF BRITISH COLUMBIA v. ATTY. GEN. OF CANADA.

Fournier J.

available for farming or other purposes. Dans la lettre de M. Trutch, agent du gouvernement fédéral auprès du gouvernement de la Colombie, les terres dont il est question sont toujours décrites comme *available for farming or other valuable purpose*. Cette dernière qualification *or other valuable purposes* ne peut pas comprendre les mines d'or puisqu'il est de principe qu'elles ne sont transférées que par des expressions expresses, mais les mots *other valuable purposes* qui doivent recevoir leur application pourraient sans doute comprendre les terres favorables à l'exploitation des bois, les mines de charbon, et carrières, etc., et ranches, mais non les mines d'or et d'argent. Dans le ch. 14 de l'acte de 1883, mettant à la disposition des colons des terres dans l'île de Vancouver, il est fait une distinction entre les terrains miniers, *coal and other minerals*, et les terres à bois. Ces terrains pourraient aussi, sans doute, être compris dans les termes *other valuable purposes*. Quoi qu'il en soit, on ne trouve dans aucune des dispositions législatives sur ce sujet des expressions suffisantes pour opérer le transport de la prérogative royale au sujet des mines de métaux précieux, et encore moins en trouve-t-on qui permettent de conclure que l'autorité législative et exécutive de la Colombie dans les territoires où sont situées les terres octroyées a été passée au gouvernement fédéral par suite d'une transaction d'intérêts purement matériels, comme celle du subside au Pacifique. Pour opérer un tel transfert du pouvoir politique il ne faudrait rien moins qu'un acte impérial modifiant les limites de la Colombie Anglaise telles que définies au moment de son entrée dans la Confédération canadienne, et il n'en existe certainement pas.

Quoique le jugement en cour d'Echiquier ait été rendu par moi, je suis tout de même d'avis qu'il doit être infirmé. Je dois ajouter que, du consentement des parties intéressées, ce jugement a été rendu sans audition, et purement par forme, afin de leur permettre de porter sans délai cette cause devant la cour Suprême.

1887

ATTY. GEN. OF BRITISH COLUMBIA v. ATTY. GEN. OF CANADA.

Henry J.

HENRY J.—This case has been presented to obtain the decision of this court as to the title to gold, deposits of silver and other precious metals in lands in British Columbia known as the twenty mile belt on each side of the Canadian Pacific Railway. In the case of *The Queen* v. *Farwell* (1) and in four other cases tried before me at Victoria in 1886, I decided that the title to the lands comprising the belt in question was not vested in Her Majesty the Queen, and being still of that opinion I must necessarily decide that the deposits of gold, silver, and other precious metals are not vested in Her Majesty for the use and benefit of Canada, but in Her Majesty for the use and benefit of British Columbia. The case of *The Queen* v. *Farwell* appealed from my judgment to this court has been argued, and is now pending for judgment. In the special case therein my judgment will be found, and I refer to it for my reasons and conclusions in that case which govern the decision of this.

TASCHEREAU J.—I concur with Mr. Justice Gwynne.

GWYNNE J.—There can be no doubt that the right of Her Majesty to the precious metals does not depend upon her being seized of the lands in which they are found, her right to them whether they be in her own lands or in the land of a subject is by the same title, namely, by prerogative royal in right of her crown, but such her title or the rule that the transfer of land, *eo nomine*, by grant from the crown to a subject, does not transfer to the grantee any interest in the precious metals which may be in the land so granted, has not, in my opinion, any application in the determination of the question arising in the present case. What was the intention of the parties to the contract under consideration is the question before us, and that must be gathered from the nature of the transaction and of the

(1) The next reported case.

1887

ATTY. GEN. OF BRITISH COLUMBIA v. ATTY. GEN. OF CANADA.

Gwynne J.

instruments in which the contract is contained and the circumstances under which and the parties between whom such instruments were framed.

By the 146 section of the British North America Act, it was enacted that it should be lawful for the Queen, by and with the advice of Her Majesty's most honorable Privy Council on addresses from the Houses of the Parliament of Canada, and from the houses of the respective legislatures of the colonies or provinces of Newfoundland, Prince Edward Island and British Columbia, to admit those colonies or provinces or any of them into the union constituted by the act the Dominion of Canada, on such terms and conditions as are in the addresses expressed, and as the Queen thinks fit to approve, subject to the provisions of the British North America Act, and that the provisions of any order in council in that behalf should have effect as if they had been enacted by the parliament of the United Kingdom of Great Britain and Ireland.

The effect of this enactment was, in my opinion, to constitute the Province of British Columbia, represented by its Legislative Council, an independent power to the extent of enabling it to negotiate a treaty with the Dominion of Canada, represented by the two Houses of the Parliament of Canada, as another independent power, and together to agree upon terms upon which the Province of British Columbia should be received into and become part of the Dominion of Canada, which treaty, if and when approved of and ratified by Her Majesty in her Privy Council, should have the force and effect of an act of the Imperial parliament.

The transaction thus authorized being of the nature of a treaty between these two independent bodies, the Province of British Columbia represented by its Legislative Council on the one part and the Dominion of

1887

ATTY. GEN. OF BRITISH COLUMBIA v. ATTY. GEN. OF CANADA.

Gwynne J.

Canada represented by the House of Commons and the Senate of Canada on the other; and Her Majesty being in no wise concerned in it, save as ratifying and approving the terms of the treaty when agreed upon by and between the parties interested, the case must be regarded not at all in the light of a grant of land by the crown to a subject, but in the light of a treaty between the two independent contracting parties upon the faith of which alone the Province of British Columbia was received into and became part of the Dominion of Canada, and being given by the British North America Act the force of an act of parliament. The addresses of the Legislature of British Columbia and of the House of Commons and Senate of Canada respectively to Her Majesty in pursuance of the above section of the British North America Act show the proceedings taken by the province and the dominion respectively for the purpose of negotiating a treaty of union.

The address of the Legislative Council of British Columbia is as follows:—

To the Queen's most excellent Majesty, most gracious Sovereign:

We, your Majesty's most dutiful and loyal subjects, the members of the Legislative Council of British Columbia in Council assembled, humbly approach your Majesty for the purpose of representing that during the last session of the Legislative Council the subject of the admission of the colony of British Columbia into the union or Dominion of Canada was taken into consideration, and a resolution on the subject was agreed to embodying the terms upon which it was proposed that this colony should enter the union.

That after the close of the session delegates were sent by the government of this colony to Canada to confer with the government of the Dominion with respect to the admission of British Columbia into the union upon the terms proposed.

That after considerable discussion by the delegates with the members of the government of the Dominion of Canada the terms and conditions hereinafter specified were adopted by a committee of the Privy Council of Canada and were by them reported to the Governor General for his approval.

That such terms were communicated to the government of this colony by the Governor General of Canada in a despatch dated July

1887

ATTY. GEN. OF BRITISH COLUMBIA v. ATTY. GEN. OF CANADA.

Gwynne J.

7th, 1870, and are as follows:—

1. Canada shall be liable for the debts and liabilities of British Columbia existing at the time of the union.

The 2nd to the 10th paragraphs inclusive it is not necessary to set out.

11. The government of the Dominion undertake to secure the commencement simultaneously within two years from the date of the union, of the construction of a railway from the Pacific towards the Rocky Mountains, and from such point as may be selected east of the Rocky Mountains towards the Pacific to connect the seaboard of British Columbia with the railway system of Canada, and further to secure the completion of such railway within ten years from the date of the union.

And the government of British Columbia agree to convey to the Dominion government, in trust, to be appropriated in such manner as the Dominion government may deem advisable in furtherance of the construction of the said railway a similar extent of public lands along the line of railway throughout its entire length in British Columbia not to exceed, however, twenty (20) miles on each side of the said line as may be appropriated for the same purpose by the Dominion government from the public lands in the North West Territory and the Province of Manitoba; Provided that the quantity of land which may be held under pre-emption right or by crown grant within the limits of the tract of land in British Columbia to be so conveyed to the Dominion government shall be made good to the Dominion from contiguous public lands; and provided further that until the commencement within two years as aforesaid from the date of the union, of the construction of the said railway, the government of British Columbia shall not sell or alienate any further portions of the public lands of British Columbia in any other way than under right of pre-emption requiring actual residence of the pre-emptor on the land claimed by him.

In consideration of the land to be so conveyed in aid of the construction of the said railway the Dominion government agree to pay British Columbia from the date of the union the sum of $100,000 per annum in half yearly payments in advance.

The 12th to the 14th paragraphs it is unnecessary to set out. The address then proceeds:—

That such terms have proved generally acceptable to the people of this colony.

That this council is therefore willing to enter into union with the Dominion of Canada upon such terms, and humbly submits that under the circumstances it is expedient that the admission of this colony into such union as aforesaid should be effected at as early a date as may be found practicable under the provisions of the 146th

section of the British North America Act, 1867.

We, therefore, humbly pray that your Majesty will be graciously pleased by and with the advice of your Majesty's most honourable Privy Council under the provisions of the 146th section of the British North America Act, 1867, to admit British Columbia into the union or Dominion of Canada on the basis of the terms and conditions offered to this colony by the government of the Dominion of Canada hereinbefore set forth.

Similar addresses having been presented to Her Majesty from the House of Commons and the Senate of Canada, Her Majesty was pleased by an order in council at the court at Windsor, dated the 16th May, 1871, to approve of the said terms and conditions, and it was thereby ordered and declared by Her Majesty by and with the advice of her Privy Council, that from and after the 20th day of July, 1871, the said colony of British Columbia should be admitted into and become part of the Dominion of Canada upon the terms and conditions set forth in the said addresses, copies of which are annexed to the said order in council.

This language of the 11th article of the treaty with reference to the transfer from British Columbia to the Dominion of Canada of this tract of land never could be literally complied with, that is to say that by no species of conveyance could the land be conveyed to the Dominion government as grantees thereof. That government, from the nature of the constitution of the Dominion, could not take lands by grant or otherwise, nor could it have the power of appropriation of the tract in question, otherwise than under the direction and control of the parliament of Canada. When therefore, as part of the terms upon which British Columbia was received into the Dominion, it was agreed that a tract of the public lands of the Province of British Columbia should be conveyed in such manner as to be subjected to being appropriated as the Dominion government may deem advisable, what was intended plainly was, as it appears to me, that the beneficial

1887

ATTY. GEN. OF BRITISH COLUMBIA v. ATTY. GEN. OF CANADA.

Gwynne J.

interest which the province had in the particular tract of land as part of the public domain of the province should be divested, and that the tract, although still remaining within the Province of British Columbia, should be placed under the control of the Dominion parliament as part of the public property of the Dominion for the purpose of being appropriated by the Dominion government, in such manner as that government should deem advisable in furtherance of the construction of the railway which that government had undertaken to construct, subject, however, to a payment for ever by the Dominion to the Provincial government of $100,000 per annum by half yearly payments in advance. That this was the view entertained by the Dominion government and parliament as to this provision of the treaty of union entered into by them with the Province of British Columbia is apparent from an act of the parliament of Canada passed in 1875, 38 Vic. ch. 51, of the passing of which act the Province of British Columbia must have become aware, by which it was enacted that the Dominion Land Acts of 1872 and 1874 and the several provisions thereof should be, and were thereby extended, and should apply to all lands to which the government of Canada were then, or should at any time become entitled, or which were or should be subject to the disposal of parliament, in the Province of British Columbia.

It is now contended on the part of British Columbia that the 11th article of the treaty of union does not cover, and was not intended to cover, the precious metals in the tract of land in question; and this contention is based wholly upon the rule applied to a grant of land, *eo nomino*, by the crown to a subject, that under such a grant the precious metals do not pass. That rule, as I have already said, has not, in my opinion, any application to a contract of the nature of

the treaty under consideration made between two independent powers of such constitutional character as are the Province of British Columbia and the Dominion of Canada. The question here is not between the crown and a subject, so that no question arises as to the prerogative rights of the crown. Indeed, if such a narrow construction should be put upon this treaty upon the faith of which British Columbia was received into the union, the chief benefit expected to accrue to the Dominion under the clause under consideration would be disappointed for as the Canada Pacific Railway through almost its whole extent within the Province of British Columbia passes through and across the two ranges of the Rocky Mountains, the lands on either side of which, except when the railway lies in the valleys of the mountain streams, are wholly unsuitable for agricultural purposes, and have little or no value other than that which consists in the precious metals which are believed to abound in them; if those metals should be regarded as excepted from the operation of the treaty, the exception would effectually deprive the Dominion Government of all benefit from the tract of land so declared to have been intended to be subjected to appropriation in such manner as the Dominion Government should deem advisable, and would make the 11th article of the treaty in so far as the Dominion in this tract is concerned quite illusory.

The contention of British Columbia is that the precious metals in the tract of land referred to in the 11th article are the property of the province, notwithstanding the treaty and that the search for them and all things relating to the prospecting for, and the opening and working of the mines are to be governed by the laws of British Columbia relating to gold mining, and for the benefit of the Provincial Government. It will be convenient here to refer to those laws, for the purpose of seeing what benefit from the tract in question

1887

ATTY. GEN. OF BRITISH COLUMBIA v. ATTY. GEN. OF CANADA.

Gwynne J.

would remain to be enjoyed by the Dominion after the exercise by the Provincial Government of the powers vested in them by the laws relating to gold mining if the precious metals in the tract in question be reserved as the property of the province.

By an act of the Provincial Legislature passed in 1867 to amend the land relating to gold mining, it is enacted: "That the Governor of the Province may from time to time appoint such persons as he should think proper to be Chief Gold Commissioner and Gold Commissioners either for the whole province or any particular districts therein. That every gold commissioner upon payment of the sums in the act mentioned to the use of the province should deliver to any person over the age of 16 years applying for the same a certificate to be called a Free Miner's certificate entitling the person to whom it is given to all the rights and privileges by the act conferred on Free Miners. That such Free Miners certificate shall, at the request of the applicant be granted, and continue in force for one year or three years from the date thereof upon payment by such applicant to the use of the province of the sum of five dollars for one year and fifteen dollars for three years. That every free miner shall during the continuance of his certificate have the right to enter upon any of the waste lands of the crown not for the time being occupied by any other person; but in the event of such entry being made on lands already lawfully occupied for other than mining purposes, previous to entry free compensation shall be made to the occupant or owner for any loss or damage he may sustain by reason of any such entry, such compensation to be determined by the nearest stipendiary magistrate or gold commissioner with or without a jury of not less than five.

That no person shall be recognized as having any right or interest in, or to any mining claim or ditch or

any of the gold therein unless he shall be, or in case of disputed ownership unless he shall have been at the time of the dispute arising, a free miner.

That all claims must be accorded annually, but any free miner shall upon application be entitled to record his claim for a period of two or more years upon payment of the sum of two dollars and fifty cents for each year included in such record. That the interest which a miner has in a claim shall be deemed to be a chattel interest equivalent to a lease for such period, as the same may have been recorded renewable at the end thereof.

That it shall be lawful for the Gold Commissioner upon being so requested to mark out for business purposes or gardens, on or near any mining ground, a plot of ground of such size as he shall deem advisable subject, however, to all the existing rights of free miners, then lawfully holding such mining ground, and any buildings erected or improvements made thereon for any such purpose, shall in every such case be erected and made at the risk of the person erecting and making the same; and they shall not be entitled to any compensation for damage done thereto by such free miners so entitled in working their claims *bonâ fide*.

That it shall also be lawful for the Gold Commissioner upon being so requested, to mark out for business purposes or gardens on or near any mining ground not previously pre-empted a plot of land of such size as he shall deem advisable to be held, subject to all the rights of free miners to enter upon and use such lands for mining purposes upon reasonable notice to quit being given to the occupier, such notice to be subject to the approval of the Gold Commissioner; and further upon due compensation for any crops thereon, and for the buildings and improvements erected on such plots, such compensation to be assessed by the Gold Commissioner previous to entry, with or without

1887

ATTY. GEN. OF BRITISH COLUMBIA v. ATTY. GEN. OF CANADA.

Gwynne J

a jury of not less than three; and that a monthly rent of five dollars shall in every such case be payable by the grantees of such plot or their assigns to the Gold Commissioners.

That every registered Free Miner shall be entitled to the use of so much of the water naturally flowing through or past his claim, and not already lawfully appropriated, as shall, in the opinion of the Gold Commissioner, be necessary for the due working thereof. That the size of claims should be as follows: For "Bar Diggings" a strip of land 100 feet wide at high water mark and, thence, extending into the river to its lowest water level.

For "Dry Diggings" 100 feet square. "Creek Claims" one hundred feet long measured in the direction of the general course of the stream and extending in width from base to base of the hill on each side Where the bed of the stream or valley is more than 300 feet in width each claim shall be only 50 feet in length, extending 600 feet in width; when the valley is not 100 feet wide the claims shall be 100 feet square.

"Bench Claims" shall be 100 feet square.

The Gold Commisssoner shall have authority in cases where benches are narrow to mark the claims in such manner as he shall think fit, so as to include an adequate claim.

Every claim situated on the face of any hill and fronting on any natural stream or ravine shall have a base line or frontage of 100 feet, drawn parallel to the main direction thereof. Parallel lines drawn from each end of the base line, at right angles thereto, and running to the summit of the hill shall constitute the side lines thereof. The whole area included within such boundary lines shall form a "*Hill Claim.*"

For the more convenient working of back claims, or benches or slopes, it was enacted that the Gold

1887

ATTY. GEN. OF BRITISH COLUMBIA v. ATTY. GEN. OF CANADA.

Gwynne J.

Commissioner may, upon application made to him, permit the owners thereof to drive a tunnel through the claim fronting on any creek, ravine or water course and impose such terms and conditions upon all parties as shall seem to him expedient. It was further enacted that "Quartz Claims" should be 150 feet in length, measured along the lode or vein, with power to follow the lode or vein and its spurs, dips and angles anywhere *on* or below the surface included between the two extremities of such length of 150 feet but not to advance *upon* or beneath the surface of the earth more than 100 feet in a lateral direction from the main lode or vein along which the claim is to be measured. That it should be lawful for the gold commissioner upon the application hereinafter mentioned to grant to any bed rock flume company for any term not exceeding five years, exclusive rights of way through and entry upon any mining ground in his district for the purpose of constructing laying and maintaining bed rock flumes. That such companies upon obtaining such grant, for which they should pay $125 into the colonial treasury should be entitled, among others, to the following rights and privileges. The rights of way through and entry upon any new and unworked river, creek, gulch or ravine, and the exclusive right to locate and work a strip of ground one hundred feet wide and 200 feet long in the bed thereof to each individul of the company also. The rights of way through and entry upon any river, creek, gulch, or ravine worked by miners for any period longer than two years prior to such entry, and already wholly or partially abandoned, and the exclusive rights to stake out and work both the unworked and abandoned portions thereof one hundred feet in width, and one-quarter of a mile in length. Also the use and enjoyment of so much of the unoccupied and unappropriated water of the stream on which they

1887

ATTY. GEN. OF BRITISH COLUMBIA v. ATTY. GEN. OF CANADA.

Gwynne J.

may be located, and of other adjacent streams as may be necessary for the use of their flumes, hydraulic power and machinery, to carry on their mining operations, and they shall have their right of way for ditches and flumes to convey the necessary water to their works, they being liable to other parties for any damage which may arise from running such ditch or flumes through or over their ground, and they shall have a right to all the gold in their flumes. And, further, it was enacted that all bed rock flume companies should register their grant when obtained, and that a registration fee of $25.00 (twenty-five dollars) should be charged therefor, and that they should also pay an annual rent of $12.50 (twelve dollars and fifty cents) for each quarter of a mile of right of way legally held by such company. It was further enacted that leases for a term of ten years might be granted upon payment of the sum of $125.00 (one hundred and twenty-five dollars) into the colonial treasury for the quantities of land following, that is to say:—

In Dry Diggings, ten acres.

In Bar Diggings unworked half a mile in length along the high water mark.

In Bar Diggings worked and abandoned one mile and a half in length along the high water mark.

In Quartz Reefs unworked half a mile in length.

In Quartz Reefs worked and abandoned one mile and a half in length with liberty in the two last cases to follow the spurs, dips and angles on and within the surface for 200 feet on each side of the main lead or seam.

Now from the conformation of the country through which, within the Province of British Columbia, the Canada Pacific Railway must necessarily have been located it may be confidently affirmed that the tract of land on either side of it intended by the treaty of union to be appropriated by the Dominion Govern-

ment, as they should deem advisable, had no appreciable value except such as might consist in the precious metals which might be found therein, and that the above Gold Mining Regulations of the Province of British Columbia would, if they apply to the above tract, absorb the whole of so much of the tract as did not consist of inaccessible mountain ranges of naked rock. The chief value, even, of the valleys through which the mountain streams flow consists, or is deemed to consist, of the gold found therein, and it is no doubt because of the gold that is therein that the above mining regulations give to the miner what may be said to be almost absolute control over the beds of the streams and the lands in the valleys through which the streams flow, in whatever lands those gold mining regulations apply to and, therefore, if they be held to apply to the railway belt in question, and if the Province of British Columbia retains a right to the precious metals therein, the right of appropriation of that belt by the Dominion Government, as expressed to be intended to be secured to it by the terms of the treaty of union would be so utterly illusory that it is, in my judgment, impossible to conceive that it was the intention of either of the parties to that treaty that what constituted what may be said to be the sole value of the tract should be exempt from the operation of the 11th article, and should be retained still as the property of the Province of British Columbia, and we can not, in my opinion, impute to them such an intention by implication, because of the existence of a rule which is applicable to the particular case of a grant of land by the crown to a subject, which establishes that such a grant does not pass the precious metals unless they be specifically named. The conditions which gave birth to that rule not existing, the rule itself cannot have any application.

1887

ATTY. GEN. OF BRITISH COLUMBIA v. ATTY. GEN. OF CANADA.

Gwynne J.

In the month of September, 1878, the Secretary of State of the Dominion in pursuance of an order in council in that behalf addressed a communication to the government of British Columbia informing them of the route of the line of railway, as then recently adopted and notifying them that all public lands in the Province of Manitoba and the North West Territories within 20 miles on each side of the line had been set apart to be appropriated in such manner as the Dominion government may deem advisable in furtherance of the construction of the said railway, and requesting the government of British Columbia in accordance with their agreement in that behalf on their entering the Dominion to convey to the Dominion government in trust to be appropriated in such manner as the Dominion government may deem advisable in furtherance of the construction of the railway, a similar extent of public lands along the line of railway throughout the entire length of British Columbia, and to make good to the Dominion from contiguous public lands, the quantity of land, if any, which may be held under pre-emption right or by crown grant within the limits of the land in British Columbia to be so conveyed to the Dominion government. In the interval between the sending of this communication and the month of May, 1880, it was found so impracticable to apply the provisions of the Dominion Lands Act, as was contemplated by the 38 Vic. ch. 51 to the survey and administration of the tract on either side of the railway in British Columbia, that this latter statute was repealed by an act passed on the 7th May, 1880, 43 Vic. ch. 27. By that act, after reciting that it had been ascertained that the conformation of the country upon and in the vicinity of the located line of the Canadian Pacific Railway through the Province of British Columbia, is such that it is inexpedient to attempt to apply the provisions of the Dominion Lands Act to the survey,

administration and management of the lands hereinafter mentioned it was enacted.

1st. That the act 38 Vic. ch. 51 is hereby repealed.

2nd. The governor in council shall have full power and authority by orders to be made from time to time to regulate the manner, terms and conditions, in and on which any lands which may have been or may be hereafter transferred to the Dominion of Canada under the terms and conditions of the admission of British Columbia into the Dominion shall be surveyed, laid out and administered, dealt with and disposed of, and from time to time to alter and repeal any such order and the regulations therein made and make others in their stead; provided that no regulations respecting the sale, leasing, or other disposition of such lands shall come into force until they shall have been published in the *Canada Gazette*, and shall have been laid before both houses of parliament for one month without being disapproved of by either house. Simultaneously with the passing of this act an act was passed by the Legislature of British Columbia for the purpose of giving effect to the 11th article of the treaty of union, which enacts as follows (1):—

Now, it is to be observed that this act, as, indeed upon its face appears, was passed for the purpose of effectually fulfilling the terms of the 11th article of the treaty of union, it must therefore be construed in the light of the treaty, and not in the light of the narrow rule applicable to the case of a grant of land by the crown to a subject.

The Legislature of British Columbia in passing the act, must, as it appears to me, be held to have intended to divest itself of all control over the tract or belt described in the act as public property of the province, and to have placed it under the control of the Dominion

(1) See page 355.

1887

ATTY. GEN. OF BRITISH COLUMBIA v. ATTY. GEN. OF CANADA.

Gwynne J.

parliament as public property of the Dominion, and thus to give effect to the condition upon which British Columbia was received into the union, although the tract being within the limits of the province, (where granted by the Dominion government to individuals like all other lands vested in individuals) will be subject to the laws of the province affecting the estate granted to such individuals as to local taxation, &c.

Title to any part of the land within the described belt can only be acquired by individuals under and in virtue of a grant from the Dominion authorities, that is to say by a crown grant executed under and in pursuance of the authority of the laws of the Dominion affecting Dominion lands; if, therefore, the rule as to crown grants of land not passing the precious metals unless they be specifically named therein is to have any application in the present case, it seems to me that as the power to grant the lands to individuals is transferred from the province to the Dominion unrestricted by any qualification as to the precious metals, it must be intended that the Dominion authorities should have power to grant them in such manner as the authorities having control of Dominion lands should think fit, and that therefore in a grant of the land or of any part thereof they might specifically grant also the precious metals therein by using appropriate language for that purpose, and if they could do so, then the rule as to the precious metals not passing if appropriate language should not be used would enure to the benefit of the Dominion and not to that of the province. The power to pass title to the land by grant from the crown being acknowledged to be in the Dominion authorities, all the incidents to that power must be in the Dominion also in the absence of any express qualification of the power contained in the instrument, in this case the treaty, vesting the

power in the Dominion.

1887

ATTY. GEN. OF BRITISH COLUMBIA v. ATTY. GEN. OF CANADA.

Gwynne J.

Subsequently to the passing of this act, some delay took place in the construction of the railway occasioned partly by reason of a contemplated change in the manner of constructing the railway, that is to say, through the means of a company to be incorporated for the purpose instead of by the government as a government work in which manner it was being constructed in 1878, and partly by reason of searching for a better line through the Rocky Mountains than that which had been located in 1878.

In 1881 an act was passed entitled an act respecting the Canadian Pacific Railway, incorporating a company to construct and work it when constructed. By this act the railway was divided into three sections, the eastern, the central and the western—the central extending from Selkirk on the east side of the Red River in Manitoba to Kamloops in the Rocky Mountains, and the western extending from Kamloops to Port Moody on Burrard Inlet; the Dominion government undertook the completion of this western section. The search for a better line through the Rocky Mountains to Kamloops than that which had been located in 1878 occupied some time, and while this search was still in progress an act was passed by the Dominion parliament in the month of May, 1882, whereby it was enacted that the Canadian Pacific Railway Company might, subject to the approval of the Governor in council, lay out and locate their main line of railway from Selkirk to the junction in the western section at Kamloops by way of some pass other than the Yellow Head Pass.

Difficulties also had arisen between the Dominion and the Provincial governments in relation to the construction of a railway and graving dock on Vancouver Island and other matters. At length in the month of

1887

ATTY. GEN. OF BRITISH COLUMBIA v. ATTY. GEN. OF CANADA.

Gwynne J.

February, 1883, the Provincial government in a paper addressed by them to the Dominion government setting forth the view taken by the Provincial government of the various matters therein stated in relation to the railway and graving dock on Vancouver Island, made a proposition as a basis to lead to a final settlement between the two governments as well in relation to the delay in the construction of the railway as in relation to the said other matters, which proposition is as follows:—

That the Domininion government be urgently requested to carry out its obligation to the province either by commencing at the earliest possible period the construction of the island railway and completing the same with all possible despatch, or by giving to the province such fair compensation for failure to build such island railway as will enable the government of the province to build it as a provincial work and open the east coast lands for settlement; and that the Dominion government be earnestly requested to take over the graving dock at Esquimalt upon such terms as shall recoup and relieve the province of all expense in respect thereof, and to complete and operate it as a federal work or as a joint imperial and Dominion work; and that in lieu of any expensive and dilatory method of ascertaining the exact acreage of lands alienated within the railway belt and otherwise rendered unavailable there be set apart for the use of the Dominion a tract of 2,000,000 acres of land in extent, to be taken up in blocks of not less than 500,000 acres in such localities on the main land as may be agreed upon, the land to be taken up and defined within two years, and that it be one of the conditions that the Dominion government in dealing with lands in this province shall establish a land system equally as liberal both as to mining and agricultural industries as that in force in this province at the present time and that no delay take place in throwing open the land for settlement.

This last clause clearly shows that up to this time the idea has not been conceived that the precious metals were not intended to pass under the provisions of the 11th article of the treaty of union. It shows also that the provincial government's understanding of that article was that the lands in British Columbia, which by that article were agreed to be transferred to, and placed under the control of, the Dominion authori-

ties, should be under such control for all purposes, mining as well as agricultural.

In the summer of 1883 Sir Alex. Campbell, then Minister of Justice, was sent by the Dominion government to British Columbia with instructions to negotiate a settlement of all existing differences, and to procure a change in the lands to be transferred by the province to the dominion between Kamloops and the eastern limit of the province rendered necessary by the contemplated change in the location of the line through the mountains east of Kamloops. The provincial authorities and Sir Alex. Campbell agreed upon terms of settlement, which were embodied in an agreement which contained a clause that the terms agreed upon should be taken by the province in full of all claims of the province against the Dominion in respect of delays in the commencement and construction of the Canadian Pacific Railway, and in respect of the non-construction of the Esquimalt and Nanaimo railway and should be taken by the Dominion government in satisfaction of all claims for additional lands under the terms of union, but should not be binding unless and until the same should be ratified by the parliament of Canada and the legislature of British Columbia. In the month of December, 1883, the legislature of British Columbia accordingly passed an act in which after setting out the agreement at large they ratified it and enacted that (1):

These sections comprised the whole of the act which relates to the lands agreed to be given to the Dominion government by the 11th article of the treaty of union; the three and one-half million of acres in the Peace River district being given in satisfaction of all claims of the Dominion for additional lands in substitution for such lands within the limits of the railway belt as

(1) See page 356.

1887

ATTY. GEN. OF BRITISH COLUMBIA v. ATTY. GEN. OF CANADA.

Gwynne J.

might be held under pre-emption right or crown grant as provided by the said 11th article of the treaty. The residue of the act relates wholly to giving effect to the agreement made between Sir Alexander Campbell and the provincial government in respect of the Vancouver Island railway, and the graving dock and has no bearing whatever upon the subject under consideration. It was argued, however, that in the clause which appropriates certain lands in aid of the construction of this railway the words "including all coal, coal oil, ores, stones, clay, marble, "slate, mines, minerals, and substances whatsoever "thereupon, therein, and thereunder," being inserted, and nothing being mentioned in the clause relating to the Canadian Pacific railway belt but "public lands "along the line of the railway wherever it may be "finally located, &c.," it must be inferred that mines and minerals were not intended to pass under the latter designation. But it is quite an accidental circumstance that the two matters are referred to in the same act. It is by the treaty of union and not by anything contained in this act that the extent of interest in the public lands within the limits of the railway belt intended by the treaty of union to be placed under the control and administration of the dominion government and parliament is to be determined; whereas the interest in the lands appropriated in aid of the construction of the Island railway, the beneficial interest in which lands was to be vested in the company to be incorporated to construct the railway, is determined by this act, which adopts the language of the act No. 15, of 1882, referred to in the agreement with Sir Alexander Campbell, whereby like provision was made in the interest of the company thereby incorporated. The dominion government having no beneficial interest whatever in the lands so

appropriated, were naturally indifferent to the language used by the provincial authorities in making the appropriation, and they cannot be prejudiced in their title to the lands within the railway belt in which they are beneficially interested by the language used in making the appropriation of lands in which they have no beneficial interest. From the provision, therefore, made in the interest of the company which should construct the Island railway no inference can be drawn to qualify the extent of the interest of the Dominion of Canada under the treaty of union in the Canadian Pacific railway belt, any more than such an inference can be drawn from like language used in a grant of land from the crown to a subject. The intention of the parties to the treaty of union is alone what must govern; and that the intention of both parties to that treaty was that the precious metals should pass to the dominion in the sense of being under the absolute administration and control of and for the exclusive benefit of the dominion authorities appears to me to be clear for the reasons already given.

The Dominion parliament by the Act 47 Vic. ch. 6 has enacted:—

Sec. 11. That the lands granted to Her Majesty represented by the government of Canada in pursuance of the 11th section of the terms of union by the act of the legislature of the Province of British Columbia, number eleven of one thousand eight hundred and eighty as amended by the act of the said legislature, assented to on the 19th December, 1883, shall be placed upon the market at the earliest date possible and shall be offered for sale on liberal terms to actual settlers.

2. The said lands shall be open for entry to *bonâ fide* settlers in such lots and at such prices as the Governor in Council may determine.

3. Every person who has squatted on any of the said lands prior to the 19th day of December, 1883, and who has made substantial improvements thereon shall have a prior right of purchasing the lands so improved at the rates charged to settlers generally.

4. The Governor in Council may from time to time regulate the

1887

ATTY. GEN. OF BRITISH COLUMBIA v. ATTY. GEN. OF CANADA.

Gwynne J.

manner in which, and the terms and conditions upon which, the said lands shall be surveyed, laid out, administered, dealt with and disposed of, provided that regulations respecting the sale, leasing or other disposition of such lands shall not come into force until they are published in the *Canada Gazette*.

By the 12th section it is enacted that the three and one-half million acres of lands in the Peace River district in British Columbia granted to Her Majesty as represented by the government of Canada by the said act assented to on the 19th day of December, 1883, shall be held to be Dominion lands within the meaning of the Dominion Lands Act, 1883.

In placing these lands in this manner by the Dominion parliament under the administration and control of the Dominion government as dominion lands, the parliament has, in my opinion, acted in perfect accordance with the letter and spirit, true intent and meaning of the 11th article of the treaty of union and the question therefore submitted in the case must be answered in favor of the affirment, The Attorney General of Canada, and the appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitors for appellant: *McIntyre & Lewis.*

Solicitors for respondent: *O'Connor & Hogg.*

1887

*June 4.

*Dec. 14.

THE QUEEN ON THE INFORMATION OF THE ATTORNEY GENERAL OF CANADA (PLAINTIFF)..... } APPELLANT;

AND

ARTHUR STANHOPE FARWELL (DEFENDANT)..... } RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT.

47 *Vic. c.* 14 *sec.* 2 *B. C—Effect of—Provincial Crown grant—Illegality of.*

By section 11 of the order in council, admitting the Province of British Columbia into confederation, British Columbia agreed to convey

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

1887

THE QUEEN v. FARWELL.

to the Dominion Government, in trust, to be appropriated in such manner as the Dominion Government might deem advisable, in furtherance of the construction of the Canadian Pacific Railway an extent of public lands along the line of railway. After certain negotiations between the governments of Canada and British Columbia, and in order to settle all disputes, an agreement was entered into, and on the 19th December, 1883, the legislature of British Columbia passed the statute 47 Vic. ch. 14, by which it was enacted *inter alia* as follows: "From and after the passing "of this act there shall be, and there is hereby, granted to the "Dominion Government for the purpose of constructing and to "aid in the construction of the portion of the Canadian Pacific "Railway on the main land of British Columbia, in trust, to be "appropriated as the Dominion Government may deem advisa- "ble, the public lands along the line of railway before mentioned, "wherever it may be finally located, to a width of twenty miles "on each side of said line, as provided in the order in council "section 11 admitting the Province of British Columbia into "Confederation." On the 20th November, 1883, by public notice the government of British Columbia reserved a belt of land of 20 miles in width along a line by way of Bow River Pass. In November, 1884, the respondent in order to comply with the provisions of the provincial statutes, filed a survey of a certain parcel of land situate within the said belt of 20 miles, and the survey having been finally accepted on the 13th January, 1885, letters patent under the great seal of the province were issued to F. for the land in question.

The Attorney General of Canada by information of intrusion sought to recover possession of said land, and the Exchequer Court having dismissed the information with costs, on appeal to the Supreme Court of Canada, it was:

Held, reversing the judgment of the Exchequer Court, Henry J. dissenting, that at the date of the grant the Province of British Columbia had ceased to have any interest in the land covered by said grant and that the title to the same was in the crown for the use and benefit of Canada.

APPEAL from the judgment of the Exchequer Court, (Henry J.) dismissing the plaintiff's information and giving judgment for the defendant.

This was an information of the Attorney General of Canada, on behalf of Her Majesty the Queen, brought against the respondent for intrusion on lands known as lot number six, in group one of the District of

1887

THE QUEEN v. FARWELL.

Henry J. in the Exchequer.

Kootenay, in the Province of British Columbia, such lands being situated within the 20 miles belt of the Canadian Pacific Railway. The pleadings, documentary and oral evidence bearing upon the case are stated at length in the judgment of Henry J. in the Exchequer Court, and in the judgment of the Chief Justice hereinafter given.

The action was tried at Victoria, B. C, on the 23rd of September, 1886.

Drake Q.C appeared for the crown.

Richards Q.C. and *T. Davie* for defendant.

On the 27th December, 1886, Henry J. delivered the following judgment in favor of the respondent:—

This action was commenced by an information of the Attorney General of Canada on behalf of Her Majesty, the Queen, as follows:

"To the Honorable the Chief Justice and Justices of the Exchequer Court of Canada.

"The information of Her Majesty's Attorney General for the Dominion of Canada on behalf of Her Majesty sheweth as follows.

"1. That certain lands and premises situate in group one of the district of Kootenay, in the Province of British Columbia, within the railway belt of the Canadian Pacific Railway, and being composed of lot No. 6 in the said group number one in the district of Kootenay aforesaid, containing 1175 acres, more or less, on the 25th day of January, A.D, 1885, and long before that date were and still ought to be in the hands and possession of Her Majesty the Queen.

"2. That the defendant, to wit: on the said 25th January, A.D. 1885, in and upon the possession of our said lady the Queen of and in the premises, entered, intruded and made entry and the issues and profits thereof coming, received and had and yet doth receive and have to his own use.

1887

THE QUEEN v. FARWELL.

Henry J. in the Exchequer.

CLAIM.

"The Attorney General on behalf of Her Majesty the Queen claims as follows:—

"1. Judgment for possession of the said lands and premises.

"2. Judgment for an account of the issues and profits of the said lands and premises, from the said 25th day of January A. D. 1885 till possession be given.

"3. Judgment for the costs of this action."

The statement of defence is as follows:

"1. In answer to paragraph one of the information herein the defendant says that on and prior to the 13th day of January, A.D. 1885, the said lands were in the hands and possession of Her Majesty and on the said day Her Majesty by patent duly issued under the great seal of the Province of British Columbia, granted the said lands unto and to the use of the defendant, his heirs and assigns for ever.

"Wherefore the defendant upon and since the said grant entered upon and has taken possession of the said lands and has since enjoyed and now enjoys possession, use and occupation of the same which is the intrusion and trespass complained of.

"And saving and except as herein is admitted the defendant denies all and every the allegations in the information set out."

To which statement of defence the following replication was filed:—

"1. Her Majesty's Attorney General for the Dominion of Canada on behalf of Her Majesty joins issue upon the defendant's statement in defence herein.

"2. And for a further replication to the said statement in defence of the defendant, Her Majesty's Attorney General says that the lands and premises in the information and statement in defence herein mentioned, were on 13th of January, A.D. 1885, in the

1887

THE QUEEN v. FARWELL.

Henry J. in the Exchequer.

hands and possession of Her Majesty, in the right of her Dominion of Canada and not in the right of her Province of British Columbia, and that a grant of the said lands under the great seal of the Province of British Columbia conveyed no interest therein to the defendant."

It will thus be seen that the issue raised is as to the title to the lands in question on the 13th of January, 1885, the date of the grant or patent issued to the defendant duly executed by the Lieutenant Governor under the great seal of the Province of British Columbia of the lands in question.

It having been admitted on the part of the plaintiff that the title to the lands up to the year 1883 was in Her Majesty for the Province of British Columbia it is claimed on the part of the plaintiff that previous to the grant or patent to the defendant the title of the province therein was by law transferred to Her Majesty in trust for the Dominion of Canada.

On reference to the exhibits and evidence it will be seen that the application by the defendant was duly made on the 22nd of November, 1883, under the statutes of British Columbia, for a patent of lands covering the locus. That under the authority of the Crown Lands Department it was surveyed as provided by the statutes in October, 1884, and the survey was formally approved and accepted by the Chief Commissioner of Crown Lands of the province on the 13th April, 1885, and the grant issued.

On the part of the defendant it is contended that he had earned under his application, accepted by the department, and by the payment of the purchase price, the right to complete his purchase by pursuing the terms of the statute in regard to the survey and other respects and finally to a grant or patent; and that the statutes of the Province and of the Dom-

inion subsequently passed in respect of the railway could not deprive him of his right to the land obtained under the provisions of the statute. The position may require to be dealt with in case of a decision in favor of the plaintiff on the issue raised more prominently by the pleadings.

As before stated the plaintiff claims title as owner of the lands in dispute at the time and before the issue of the grant or patent to the defendant

That claim rests not upon any grant or other ordinary conveyance by which the title is alleged to have been transferred to the plaintiff but upon certain statutes passed by the Legislature of British Columbia and by the Parliament of Canada and on the minutes of council of the Government of Canada and of the Government of British Columbia and other documents put in evidence on both sides.

The first to which I consider it necessary to refer is the II article of the terms of the union of British Columbia with Canada as agreed upon by Government of the latter and the Legislature of the former of the 25th of July, 1870.

The article is as follows :—

The Government of the Dominion undertake to secure the commencement simultaneously, within two years from the date of union, of the construction of a railway from the Pacific towards the Rocky Mountains, and from such point as may be selected east of the Rocky Mountains towards the Pacific, to connect the seaboard of British Columbia with the railway system of Canada ; and further, to secure the completion of such railway within ten years from the date of the union.

And the Government of British Columbia agree to convey to the Dominion Government, in trust, to be appropriated in such manner as the Dominion Government may deem advisable in furtherance of the construction of the said railway, a similar extent of public lands along the line of railway throughout its entire length in British Columbia, not to exceed however, twenty (20) miles on each side of said line, as may be appropriated for the same purpose by the Dominion Government from the public lands in the Northwest

1887

THE QUEEN v. FARWELL.

Henry J. in the Exchequer.

territories and the Province of Manitoba. Provided, that the quantity of land which may be held under pre-emption right or by crown grant within the limits of the tracts of land in British Columbia to be so conveyed to the Dominion government shall be made good to the Dominion from contiguous public lands; and provided further, that until the commencement, within two years as aforesaid from the date of the union, of the construction of the said railway, the Government of British Columbia shall not sell nor alienate any further portions of the public lands of British Columbia in any other way than under right of pre-emption, requiring actual residence of the pre-emptor on the land claimed by him. In consideration of the land to be so conveyed in aid of the construction of the said railway, the Dominion Government agree to pay to British Columbia from the date of the union, the sum of 100,000 dollars per annum, in half-yearly payments in advance.

The terms of the article were carried out by the government of British Columbia by withdrawing all its public lands from sale or alienation according to the terms of the article, but on the expiration of two years the railway not having in the interim been commenced the Government of British Columbia declined to convey certain lands on the east coast of Vancouver Island in British Columbia, that then being considered a part of the railway referred to in that article, although requested to do so by a communicated minute of coun cil of the Government of Canada.

Numerous orders in council were during several years passed by the Dominion and Provincial governments, and despatches and telegrams passed the latter government complaining of delay in the building of the railway which, in my opinion, do not affect the issue in this case very much; a perusal of them, however, shows a continuous want of effective co-operation and ineffectual negotiations. Nothing was really done of any consequence to hasten the commencement of the railway for several years. The western terminus was at an early day fixed to be at Esquimalt and much difficulty had arisen in regard to the building of the line on Vancouver Island.

1887

THE QUEEN v. FARWELL.

Henry J. in the Exchequer.

That difficulty was, however, removed by an order of the Dominion Council passed on the 29th of May, 1878, rescinding the previous order locating the terminus at Esquimalt and fixing it on the mainland at Burrard Inlet. The line then adopted was as notified to the Government of British Columbia to pass through Tête Jaune Cache by way of the Thomson river and Kamloops.

By section 15 of the act of the Dominion of 1881 ch. 1, the line was provided to be built as continuous "from the terminus of the Canada Central Railway "near lake Nipissing known as Callender Station to "Port Moody," under the name of "The Canadian "Pacific Railway," and by "section 17" the consolidated Railway Act of 1879 with certain modifications was made applicable to that railway. It will be seen that by this act no change was made in the line through Manitoba, the North West Territories, or the mainland of British Columbia, except that involved by the adoption of Port Moody as the terminus instead or Esquimalt in Vancouver Island. On the contrary so far as this controversy is concerned the northern line by Tête Jaune Pass was that provided for. By the eleventh section of the schedule to the act and made part of it is provided as follows:—

> The grant of land hereby agreed to be made to the company shall be so made in alternate sections of 640 acres each extending back 24 miles deep on each side of the railway from Winnipeg to Jasper House, in so far as such lands be vested in the government the company receiving the sections bearing uneven numbers.

No change that I can find was ever made in that appropriation appropriating the whole of the lands to the extent of twenty miles, or for any extent on each side of the railway except by alternate sections as before stated.

By the provision of the eleventh article of the terms of union the agreement of the Government of British

1887

THE QUEEN v. FARWELL.

Henry J. in the Exchequer.

Columbia was to convey to the Dominion Government:—

A similar extent of public lands along the line of railway throughout its entire length in British Columbia not to exceed, however, twenty (20) miles on each side of said line as may be appropriated for the same purpose by the Dominion government from the public lands in the North West Territories and the Province of Manitoba.

By section 2 of the act of British Columbia of 1883, ch. 14 there was granted to the Dominion Government to aid in the construction of the portion of it on the mainland of that province:—

A similar extent of public lands along the line of the railway before mentioned, wherever it may be finally located (not to exceed twenty miles on each side of the said line) as may be appropriated for the same purpose by the Dominion from the public lands of the North West Territories and the Province of Manitoba as provided by the order in council section 11 admitting the Province of British Columbia into confederation.

By section one of the act of British Columbia of 1880, ch. 11, the same provision was made but the line was therein stated to be between Burrard Inlet and Yellow Head summit the line to begin:—

At English Bay or Burrard Inlet and following the Fraser river to Lytton thence by the valley of the Thomson river to Kamloops thence up the valley of the North Thomson, passing near to lakes Albrida and Cranberry to Tête Jaune Cache thence up the valley of the Fraser river to the summit of Yellow Head or boundary between British Columbia and the North West Territories. The grant of the said land shall be subject to the conditions contained in the said 11th section of the terms of union.

By section 2 of the Act of British Columbia of December, 1883, ch. 14, the section of the act just in part recited was amended to read as follows:—

From and after the passing of this Act there shall be and there is hereby granted to the Dominion Government for the purpose of construction and to aid in the construction of the portion of the Canadian Pacific Railway on the mainland of British Columbia in trust to be appropriated as the Dominion Government may deem advisable, the public lands along the line of the railway before mentioned, wherever it may be finally located, to a width of twenty miles on each side of the line as provided in the Order in Council section 11 admitting the Province of British Columbia into Con-

federation.

1887

THE QUEEN v. FARWELL.

Henry J. in the Exchequer.

That may be construed as a grant of twenty miles of the public lands of the Province as provided in section eleven, therein referred to. By section eleven, and the acts of British Columbia previously passed the extent was provided to be limited by that "appropriated for the same purpose by the Dominion Government from the public lands in the North West Territories and the Province of Manitoba." If then, but alternate sections were appropriated on the east side of the boundary line does not that limit the contribution to be made on the west side of the line?

If that be the true construction would the Province of British Columbia, under any circumstances be bound to do more than to convey each alternate mile to the extent of 20 miles on each side of the railway. Up to the date of a notice given by Mr. Trutch the agent of the Dominion Government to the Commissioner of Crown Lands of the Province, the route by the "Tête Jaune Pass" was that dealt with by the government of that province.

That notice dated on the 5th November, 1883, is as follows:—

Dominion Government Agent's Office,
Victoria, British Columbia,
5th November 1883.

SIR,—I have the honor to apprise you that I have to-day received from the Rt. Hon. Sir John A. MacDonald a reply by telegraph to the telegram and letter which I addressed to him on the 23th ulto. upon the subject matter of the interview which I had on that day with you and your colleagues in the Ministry.

Sir John MacDonald directs me to inform you that the Canadian Pacific Railway Company have definitely abandoned the Yellow Head Pass, and have adopted a line crossing the Rocky Mountains by the Bow River Pass and the Selkirk Range through what is known as Roger's Pass by the Beaver Creek and Illecillewaet River Valleys, and through Eagle Creek Pass to Kamloops.

Some improvement may be made in this line between the summit of the Rocky Mountains and the Columbia River before work is recommenced in the spring which may render it not strictly accurate

1887

THE QUEEN v. FARWELL.

Henry J. in the Exchequer.

to speak of the line as following the Kicking Horse Pass although that pass is entirely practicable and will be followed unless some one of the alternative lines in the immediate vicinity which are now being examined is found to afford lighter work and easier grading.

Sir John Macdonald further directs me to request you to place the belt of land 20 miles on each side of the railway line along the route so above indicated under reservation as the land to be granted to the Dominion by British Columbia, instead of the land along the Yellow Head Pass conveyed by the British Columbia Act, ch. II, in accordance with the agreement now existing between your Government and that of the Dominion.

I beg accordingly that you will be pleased to have the said lands at once placed under reservation for this purpose.

I have the honor to be,
Your obedient servant,
(Sd). JOSEPH W. TRUTCH.

It will be seen that the object of that notice was to request the local government to place 20 miles on each side of the general line indicated under reservation instead of the land along the line by the Yellow Head Pass conveyed by the local act 43, vic., ch. 11, (1880).

The request to place the lands on the line referred to in the notice under reservation is a clear admission that such lands were then the lands of British Columbia, and subsequently to that notice the lands "were reserved until further notice." But that act of reservation conveyed no title to the Dominion Government nor did it prevent the Government from raising or removing such reservation by the receipt of application for the purchase of any portion of them or from conveying the same by grant or patent. The subsequent act did not grant according to that reservation.

On the 29th November, 1883, a notice signed by the Chief Commissioner of lands and works of the province was published in the *Provincial Gazette* which after reciting sec. 2, of 46 Vic., ch. 14 (1883) of British Columbia continues as follows:—

And whereas official information has been received that a definite route has been adopted by way of Bow River Pass and that via Yellow Head Pass has been abandoned.

1887

THE QUEEN v. FARWELL.

Henry J. in the Exchequer.

Public notice is therefore given that the following belt of land is hereby reserved until further notice, viz: commencing at Kamloops, thence on a line by the valley of the South Thomson river and through Eagle Pass to the Columbia river, thence by the Illecillewaet river and Beaver Creek Valley's, and by Roger's Pass through the Selkirk Range to the boundary of British Columbia at Bow River Pass and having a width of 20 miles on each side of said line.

The Provincial act of December, 1883, does not however refer to any line in particular, but makes the provision in respect of the public lands along the line of the railway wherever it may be finally located as provided in the order in council, sec. 11, before recited and frequently referred to.

It is under the provisions of that act that the claim of the plaintiff to recover is made.

After the plaintiff's case was rested, council on behalf of the defendant urged substantially in defence the points and objections following:—

1st. That to make title the lands should have been conveyed by patent under the seal of the province.

2nd. That the grant to the "Dominion Government" passed no title to Her Majesty the Queen.

3rd. That the land is not described or defined.

4th. That the statute did not operate as an immediate transfer and is therefore void as a transfer.

5th. That the notice of location under the date of the 5th November, 1883, was not a sufficient notice of the final location of the line so as to enable the belt on each side to be definitely located and that no further notice was shown to have been given.

6th. That the location as by notice might have been changed.

7th. That no evidence was given that any lands in the North West Territories or Manitoba has been appropriated by the Dominion Government on the adopted line.

8th. As the charter gives to the Canadian Pacific

1887

THE QUEEN v. FARWELL.

Henry J. in the Exchequer.

Railway Company only alternate sections a survey was necessary of the lands in British Columbia before any title vested in the Dominion Government even of the alternate sections.

9th. The defendant having applied and his application having been received and acted on before any statute as to the railway was passed or reservation made, he became entitled to a grant as purchaser having been shown to have complied with the terms and conditions provided by statute.

As to the first point I have no doubt that the Legislature of British Columbia had the power of passing a title of public lands by an act and by doing so might repeal to that extent any previous statutory provisions to the contrary.

To the second point I have given attentive consideration and have failed to arrive at the conclusion that grant or conveyance to the "Dominion Government makes any title to Her Majesty the Queen. In the first place a grant or conveyance of land must be to one, or a body capable of receiving a title to and holding land with the power of transmitting or conveying it and I cannot see how the Dominion Government as such has any legal status or entitled or authorized to do any of those acts. When a conveyance for public uses is taken of land it is directly made to the Queen in trust. Nor can I conclude that even if the Dominion Government by that title could receive, hold and convey land why Her Majesty would necessarily have a title thereto; and in that case an action to recover possession should be, not by the Queen but by those to whom the title was made. Had the grant by the statute been to Canada or to the Dominion of Canada the application to it of the rules of law would be essentially different.

There is no statute providing for the purchase of land or receiving a title thereto by the Dominion Government

and there is none providing that, should such be done, a conveyance to it should be held or deemed to be a conveyance to Her Majesty. The fee simple of land is never in abeyance. If A owns land and conveys it to B the fee simple is immediately transferred to the latter if he is capable of holding it. If not, or if the conveyance be defective, the fee simply remains in A. If the Dominion Government as such is incapable of holding the title of the lands referred to in the statute the title remains in Her Majesty on behalf of the Province of British Columbia, the legal result of which is that the plaintiff has no title upon which to sustain this action, and that even if the defendant had no legal title from Her Majesty through his grant or patent he is entitled to the judgment of this court.

It may be suggested that the statute was intended to give a title to Her Majesty in the lands in question although the grant is to the "Dominion Government"; but we cannot go outside of the words used in it and must not speculate as to what may have been intended. The title to land is in question and we must not depart from the rules of construction necessary to sustain titles or, in an opposite direction, affect them. We cannot import words much less speculations as to intentions into conveyances, which on their face are capable of but one construction.

The third objection that the land is not described or defined is an important one.

In a grant, deed or other conveyance of land, the land requires to be so described that on the execution of the conveyance the location, quantity, and shape may be ascertained by the usual means.

The land may be described by a line commencing at a certain specified, and, at the date of the conveyance, ascertainable point and running by metes and bounds round it to the place of commencement. It may be

1887

THE QUEEN v. FARWELL.

Henry J. in the Exchequer.

described by the lines of adjoining lands or in many other modes so as distinctly to point out the land conveyed. It may also do so by references to documents, lines, boundaries, monuments, and otherwise then existing, but not subsequently to be made or established.

The land must be capable in some way of being ascertained by means of the directions of the conveyance immediately after it is executed independently of other supplementary evidence making an addition to the words of the conveyance.

Testing then the statute of December, 1883, under which the plaintiff claims title by the rules just stated the question is: Who could immediately afterwards lay out and ascertain the exact or even approximate boundaries of the land?

By the statute the land referred to in it was enacted to be 20 miles on each side of the railway wherever it may be finally located. It is well known that from the 49th parallel the southern boundary of British Columbia to its northern boundary there are several hundreds of miles. There is no evidence of any location of the line of railway when that act was passed and the act does not provide to give lands on any line but one to be subsequently located. Who could then, on the passing of that act, say what part of the territory of British Columbia of the hundreds of miles in extent between its southern boundaries was conveyed?

There is nothing in the statute to determine it and no reference to other objects then existing by which it could be determined. If not then does any title to any land pass by it?

An ordinary conveyance in such terms would be void for uncertainty, and I know not why the statute in question should be construed differently. It is un-

necessary for me to decide what the statute amounts to, whether an agreement or otherwise. It is only necessary in this case to ascertain if it amounts to an absolute conveyance, and I think it does not.

The fourth objection is, I think, equally available for the defence. The statute to amount to a transfer of title must operate to define the land, as it should in every other respect, as soon as passed. If not then a transfer in law, it could not afterwards become so so as to affect any particular lands. It did not purport to convey all the lands of the province between the boundaries before mentioned, and it contained no directions by which on its passage a surveyor or any other party could have ascertained what particular lands were conveyed. In fact such an enquiry could not be made as the legislature that passed the act did not itself know where the line was to run.

I will deal with the fifth and sixth objections together.

The notice o the 5th November, 1883, signed by Mr. Trutch is certainly no evidence that any line had been finally located, but, on the contrary showed that it was not, and that alterations in the projected line were expected to be made. Under such circumstances no surveyor could have made measurements to cover 20 miles on either side of the railway, and if such had been attempted it was likely to have proved to have been labor lost. No surveyor could ascertain the land under the statute until the line was finally located on the ground and a plan of it correctly made shewing courses and distances. A survey without such being previously done could not properly locate the lands referred to in the statute, and, if otherwise done, would no doubt improperly place portions inside and other portions outside of the belt. As far as the evidence goes nothing of the kind has ever yet been done. It

1887

THE QUEEN v. FARWELL.

Henry J. in the Exchequer.

may, however, be found that the lands now in question are within the belt, and, in fact, that seemed to me to be conceded at the trial. That, however, does not affect in any way the construction of the statute.

To the 7th objection I may say that although my attention on the trial to any appropriation of lands for the railway by the Government or Parliament of Canada on the side of the adopted line was not directed, and although I have not succeeded in finding any direct appropriation, I am of the opinion that it was inferentially done in a sufficient manner as was done in respect of the more northern line.

In reference to the 9th objection, I will only observe that in the view of the other parts of the case which I have taken, I have not thought it necessary to deal with that point.

I have reason to expect that an appeal to the whole court will be had whatever my judgment may be, and I have therefore principally endeavored to place the facts upon which the decision of the case depends in a compass to be easily ascertained.

In doing so, however, I have felt it but proper to give my views on the legal points generally, having reason to believe they will again be fully argued and my views if wrong corrected.

For the reason given I am of opinion that the plaintiff did not make out the case alleged in the information, and that the defendant is entitled to judgment with costs.

The *Attorney General of Canada* for the appellant:

This appeal involves the title to lands claimed by the Dominion Government in British Columbia, amounting to a million acres. The suit is by writ of intrusion for lot known as No. 6 group 1. The defendants claim under a grant from the Government of British Columbia. The Canadian Pacific Railway crosses the

lot at a quarter of a mile north of the location of Two Rivers.

We claim this land in British Columbia as within the twenty mile belt. An order in council was passed under section 146 B. N. A. Act on March 16th, 1871, admitting British Columbia into the union. That order has the same effect in relation to British Columbia as the British North America Act has to the other Provinces. It has the effect of an Imperial statute.

On the question as to whether this was a present right or only an agreement, I would refer to the fact that the Dominion Government agreed to pay $100,000 a year from the date of the agreement and has paid it.

This concession of lands in British Columbia is to be distinguished from the appropriation of lands in Manitoba. By the terms of the union the quantity of land in British Columbia was limited to twenty miles on each side of the railway. In Manitoba and the North West Territories we granted twenty-five millions of acres to the Canadian Pacific Railway and we are entitled to the whole twenty miles in British Columbia.

The British Columbia Government stipulated that no sales were to be made until the completion of the railway.

The defendants application bears date October 20, 1883. That is not the actual date as it was only delivered to the Government of British Columbia on 19th November, 1883. On November 5, 1883, it was understood that the present route of the railway would be selected. The patent is dated 16th January, 1885. The official acceptance of the application is the notice in the *Gazette* which is 13th January, 1885. The application was made under the Land Amendment Act of 1882.

1887

THE QUEEN v. FARWELL.

Some confusion arises from the contention of the defendant that the termini of the road were never fixed. The act of 1872 ch. 71 defines the termini. That act makes it perfectly plain that the termini were not uncertain.

I next refer to ch. 14 of the act of 1874 to show the quantity of land granted to the Canadian Pacific Railway in the North West Territories.

Ch. 11 of the acts of 1880, British Columbia, for the first time undertook to define the limit where the lands should be. That statute never had any effect, because it was opposed to the terms of union which had the force of an Imperial statute. Then the Dominion Act of 1881 ch. 1, the Canadian Pacific Railway incorporation act, finally fixed the quantity of land to be given in the North West Territories at twenty-five million acres.

Next is the statute of 1883 ch. 14 British Columbia. That repealed the act of 1880.

We say that no grant was necessary to pass these lands. They were held by Her Majesty for the benefit of the province. Her Majesty could not grant to herself. The Province of British Columbia undertook to use a larger word than was necessary to vest the lands in the Dominion Government.

The next point is this: It is contended that the words used do not vest any right in Her Majesty, because the expression used is "Dominion Government" The British North America Act says that Her Majesty shall continue to be the executive Governor of Canada. Then, the terms of union, having the effect of an Imperial statute, use that very expression.

Then, as regards the definiteness of the grant. It was a title capable of being vested immediately. When the statute passed in 1883, a large portion of the railway had been completed. There is evidence that the

construction in British Columbia had been begun nearly four years before.

A good deal of contention appears in the case as to whether this was treated by either government as a grant vesting a title. It is contended by the respondent that it was treated only as an agreement.

[The Attorney General referred to the Dominion Act of 1875, ch. 51, providing for the sale of these lands. Statute of 1880 43 Vic. ch. 27, repealing 38 Vic. ch. 51, also to the Statute of 1884, ch. 6, and produced map to show that the land was never unsurveyed.]

Burbidge Q.C. follows: There was never any change of route west of Kamloops. From Port Moody to Kamloops the line follows the direction given in the act of 1880. In the contract the line is described as going by Yellow Head Pass. In 1882 this was found impracticable, and the Act 45 Vic. ch. 23 was passed. That authorizes a change from the Yellow Head to a more southerly pass.

In May, 1880, British Columbia passed an act reciting the agreement with the Dominion Government. Two matters in dispute were the Esquimalt and Nanaimo Railway and the Graving Dock. The Dominion Government could not confirm this legislation, because it was contrary to the terms of union.

Sir Alex. Campbell went to British Columbia in August, 1883, and an agreement was made between him and Mr. Smith.

On 5th November Mr. Trutch gave notice to Smith of the final line of the road. As far as Kamloops the line was located, and it could not be that there was to be a subsequent location. They had to strike Columbia river which is where these lands are. Mr. Trutch said that it might have to be improved when they came to strike the line at Columbia River, and that is their whole agreement.

1887

THE QUEEN v. FARWELL.

Theodore Davie for the respondent:

The title of the Dominion Government to these lands takes its origin from the terms of union. The order in council contains a provision, that the government of the province should convey to the Dominion a quantity of land similar in extent to that in the North West Territories. No attempt had been made to survey it, and it was thought it would take at least two years to make a survey. The contracting parties had two difficulties. The settlement of the country must go on, and it was thought that the lands should not be locked up, and again, that they should not be sold to the Dominion. And the agreement was, that after two years the province should deal with the lands as before. Work was not commenced within two years and a good deal of dispute arose The Dominion Government had nominated Esquimalt as on the line of railway. Application was made to the local government to reserve land on Vancouver Island. On June 30, 1873, Esquimalt was fixed as the terminus. (Refers to act of 1875 granting land to Dominion Government.)

In 1878 Burrard Inlet was by order in council made the terminus.

(Refers to statute of 8th May, 1880, B. C. Reads sec. 1.)

On November 5 Mr. Trutch gave his notice of the abandonment of the Yellow Head Pass route. Before this notice respondent had made his application to purchase.

In 1883 negotiations were entered into between the Province and the Dominion for the settlement of this dispute as to the lands for the Canadian Pacific Railway in British Columbia, and under these negotiations the Province agreed to concede the claim of the Dominion to additional land to make up for valueless portions within the railway belt, and to meet this point, as well as the question of alienation, it was arranged

that the Province should cede to the Dominion three and a half millions of acres in Peace River. This was subsequently embodied in an act which was disallowed by the Dominion, and finally the agreement between Sir Alex. Campbell and Mr. Smith was made. This agreement resulted in the act known as the 2nd Settlement Act of British Columbia.

The Dominion Parliament did not ratify this agreement until April 1884, 47 V., c. 46. Therefore the title of the Dominion to lands under the settlement act did not arise until that date.

47 V., c. 16 B. C., the land act under which the defendant's grant was made, was assented to on 18th February, 1884, before the ratification of the Settlement Act. Sec. 76 of that act is as follows :—

76. Notwithstanding anything in this act contained any person or persons who have prior to the passing of this act, *bonâ fide* located and applied for land under the provisions of the act hereby repealed, or any, or either of them shall be entitled to acquire such land in like manner as he or they would have been or would be entitled, if this act had not been passed, but subject to proof to the satisfaction of the Chief Commissioner of Lands and Works that the provisions of the previous act have been complied with, provided however, that unless all the provisions of the said acts, including payment, are complied with by the applicant within nine months from the passage of this act all claims of the applicant to be entitled to complete his purchase shall cease and determine.

The case for the crown is defective in two particulars. It is not shown what quantity of land has been appropriated for railway purposes in Manitoba and the North West Territories. They can only claim in British Columbia the same quantity. It is said that they have appropriated 25,000,000 of acres. (refers to Act of 1881, c. 1 D). The Settlement Act points to a new appropriation.

There is no evidence to show that the line was ever located. There is no evidence of surveyors running the line.

1887

THE QUEEN v. FARWELL.

The following cases were cited: *Hegdenfeldt* v. *Doney, Gold and Silver Mining Co.* (1); *Ehrhardt* v. *Hogabone* (2); *Butt* v. *Northern Pacific Railway Company* (3).

Attorney General of Canada in reply.

The legitimate conclusion of the defendant's argument is that the line can never be located, the rights of the crown can never accrue, and the grant is inoperative.

Then as to the quality of land granted to North West Territories, (reads from S. 11 of 44, V. c. 1.)

Sir W. J. RITCHIE C. J.—The crown seeks to recover possession of certain property known as lot No. 6, in group number one, of the district of Kootenay in the Province of British Columbia. The Canadian Pacific Railway runs through this lot which is situate on the Columbia river at and near where the Illecillewant river empties into the Columbia. The defendant claims the lands in question by virtue of a grant or letters patent under the Great Seal of the Province of British Columbia, dated the 16th January 1885. The evidence shows that the defendant made an application for certain lands under the land amendment act, 1882, (B.C.) as follows:—

LAND AMENDMENT ACT, 1882.

Sale of Unsurveyed Land,
District of Kootenay, British Columbia,
October 20th 1883.

To the Hon. the Chief Commissioner of Lands and Works, Victoria.

SIR,—I have the honor to inform you that I desire to purchase, under clause 1 of the "Land Amendment Act, 1882" one hundred and fifteen thousand (115,000) acres of unsurveyed, unoccupied, and unreserved crown land, situate in the land recording district of Kootenay; a sketch plan of the land required is drawn on the back of this application, and I propose employing Mr. Edward Stephens,

(1) 93 U. S. 634. (2) 116 U. S. R. 67.]
(3) 116 U. S. R. 100.

C. E., to survey the same and request you to forward instructions to him in reference thereto addressed to post office, Victoria.

I have the honor to be, Sir,
Your obedient servant,
A. S. FARWELL.

N. B.—A sketch plan of the land required, giving distances and boundaries, must be drawn on the back of this application.

This application though dated the 20th October, 1883, does not appear to have been received at the office of the Surveyor General until the 19th November, 1883, and a survey came to the office some time in the autumn of 1884, prior the surveyor general says, to the 17th and 18th November, at which date under clause 79 application was made, but this survey was never accepted by the government until 13th January 1885.

The evidence bearing on the application is as follows: Mr. Gore, Surveyor General of British Columbia:

Q. Will you produce Mr. Farwell's application? (Application produced).

Q. When was that received at the office? A. It is stamped November 19th, 1883. It is an application for 115,000 acres.

Q. Is that the only application you have with regard to Mr. Farwell's land grant? A. Yes.

Q. Is the land conveyed to him a portion of that land? A. Yes.

Q. Was any plan furnished to the office of Mr. Farwell? A. There is a plan drawn on the back of the application for 115,000 acres.

Q. Any with regard to the 1175 acres? A. He furnished a plan with the field notes of the survey of 1175 acres.

Q. Then he reduced his application afterwards? A. This is the only application I had.

Q. There was not an application for 1175 acres? A. None.

Q. When was the plan accepted by the Chief Commissioner? A. It was finally accepted in January, 1885 I believe. (Application handed in marked D.)

* * * * *

Q. You were aware of Mr. Farwell's application of that date I suppose? A. Oh yes.

Q. And when did the survey come in? A. The survey came in sometime in the autumn of 1884, prior to the 17th or 18th November, at which date under clause 79 application was made. The acceptance of the survey was on the 13th January, 1885 in the *Gazette*.

1887

THE QUEEN v. FARWELL.

Ritchie C.J.

EXTRACT FROM THE BRITISH COLUMBIA GAZETTE.

DATED VICTORIA JANUARY 15TH, 1885.

NOTICE TO CLAIMANTS OF LAND.

KOOTENAY DISTRICT.

Notice is hereby given that the undermentioned lots, situate at the Big Eddy, Columbia River, have been surveyed, and a plan of same can be seen at the Lands and Works Office, Victoria:

Lot 6, Group 1—A. S. Farwell, application to purchase, October 20th, 1883.

Lot 7, Group 1.—G. B. Wright, application to purchase, October 19th, 1883.

WM. SMITH,
Chief Com. Lands and Works.

Land and Works Department,
Victoria, B. C., January 13th, 1885.

On the 16th January, 1885, letters patent were issued to defendant as follows:—

To all to whom these presents shall come, Greeting:

Know ye, that We by these presents, for Us, our Heirs and Successors, in consideration of the sum of eleven hundred and seventy-five dollars to us paid, give and grant unto Arthur Stanhope Farwell, his heirs and assigns, all that Parcel or Lot of Land situate in Kootenay District, said to contain eleven hundred and seventy-five acres, more or less, and more particularly described on the map or plan hereunto annexed and coloured red and numbered Lot six (6) Group one (1) on the Official Plan or Survey of the said Kootenay District, in the Province of British Columbia, to have and to hold the said Parcel or Lot of Land and all and singular the premises hereby granted with their appurtenances, unto the said Arthur Stanhope Farwell, his heirs and assigns forever.

Many of the questions raised in this case (I may say all the questions on which the case turned in the court below) have been disposed of in the case of *The Attorney General of British Columbia* v. *The Attorney General of Canada*, and the only question remaining to be decided, it appears to me is: Had the Government of British Columbia any right to make this grant?

By 47 Vic. ch. 14 passed on 19 December, 1883, the act of 1880 is amended to read as follows:—

From and after the passing of this act there shall be, and there is granted to the Dominion Government for the purpose of constructing and to aid in the construction of the portion of the Canadian

1887

THE QUEEN v. FARWELL.

Ritchie C.J.

Pacific Railway on the mainland of British Columbia, in trust, to be appropriated as the Dominion Government may deem advisable, the public lands along the line of the railway before mentioned, wherever it may be finally located, to a width of 20 miles on each side of the said line as provided in the order in council, section 11, admitting the Province of British Columbia into confederation; but nothing in this section contained shall prejudice the right of the province to receive and be paid by the Dominion Government the sum of $100,000 per annum, in half yearly payments in advance, in consideration of the lands so conveyed, as provided in section 11 of the terms of union.

With no other proviso than that the line of railway shall be one continuous line of railway only, connecting the seaboard of British Columbia with the Canadian Pacific Railway now under construction on the east of the Rocky Mountains.

On the 19th April, 1884, the Dominion parliament passed an act similar to the British Columbia act approving and ratifying the agreement set out in both acts, so that assuming the provincial act was inoperative until the legislation of the Dominion parliament in relation thereto, from that time I am of opinion that the legislature of British Columbia had put it out of the power of the executive of British Columbia to deal with the lands so referred to and granted by the said act, otherwise than in the manner and for the purpose provided for by the act.

There can be no question that before the passing of either of these acts the Government of British Columbia knew full well of the abandonment of the Yellow Head Pass and the adoption of the line on which the road was subsequently constructed, as the following correspondence clearly demonstrates:—

The Hon. Mr. Trutch, C.M.G., to the Hon. Mr. Smithe.

DOMINION GOVERNMENT AGENT'S OFFICE,
VICTORIA, B.C., November 5, 1883.

SIR,—I have the honour to apprise you that I have received from the Right Honorable Sir John A. Macdonald, a reply by telegraph to the telegram and letter which I addressed to him on the 24th ult.

1887

THE QUEEN v. FARWELL.

Ritchie C.J.

upon the subject matter of the interview which I had on that day with you and your colleagues in the ministry.

Sir John Macdonald directs me to inform you that the Canadian Pacific Railway have definitely abandoned the Yellow Head Pass, and have adopted a line crossing the Rocky Mountains by the Bow River Pass and the Selkirk Range, through what is known as Roger's Pass, by Beaver Creek and Illecillewaut River Valleys, and through Eagle Creek Pass to Kamloops. Some improvements may be made in this line between the summit of the Rocky Mountains and the Columbia River before work is recommenced in the spring, which may render it not strictly accurate to speak of the line as following the Kicking Horse Pass, although that Pass is entirely practicable and will be followed, unless some one of the alternative lines in the immediate vicinity, which are now being examined, is found to afford lighter work and easier grading.

Sir John Macdonald further directs me to request you to place the belt of land, 20 miles on each side of the railway line along the route so above indicated, under reservation, as the land to be granted to the Dominion by British Columbia, instead of the land along the Yellow Head Pass conveyed by the British Columbia Act, 43 Vic. ch. 11, in accordance with the agreement now existing between your government and that of the Dominion.

I beg, accordingly, that you will be pleased to have the said lands at once placed under reservation for this purpose.

I have, etc.,

(Signed) JOSEPH W. TRUTCH.

And which the Government of British Columbia acted upon on the 20th November, 1883, by a public notice in the *Royal Gazette* as follows:—

PUBLIC NOTICE.

Whereas section 2 of 46 Vic. ch. 14 grants to the Dominion Government, for the purpose of aiding in the construction of the portion of the Canadian Pacific Railway on the mainland of British Columbia, a tract of land not exceeding 20 miles in width on each side of the line of the railway, wherever it may be finally located, in lieu of that heretofore conveyed along the line located to Yellow Head Pass.

And whereas official information has been received that a definite route has been adopted by way of Bow River Pass, and that via Yellow Head Pass abandoned.

Public notice is therefore hereby given, that the following belt of land is hereby reserved until further notice, viz:—

Commencing at Kamloops thence on a line by the Valley to the South Thompson River and through Eagle Creek Pass to the Columbia River, thence by the Illecillewaut River and Beaver Creek Val-

leys, and by Roger's Pass through the Selkirk range to the boundary of British Columbia at the Bow River Pass, and having a width of 20 miles on each side of said line.

WM. SMITHE,
Chief Com. of Lands and Works.

Lands and Works Department,
Victoria, B.C., November 20, 1883.

Mr. Smithe on 24th November, 1883, replied as follows to the above letter of Mr. Trutch:—

Hon. Mr. Smithe to Hon. Mr. Trutch, C.M.G.

VICTORIA, 24th November, 1883.

SIR,—I have the honor to acknowledge the receipt of your letter, dated the 5th instant, in which you advise me of a telegram received from the Right Honorable Sir John A. Macdonald, which conveys intelligence that the Canadian Pacific Railway Company have definitely abandoned the Yellow Head Pass route, and have adopted one by way of Bow River Pass, and through what is known as Roger's Pass in the Selkirk Range of Mountains by Beaver Creek and Illecillewaet River Valleys, through Eagle Creek Pass to Kamloops, and in which you request that, pending the final passage of the Settlement Bill, a reserve shall be placed on the land along the proposed new line of railway.

In complying with the request of the Dominion Government, thus conveyed to me, I cannot refrain from urging on you the pressing necessity that exists for giving facilities to settlers to take up lands within this belt. The Yellow Head Pass route has been under reserve for many years, to the great injury of provincial interests, and that reserve and the conveyance of lands was made by the province in fulfilment of the terms of union, and hitherto the province has had just cause of complaint owing to the delays which have occurred by reason of the Dominion Government not having recognised its own responsibilities.

The clause in the Settlement Act under which alone the demand can properly be made for a grant along the new line of railway in place of that abandoned along the old route, can only be fully acted on when the conditions upon which it is based have been complied with.

This government, however, recognize the fact that the Dominion Government have partially assumed the responsibilities which that act entails on them, and giving that government the fullest credit for a sincere desire to complete the arrangements which have been agreed upon, have made the reserve asked for.

It will of course be necessary before any actual possession of these lands can be allowed to the Dominion Government under the act that the Dominion Parliament shall have passed a confirming act,

1887

THE QUEEN v. FARWELL.

Ritchie C.J.

and that the Dominion Government by order in council shall have formally abandoned the Yellow Head route and have adopted one by way of Bow River Pass.

I have, etc.,

(Signed) WM. SMITHE.

This notice and letter which I have just read likewise show that the only objection raised to the Dominion Government taking the actual possession of these lands was that before a clear possession could be allowed to the Dominion, it was necessary that the Dominion Parliament should have passed a confirming act, and have formally abandoned the Yellow Head route and adopted one by way of Bow River Pass.

On this point Mr. Trutch, agent of the Dominion Government, thus speaks and there is nothing to the contrary in the evidence:—

Q. You say in this letter of 1883 that Sir John Macdonald requests that a reservation be placed upon the land along the line of Yellow Head Pass? A. It was of course granted.

Q. Then what was the objection of the Dominion Government? A. It is very clear; the statute says that the conveyance made at that date was for a railway belt along the line wherever finally located. On the 5th November I wrote that the line had been officially located along Eagle and Rogers Passes, and therefore that is the line claimed under the statute.

Q. If the land was already conveyed there was no necessity for asking the Local Government to place it under reservation. Does it not appear to you as if the act of 1883 was not operating as a conveyance. A. The Local Government desired to place it under reservation.

Q. Did you request them to do it? A. Yes; they were requested because it was their desire, as they wanted to know where the belt would be.

Q. It was in consequence of the request of the Provincial Government that the specific line was located in order that the rest of the land might be released? A. Yes undoubtedly. My letter was communicated to the Premier in order that the act relieving the land not identified in that letter from reservation should be passed, and as a matter of fact that was the course taken.

Therefore so soon as the act of the Dominion adopting and confirming the legislation of the Province was passed, the line of the Canadian Pacific Railway thus

selected by the Dominion Government and adopted by British Columbia passed out of the control of the executive government of British Columbia, and was held by the crown as represented by the Governor General of Canada, no necessity existing for, nor indeed could there be, any actual change of possession because the possession was always in the crown whether held for British Columbia or the Dominion.

This line indicated in Mr. Trutch's letter was no doubt taken possession of by the Dominion Government.

Mr. Trutch says :—

Q. In May 1886 was railway construction going on in the province ? A. Certainly.

Q. When did that commence ? A. In the month of May 1880.

Q. The construction from Yale up to Savona ? A. On the section contracted for between Emory and Boston Bar was the first section that was commenced.

Q. That was by the Dominion Government ? A. By Onderdonk under contract with the Minister of Railways.

Q. When did construction commence east of Kamloops towards Kicking Horse Pass, east of Savona ? A. It commenced in the spring of 1884, about April or May. That work was under contract between Savona and Kamloops between Onderdonk and the Canadian Pacific Railway.

Q. That was along the line as defined in your letter of the 5th November ? A. Yes, on the south shore of Kamloops Lake.

Q. Does the railway pass through the land claimed by defendant ? A I don't know exactly, I believe it does. Mr. Davie: Speak as to your own knowledge. Mr. Drake: You will know if you see the plan ? A. I presume I shall be able to identify the land. (Plan produced).

Q. On looking on that plan you say that the railway passes through ? A. Yes, I recognize at this sketch the Illecillewant river emptying into the Columbia, and I know that the railway crosses about three quarters of a mile north of that, which places the line of railway within the tract of land colored red, Gp. 1, lot 6.

And this line so far as can be discovered from the evidence has never been departed from, and it has not been disputed that the railway has been constructed on the line thus indicated, nor is it denied that the land in dispute is within the 20 miles' belt. But the defendant claims this land under and by virtue of the 45 Vic.

1887

THE QUEEN v. FARWELL.

Ritchie C.J.

ch. 6 (21 April, 1882), "An Act to amend the Land Act, 1872," which is as follows:—

Statutes of British Columbia, 1882, 45 Vic., ch. 6.

SECTION 1 SUB. SEC. 4.—"SALE OF UNSURVEYED LANDS."

1. Every person desiring to purchase unsurveyed, unoccupied, and unreserved Crown lands shall give two months notice of his intended application to purchase by a notice inserted, at the expense of the applicant, in the British Columbia *Gazette*, and in any newspaper circulating in the district wherein such land lies; and such notice shall state the name of the applicant, the locality, boundaries and extent of the land applied for, such notice shall be dated, and shall be posted in a conspicuous place on the land sought to be acquired, and on the government office, if any, in the district. He shall also place at each angle or corner of the land to be applied for a stake or post at least four inches square and standing not less than four feet above the surface of the ground. Except such land is so staked off before the above notice is given all the proceedings taken by the applicant shall be void. He shall also have the land required surveyed, at his own cost, by a surveyor approved of and acting under the instructions of the Chief Commissioner of Lands and Works or Surveyor General; and such lands shall be surveyed on the rectangular or square system now adopted by the government, and all lines shall be run due north and south and due east and west, except where from the nature of surveys made it would be impossible to conform to the above system; and the said survey of the said land shall be connected with some known point in previous surveys, or with some other known point or boundary, unless otherwise ordered by the Chief Commissioner of Land and Works or Surveyor General; and the price of said land shall, except as further provided, be one dollar per acre, which shall be paid in full at the time of the purchase; but no title can be acquired to any such land until after such land shall have been surveyed, and such survey shall have been accepted by the Chief Commissioner of Lands and Works or Surveyor General in writing and payment made for the said land; provided always, that it shall not be lawful to survey or sell any lands under authority of this section in such manner as to dispose of a less quantity of land than 160 acres, measuring 40 chains by 40 chains, except where such area cannot be obtained or such measurement carried out, nor shall the application above mentioned of itself confer any right or title to the land applied for upon the applicant.

The defendant thus claims that on the 22nd November, 1883, he made application for a patent of lands covering the lands in dispute, that these lands were surveyed in October, 1884, and that the survey was

1887

THE QUEEN v. FARWELL.

Ritchie C.J.

accepted by the Chief Commissioner of Crown Lands in British Columbia on 13th January, 1885, and that his grant issued on the 16th January, 1885.

I am clearly of opinion that the application of the defendant on the 22nd November, 1883,conferred on him no right, title, or interest in the land applied for. I am also of opinion that the line of the Canadian Pacific Railway, as well in law as in fact, was on the 13th January, 1885, when the survey and plan were fyled in the Lands and Works Department of British Columbia, duly located, that the filing of such survey and plan conferred on defendant no right, title, or interest in the land, and that on the 16th day of January, 1885, the date of the grant, the Province of British Columbia had ceased to have any interest in the land covered by said grant, and that the title to the same was in the crown for the use and benefit of the Dominion of Canada and consequently conveyed no right, title, or interest to the defendant in said lands.

There was nothing in the objection that as Canada only gave the company every alternate section only the alternate sections could be appropriated in British Columbia and until a survey it was not possible to say whether the land in question belonged to Canada or not, but the conclusive answer to this is that British Columbia, agreed to grant a similar extent of public lands along the line of railway throughout the entire length of British Columbia (not exceeding 20 miles on each side thereof) as might be appropriated for the same purpose by Canada from the public lands in the Territories and Manitoba. Canada appropriated 25 millions of acres. A belt of land 20 miles wide on each side of the Canadian Pacific Railway, viz., 508 miles long, the length then in British Columbia by 40 miles wide would contain 13,004,809 acres, so that it is quite clear there is not the slightest pretence for

1887

THE QUEEN v. FARWELL.

Ritchie C.J.

the claim set up that the Dominion are entitled only to alternate sections in British Columbia, which would not give them nearly the amount of land to which they would be entitled. Under these circumstances the judgment of the Exchequer Court should be reversed and the contention of the crown on behalf of the Dominion Government should prevail.

STRONG J.—The title of the crown depends upon section 2 of the British Columbia Act 47 Vic. ch. 14 passed on the 19th December, 1883, which is as follows:—

2. Section 1 of the act of the legislature of British Columbia, No. 11, 1880, intituled: An act to authorize the grant of certain public lands on the mainland of British Columbia to the government of the Dominion of Canada, for Canadian Pacific Railway purposes, is hereby amended so as to read as follows:—

From and after the passing of this act there shall be, and there is hereby granted to the Dominion Government for the purpose of constructing and to aid in the construction of the portion of the Canadian Pacific Railway on the mainland of British Columbia, in trust, to be appropriated as the Dominion Government may deem advisable, the public lands (along the line of the railway) before mentioned, wherever it may be finally located to a width of twenty miles on each side of the said line, as provided in the order in council, section 11, admitting the Province of British Columbia into confederation; but nothing in this section contained shall prejudice the right of the province to receive and be paid by the Dominion Government the sum of $100,000 per annum, in half yearly payments in advance in consideration of the lands so conveyed as provided in section 11, of the terms of union; provided always that the line of railway before referred to shall be one continuous line of railway only, connecting the sea-board of British Columbia with the Canadian Pacific Railway, now under construction on the east of the Rocky Mountains.

The land which the crown by this information seeks to recover is within the belt of twenty miles on each side of the Canadian Pacific Railway, as that line of railway was finally located and constructed.

The respondent claims title by virtue of a grant by the crown under the great seal of British Columbia made upon the 16th January, 1885.

1887

THE QUEEN v. FARWELL.

Strong J.

I am of opinion that the objection that the statute required a grant or some subsequent instrument to carry it into execution wholly fails. It was clearly self executing and operated immediately and conclusively so soon as the event on which it was limited to take effect happened, that is as soon as the "line of railway was finally located." Whether upon that event occurring it operated by relation from the date of its enactment so as to avoid intermediate grants by the Province of British Columbia is an inquiry which the facts of the present case do not require us to enter upon for the respondent acquired no title to this land until after the line of railway was finally located.

The objection that the statute is void and inoperative (for it amounts to that) because the grant made by the statute is to the "Dominion Government" instead of to the Queen her heirs and successors is equally untenable. This statute is not to be construed according to technical rules applicable to deeds, but according to the general rules of statutory construction one of which is that it must be so construed as to be effective, and it shall not be held to fail for want of certainty unless it is impossible to put a sensible meaning upon the language in which it is expressed. The expression "Dominion Government" used in making the grant which the statute was intended to effect is, it is true, a colloquial and not a technical designation for the crown in the right of the Dominion to whom the grant was doubtless intended to be made, but it is not so devoid of meaning as to warrant us in holding the statute ineffectual because of its use; it must on the contrary be read as symbolising the proper technical words which might have been used, and for which it was meant to be an equivalent, viz.: "there is hereby "granted to Her Majesty, her heirs and successors in "right of, and for the use of her Dominion of Canada,"

1887

THE QUEEN v. FARWELL.

Strong J.

and if these terms had been actually used in the act, no force of ingenuity would have been able to raise a doubt as to their conclusive effect in vesting the property in the lands in question in the crown in right of the Dominion.

As regards the words "final location of the railway" I am unable to see that any difficulty can arise as to the meaning to be attached to them. It was of course a necessary preliminary to the making of the railway that the line on which it was to be made should be finally ascertained, surveyed and marked out, and it was the final completion of this preliminary work which is clearly meant and most appropriately and correctly designated in the statute as the final location of the line of railway. The word location is one of common use in this country as a term to designate the selection of a line of railway or a line of road, or the ascertainment of a parcel of wild land for the purpose of settlement, and used as we find it here it can possibly mean nothing else than the final selection of the line upon which the railway was afterwards to be laid down. To give it the only other meaning which has been suggested, namely, that it is used as convertible with "construction or completion" so far from being a just interpretation would be doing nothing less than wresting it from the well known and understood meaning which usage has attached to it.

That the line was finally located in the sense just adverted to at a date anterior to the 15th January, 1885, the earliest date to which the respondent's title can be ascribed, is a fact of common notoriety, and I do not consider that any objection was raised to a defect of formal proof on this head. Should any such objection be insisted upon, this court may, as having jurisdiction to pronounce the judgment which the Exchequer Court ought to have given, order that the crown may be

1887

THE QUEEN v. FARWELL.

Strong J.

at liberty to establish the fact by the affidavit of the Chief Engineer of the Pacific Railway pursuant to the general orders of the Exchequer Court.

As regards the respondent's title that, as I have said, cannot be referred to any earlier date than the 15th January 1885, the day before the grant to him was made when the defendant's survey was delivered to the Commissioner of lands in British Columbia, (if indeed any title pre-emptive or otherwise vested in him prior to the date of the letters patent), and the line of railway had been finally located long before that date. The respondent clearly got no title under what he pretends was his original location of 115,000 acres by his letter to the Commissioner of the 20th October, 1883. No statutory provision can be referred to as conferring any title or right of pre-emption as a consequence of that letter. At most the handing in of the survey of a particular parcel of land on the 15th January, 1885, gave the respondent a claim of right for the first time though that too is not free from doubt and question which, however, it is not worth while to consider as the grant passed the next day. Section 76 of the British Columbia Land Act, 1884, does not help the respondent, it only saves rights of pre-emption previously acquired; and none had been acquired as regards the 1175 acres now in question.

The result is that when the letters patent under the great seal of British Columbia, issued on the 16th January, 1885, assuming to grant this land to the respondent, the province had no title to the land, and consequently nothing to grant, an absolute title thereto, having previously vested in the Dominion under the statute, 47 Vic., ch 14, upon the final location and ascertainment of the line of railway.

The judgment of the Exchequer Court must therefore, on the affidavit mentioned being filed if the res-

1887

THE QUEEN v. FARWELL.

Strong J.

pondent requires it, be reversed and judgment entered for the crown with costs in both courts.

FOURNIER J.—In this case I am in favor of allowing the appeal. In the case of *Attorney General of British Columbia* v. *Attorney General of Canada* (1); which was decided by this court yesterday, I had occasion to express my opinion upon the question of the ownership of the precious metals in these railway lands, but as regards the construction to be put upon the statute granting provincial lands in aid of the construction of the Canadian Pacific Railway, I think the expressions used are quite sufficient to convey the lands to the Dominion, and therefore Farwell's title from the Government of British Columbia is void; but I come to this conclusion, with the reserve I made in the other case, that the conveyance does not cover the gold and silver mines.

HENRY J—My judgment has already been given in this case. I adhere to the same views as I entertained when I delivered the judgment in the Exchequer Court, and I refer to it and think the appeal should be dismissed.

GWYNNE J—I concur with the majority of this court that the appeal should be allowed for the reasons sufficiently stated in the case of *Attorney General of British Columbia* v. *Attorney General of Canada* (1); the title of Canada is referable to the treaty alone, and the acts of Parliament which were passed to carry out the provisions of that treaty.

Appeal allowed with costs.

Solicitors for appellant: *O'Connor & Hogg.*

Solicitors for respondent: *McIntyre, Lewis & Code.*

(1) P. 345.

CONTROVERTED ELECTION FOR THE ELECTORAL DISTRICT OF L'ASSOMPTION.

1883
*Feb. 27.

JOSEPH GAUTHIER.....APPELLANT;

AND

JOSEPH E. B. NORMANDEAU.....RESPONDENT.

ON APPEAL FROM THN DECISION OF THE SUPERIOR COURT FOR LOWER CANADA (TASCHEREAU J.)

CONTROVERTED ELECTION FOR THE ELECTORAL DISTRICT OF QUEBEC COUNTY.

ED. O'BRIEN *et al*.....APPELLANTS;

AND

SIR A. P. CARON.....RESPONDENT.

ON APFEAL FROM THE DECISION OF THE SUPERIOR COURT FOR LOWER CANADA (CARON J.)

Dominion Controverted Elections Act—R. S. C. ch. 9 secs. 32, 33 & 50—Petition—Time, extension of—Appeal—Jurisdiction.

An order in a controverted election case made by the court below or a judge thereof not sitting at the time for the trial of the petition, and granting or rejecting an application to dismiss the petition on the ground that the trial had not been commenced within six months from the time of its presentation, is not an order from which an appeal will lie to the Supreme Court of Canada under sec. 50 of the Dominion Controverted Elections Act (R. S. C. ch. 9). Fournier and Henry JJ. dissenting.

L'ASSOMPTION ELECTION CASE.

APPEAL from the judgment of the Superior Court of the Province of Quebec, presided over by Mr. Justice H. Taschereau, rejecting appellant's motion presented on the 20th of December to have an election petition declared out of court and abandoned,

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

1888

L'ASSOMPTION ELECTION CASE.

by reason of the respondent not having proceeded with the trial of the petition within six months of the presentation thereof.

Respondent contested the election of appellant who was elected at the last federal elections for the electoral district of L'Assomption.

The petition was presented on the 23rd of April, last past.

Appellant fyled preliminary objections on the 30th of April, and on the same day moved that all proceedings in the case be suspended during the session of Parliament then pending.

On the 11th of May Taschereau J. granted that motion.

Parliament opened on the 13th of April, 1887, and was prorogued on the 23rd June.

Long vacation began one week after on the 1st of July and ended on the 1st of September during which time the judges of the Superior Court formally declined to try any controverted election case.

On the 2nd of September respondent moved that a day be fixed for the hearing of the preliminary objections.

On the 6th of September the case was heard on the preliminary objections, and they were dismissed.

On the 17th of September, respondent moved that an order be made and a day fixed for the examination of appellant; that motion was granted on the 4th of October, the day was fixed, and appellant was examined on that day. On the same day, respondent applied to have a day fixed for the trial of the petition.

On the 10th of October, Mr. Justice Taschereau fixed the 20th December as the day for the trial. On that same day, immediately after the judgment fixing the day for trial ap pellant moved that respondent fyle a bill of particulars before the trial. The court made an

order that respondent fyle his bill of particulars on or before the 13th December.

On the 20th December, the day fixed for the trial, appellant moved that the trial be not proceeded with, that the right of respondent to proceed with the trial be declared forfeited, and that the petition be declared abandoned and out of court because the trial of the petition had not been commenced within six months from the presentation thereof.

That motion was rejected by the court and the trial proceeded. The appellant's election was voided by reason of corrupt practices on the part of his agents.

On appeal to the Supreme Court of Canada the counsel for the appellant stated that although by his factum it appeared that the present appeal was only from the judgment of Mr. Justice Taschereau, dismissing the motion to set aside the election petition on the ground that the trial had not been commenced within six months from the date of the presentation of the petition, was an error, as the appeal was from the final judgment as well, and asked permission to complete the record by adding such final judgment and the notice of appeal.

The respondent's counsel objected to any indulgence being granted, on the ground that as the final judgment avoided the election petition for admitted acts of corruption by agents, and that the appeal now before the court was solely from the interlocutory judgment of Mr. Justice Taschereau, on a motion which was not appealable, and contended that the appeal should be quashed for want of jurisdiction.

Prefontaine for appellant.

Bisaillon Q.C. for respondent.

Sir W. J. RITCHIE C.J.—This is not an appeal from a decision by the judge at the trial, but from an

1888

L'ASSOMPTION ELECTION CASE.

Ritchie C.J.

order of the Superior Court, dismissing a motion to set aside the election petition on the ground that the trial had not been commenced within six months from the date of the presentation thereof.

I think that where a party has gone before a judge and admitted bribery by agents, that we should not strain the law to allow him to appeal. There is no provision in the law allowing an appeal from the decision of the Superior Court on a preliminary objection which is not final and conclusive and does not put an end to the petition, and such is the appeal which is now before us. I am clearly of opinion that we have no jurisdiction in the case, and therefore the appeal should be quashed.

STRONG J---Nothing can be clearer than that appeals in Controverted Elections are limited to two matters only, viz: first, an appeal from any decision, rule or order on preliminary objections to an election petition the allowance of which is final and conclusive and puts an end to the petition or which objection, if it had been allowed, would have been final and conclusive and have put an end to the petition; and, secondly, an appeal from the judgment or decision on any question of law or of fact of the judge who has tried the petition. As the appeal is now presented it is quite clear that it does not fall under either of these heads, and consequently this court has no jurisdiction. The appellant after admitting that his election should be set aside for corruption by agents, wishes us to assist him and convert a judgment which on the material now before us is clearly not appealable into a judgment on the merits from which an appeal lies. I am of opinion that this cannot be done and therefore the appeal must be quashed.

FOURNIER J—I am of opinion that we have jurisdic-

tion in this case. Moreover, I think the decision in this case should be postponed until we are ready to decide the case which was argued at length before this court some days ago, and in which the learned counsel for the appellants contended that a similar judgment was appealable either as coming within the first part of sec. 50, R.S.C., ch. 9, being a judgment on a preliminary objection to an election petition, or as coming within the second part of sec. 50, being a final judgment upon a question of law by the judge who has charge of the trial of the petition. However, if the majority of the court have decided to go on, I will only enter my dissent, and later on in the Quebec County case I will give at length my reasons for my opinion in favor of the jurisdiction.

HENRY J.—The motion which is now made and under consideration is to allow the appellant to complete his case and without that the court has no material to pronounce upon. In another case this court gave permission to allow the appeal to stand over until another session in order to have the judgment appealed from printed, and I think if we do not wish to be taxed with inconsistency we should be prepared to allow appellant's counsel forty-eight hours to produce his notice of appeal and ascertain whether he has or has not limited his appeal to the question of the six months.

TASCHEREAU J.—I am also of opinion that we have no jurisdiction.

GWYNNE J.—Upon the facts presented it is apparent the court has no jurisdiction.

Appeal quashed with costs.

Solicitors for appellant: *Godin, Champagne & Dugas.*

Solicitors for respondent: *Lacoste, Bisaillon, Brousseau & Lajoie.*

1888

*Feb. 21.
*March 16

QUEBEC COUNTY ELECTION APPEAL.*

APPEAL from the judgment of Mr. Justice Caron dismissing the election petition on the ground that the petitioners had not proceeded to trial within six months from the presentation of said petition.

The petition to set aside the election for the electoral district of Quebec county in the province of Quebec, was presented on the 9th of April, 1887.

On the 20th day of the same month preliminary objections were fyled by the defendant and on the 30th day of May next the same were dismissed.

On the 26th of August a motion to fix a day and a place for the trial of the petition was presented, which motion was continued to the 5th of September by a ruling of Mr. Justice Caron.

At the latter date the same motion was again continued to the 12th day of September, and on that day the trial of the petition was fixed by Mr. Justice Casault, to be held on the 31st of the month of October at Quebec.

On the 13th of September a notice of the time and place of trial was given by the prothonotary of the Superior Court according to law, and copies thereof were sent to the petitioners, to the respondent and to the sheriff.

On the 26th day of September a petition was presented on behalf of the petitioner to fix a day for the personal examination of the defendant; this petition was, by consent of the parties, continued to the 30th September and subsequently to the 3rd, 4th and 8th of October, by rulings of Messrs. Justice An-

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

drews, Caron and Casault.

On the 26th of October the defendant having failed to appear, though duly summoned by subpoena, the case was continued to the 28th to enable the defendant to produce affidavits to justify his absence.

That affidavit having been produced, the petitioners then moved for an extension of time for the trial of the petition. On the 2nd day of December two rules were argued, one for extension of delay on behalf of the petitioners and the other by defendant to declare delay of six months for the beginning of the trial lapsed and the petition dismissed accordingly.

The former was dismissed and the latter declared absolute and the petition was dismissed by the following judgment:—

"The parties having been heard by counsel upon the "rule of the 30th day of November last to the end that "whereas more than six months have elapsed from the "time when the petition in this cause was presented; "and whereas the petitioners have not yet proceeded "with the trial of such petition; and whereas the trial "of said petition has not commenced within six months "from the time when the said petition was presented; "the said petition be dismissed and that no further pro-"ceedings be had on the same; it is ordered that the "said rule be and the same is made absolute, and the "said election petition be and the same is hereby dis-"missed, each party paying his own costs."

Bossé Q.C. for respondent moved to quash the appeal for want of jurisdiction.

MacDougall Q.C. and *Martin contra.*

The statutes and cases relied on by counsel are reviewed in the judgments.

Sir W. J. RITCHIE C. J.—This question has been decided during the present sittings, and I can only repeat what I then desired to say, viz: That I think

1888

QUEBEC COUNTY ELECTION CASE.

Ritchie C.J.

the appeal to this court is limited under sec. 50 of ch. 9, R. S C., to judgments, &c., on preliminary objections the allowance of which has been final and conclusive and has put an end to the petition, or which objection, if allowed, would have been final and conclusive and have put an end to the petition, and to judgments or decisions on questions of law or of fact of the judge who has tried such petition.

The objection here is not, in my opinion, an objection to a preliminary objection under this clause, nor is it from a judgment or decision on any question of law or of fact of the judge who has tried the petition. The petition was never tried, and the appeal is from the decision of a judge who treated the petition as abandoned, and on which no further proceeding could be had. Our authority to hear appeals is strictly statutory, and unless the matter appealed from can be brought within the terms of the statute we are powerless to interfere. Had the legislature intended to give an appeal in a case such as this that intention should have been made clearly to appear by the terms of the statute. If it was the intention that there should be an appeal in a case such as this there has been a *casus omissus* in not making such intention apparent. The appeal should therefore be quashed.

FOURNIER J.—The question to be determined on this appeal is whether this court has jurisdiction to entertain an appeal from Mr. Justice Caron's judgment dismissing the election petition against the return of the respondent as member for the House of Commons for the electoral district of the County of Quebec.

In order to arrive at a proper conclusion on this important question I think it desirable first to refer at length to the sections of the Dominion Controverted Elections' Act (1) which in my opinion are material

(1) R. S. C. ch. 9.

on this point and afterwards to give a synopsis of the pleadings in the case.

The material sections of that act are as follows:—

13. Within five days after the decision upon the preliminary objections, if presented and not allowed, or on the expiration of the time for presenting the same, if none are presented, the respondent may fyle a written answer to the petition, together with a copy thereof for the petitioner; but whether such answer is or is not fyled, the petition shall be held to be at issue, after the expiration of the said five days, and the court may, at any time thereafter, upon the application of either party fix some convenient time and place for the trial of the petition.

43. At the conclusion of the trial the judge shall determine whether the member whose election or return is complained of or any and what other person was duly returned or elected, or whether the election was void, and other matters arising out of the petition and requiring his determination, and shall, except only in the case of appeal hereinafter mentioned within four days after the expiration of eight days from the day on which he shall have given his decision, certify in writing such determination to the Speaker, appending thereto a copy of the notes of the evidence, and the determination thus certified shall be final to all intents and purposes.

50. An appeal shall lie to the Supreme Court of Canada under this act by any party to an election petition who is dissatisfied with the decision of the court or a judge.

(*a.*) From the judgment, rule, order or decision of any court or judge on any preliminary objection to an election petition, the allowance of which objection has been final and conclusive, and has put an end to such petition, or which objection if it had been allowed would have been final and conclusive and have put an end to such petition; provided always that, unless the court or judge appealed from otherwise orders, an appeal in the last mentioned case shall not operate as a stay of proceedings, nor shall it delay the trial to the petition.

(*b.*) From the judgment or decision on any question of law or of fact of the judge who has tried such petition.

56. No election petition under this act shall be withdrawn without the leave of the court or judge (according as the petition is then before the court or before the judge for trial) upon special application made in and at the prescribed manner, time and place.

The election petition in this case was presented on the 9th April, 1887. On the 20th of the same month preliminary objections were filed, and on the 20th of May Mr. Justice Casault dismissed them without

1888

QUEBEC COUNTY ELECTION CASE.

Fournier J.

costs. On the 26th August a motion was made to the Superior Court to fix a day and a place for the trial of the petition; this motion was continued by consent of parties to the 12th September, and on that day the trial of the petition was fixed by Mr. Justice Casault, to be held on the 31st of October, at Quebec. On the 26th September application was made to the judge to fix a time for the personal examination of the respondent, and this application was continued by consent until the 10th October, when the petitioners applied to have the day fixed for the trial of the petition changed from the 31st of October to the 19th December, as being more suitable for all parties. The application being based on the following consent filed by the attorneys of record :—

CONSENT OF 10TH OCTOBER, 1887.

Les parties consentent à ce qui suit :

Vu la motion à être présentée ce jour de consentement en cette cause.

Les pétitionnaires consentent à l'ajournement tel que convenu mais sans préjudice à leurs droits.

Le défendeur et intimé déclare renoncer aux délais et ne pas s'en prévaloir et consent à ce que tous les procédés ajournés soient faits avec la même force et effet plus tard qu'ils le seraient si l'ajournement convenu aujourd'hui n'aurait pas lieu.

Si le défendeur ne comparait pas le vingt-six novembre tel que dit dans la dite motion, les petitionnaires ne seront pas tenus de produire leurs particularités le douze décembre prochain ni de procéder à la preuve le dix neuf du même mois, mais ils auront droit de faire remettre la cause et la production des particularités jusqu'à dix jours après que le dit défendeur aura comparu pour répondre aux questions qui lui seront posées de la part des pétitionnaires.

Quebec, 10 Octobre 1887.

(Signé) JOSEPH MARTIN,
Proc. des pétitionnaires.
ANGERS, CASGRAIN ET HAMEL,
Procs. du défendeur Caron.

Mr. Justice Casault thereupon fixed the trial for the 19th day of December. On the 29th November the attorneys for respondent took out a rule *nisi* to dismiss the petition for want of prosecution within six months

1888

QUEBEC COUNTY ELECTION CASE.

Fournier J.

from the time when the petition was presented. On the 19th December Mr. Martin, attorney for the petitioners, fyled the following affidavit:—

AFFIDAVIT OF JOSEPH MARTIN RESPECTING DELAYS.

Je soussigné, Joseph Martin, avocat de la cité de Québec, étant dument assermenté sur les Saints Evangiles, dépose et dit:—

Je suis le procureur des petitionnaires en cette cause. Durant la vacance de la cour entre le premier juillet et le premier septembre derniers je suis allé plusieurs fois à la chambre des juges de ce district, au palais de justice, en cette cité, pour demander de procéder, et que ce n'est que le vingt-trois août que l'un des juges a consenti à prendre ma requête pour fixer l'enquête; Qu'au jour fixé pour la présentation de cette requête, un certain avocat non autorisé par moi et accompagné que par le conseil du Defendeur sont allés devant l'honorable juge Caron, avant l'heure fixée dans l'avis sur la requête, et tous deux ont fait remettre la requête au douze septembre, par jugement de son Honneur, et que ce jugement que je n'ai pu réussir à faire changer a été la cause que la fixation de l'instruction et l'audition des témoins en cette cause n'a pas eu lieu dans les six mois après la présentation de la pétition.

Que les pétitionaires ont toujours été prêts et ont persisté pour procéder à l'intruction de la pétition dans cette cause,

Et j'ai signé,

JOSEPH MARTIN.

On the 26 December, Mr. Justice Caron delivered the following judgment, dismissing the election petition:

The parties having been heard by counsel upon the rule of the 30th day of November last, to the end that, whereas more than six months have elapsed from the time when the petition in this cause was presented, and whereas the petitioners have not yet proceded with the trial of such petition, and whereas the trial of said petition has not commenced within six months from the time when the said petition was presented,—the said petition be dismissed and that no further proceedings be had on the same: It is ordered that the said rule be and the same is made absolute and the said election petition be, and the same is hereby dismissed, each party paying his own costs.

The petitioners filed an exception to the judgment rendered, dismissing their election petition, and declared their intention to appeal therefrom.

Now, sections 13, 43 and 56, with the exception of the first part of sec. 50, are the revised enactments of the corresponding sections of 37 Vic. c. 10, viz.: secs.

1888

QUEBEC COUNTY ELECTION CASE.

Fournier J.

11, 29, 54 and 38 Vic. ch. 11, sec. 48, and it should be remembered that these very same sections have already been the subject of mature consideration for this court in the case of *Brassard* v. *Langevin* (1). In that case (though I must say I was of a contrary opinion) the court held that "the hearing of the preliminary objec- "tions and the trial of the merits of the election peti- "tion are distinct acts of procedure," and that the judgment then under appeal was not appealable because the appeal was not from the decision of a judge who had tried the merits of the petition. The reasoning of the majority of the court is based upon the fact that the act as framed carried out a distinction as to the separation of the powers and jurisdiction *of the court* and those *of the judge at the trial.* Mr. Justice Strong, in whose judgment Sir Wm. B. Richards, the late Chief Justice of this court, concurred on this point, says (2) :—

Section 54 (which is verbatim section 56 of the Revised Statutes, chapter 9, which I have read) of the act contains a provision recognizing a distinction very pertinent to the question raised here; it relates to the withdrawal of a petition and enacts that a petition shall not be withdrawn without the leave of the court or judge, according as the petition is then before the court or before the judge for trial, upon special application.

After the petition is set down for trial the functions of the court are at an end, for no provision similar to that embodied in section 23 of the Controverted Elections' Act, 1873, authorising a judge who tries a petition to reserve a case for the opinion of the court, is contained in the act of 1874. There is, therefore, *a well defined line of demarcation* between the two jurisdictions, *that of the court* and that of the *judge who tries the petition*.

and, at page 327, he proceeds :

This practice of disjoining the hearing of preliminary objections from the trial, which does not correspond with any similar proceeding provided for by the English act, was probably suggested by the course of proceeding formerly adopted by the election committees who, though bound by no prescribed rules but being free to regulate their proceedure in each case according to convenience, were accustomed to hear and determine *in limine* objections taken to

(1) 2 Can. S. C. R. 319. (2) At p. 324.

the qualification of the petitioner, and others of the same class, before proceeding to investigate the merits of the petition. These considerations appear sufficient to demonstrate that the Controverted Elections' Act, 1874, deals with the hearing on preliminary objections and the trial of the petition as two distinct acts of procedure having for their objects different results and which it was the policy of the act to keep separate. Parliament has indeed in so many words recognised the separation between the jurisdiction of the court before trial and that of the judge *after the petition is set down for trial*, when in the 54th section it requires the withdrawal of the petition to be with the leave of the court or judge- (According as the petition is then before the court or before the judge for trial.)

It is evident the court held in that case the line of demarcation, when the functions of the court were at an end, to be: "*After the petition was set down for "trial.*" From that moment therefore the election petition is before the trial judge, who alone can make a report to the Speaker, under sec. 43, declaring the respondent duly elected or unseated for corruption by agents or otherwise.

The interpretation put on section 18 chapter 2 of 38 Vic. by the Supreme Court of Canada having been brought to the notice of Parliament, the act was amended by 42 Vic., ch. 39, giving the right of appeal from the decision *of the court or judge*, on preliminary objections, and as under sec. 13, after the expiration of five days from the decision of the preliminary objections the petition is to be at issue, and the court is to fix a time and place of trial, and as it has been decided by the highest court of the Dominion that from that moment the election petition was under the control of the trial judge, from whose judgment, in the words of sec. 50 (*b*) "on any question of law or of fact", an appeal would lie, it was believed it would not be in the power of a single judge to dismiss an election petition or unseat a member of Parliament without appeal, if provision was made for an appeal from the judgment, rule, order or decision of any court or judge on any preliminary ob-

1888

QUEBEC COUNTY ELECTION CASE.

Fournier J.

jection to an election petition. Now, applying the law as interpreted in the case of *Brassard* v. *Langevin* to the facts of the present case, can it be said that the procedure in this case reached the line of demarcation where the jurisdiction and powers of the court or judge ceased, and the powers and jurisdiction of the trial judge commenced? And is there a decision of the trial judge on any question of law or of fact from which an appeal lies under sec. 50 of ch. 9, R. S. C?

It is evident if we follow the ruling of this court in the case of *Brassard* v. *Langevin*, to which I have referred, that on the 12th September, when Mr. Justice Casault ordered that the trial of the election petition should be held at Quebec on the 31st October, 1887, the procedure in the case had reached *that line of demarcation* when the jurisdiction of the court or judge as regards all preliminary proceedings was at an end, and the exclusive jurisdiction of the trial judge commenced. Consequently all subsequent proceedings in the case were proceedings before the judge who had charge of the trial of the merits of the petition, and if any question of law or of fact arose on such proceedings, it would be one which had to be decided by such judge whose decision is subject to review on an appeal to this court, and whose decision in the event of no appeal being taken is, under sec. 43, to be certified in writing to the Speaker of the House of Commons.

If no appeal had been taken it would no doubt have been the duty of the learned judge who had charge of the petition, and who decided that the petition should be dismissed, to have made his return to the Speaker, declaring the respondent duly elected. On the pleadings the learned judge having decided as a question of fact whether six months had elapsed without proceeding, and as a question of law whether the statute should be construed as he had done, does not his judg-

ment dismissing the election petition *after the same had been set down for trial* determine a question of law and of fact appealable under sec. 50 (*b*) ? I can come to no other conclusion than that such a judgment is appealable.

HENRY J.—This is an appeal from the judgment of one of the judges of the Superior Court of Quebec, on a petition of the appellants against the election of the respondent as a member of the House of Commons for the County of Quebec, who decided that the petition should be dismissed because the trial thereof was not commenced within six months from the date of the presentation of the petition.

It is objected on the part of the respondent that no appeal to this court lies from the judgment, and

Secondly, that if it does, that the judgment was warranted by the provision of sec. 32 of ch. 9, of the Controverted Elections Act.

By sec. 48 of the Supreme and Exchequer Courts Act an appeal from a judgment on an election petition was provided to be taken by any one

Who may be dissatisfied with the decision of the judge who has tried such petition on any question of law or of fact.

In the case of *Brassard and others* v. *Langevin* (1) it was held by a majority of this court (Fournier and Taschereau JJ. dissenting), that a judgment on preliminary objections:

Was not appealable, and that under that section an appeal will be only from the decision of a judge who has tried the merits of an election petition :

And it was held by my brother Strong, (Richards C. J. concurring),

That the hearing of the preliminary objections and the trial of the merits of the election petition are distinct acts of procedure.

That judgment was given in April, 1878, and during the following session of Parliament it was provided

(1) 2 Can. S. C. R. 319.

1888

QUEBEC COUNTY ELECTION CASE.

Henry J.

by the Supreme Court Amendment Act of 1879 that

> An appeal shall lie to the Supreme Court from the judgment, rule, order or decision of any court or judge on any preliminary objection to an election petition the allowance of which shall have been final and conclusive and which shall have put an end to the petition, or which would, if allowed, have been final and conclusive and have put an end to the petition.

Preliminary objections are provided by the statute to be tried before a judge, and they are, in my opinion, such preliminary objections as are taken within the prescribed five days. After they are decided nothing remains to be tried but the *merits of the petition.*

What then constitute the merits of the petition? After the preliminary objections are disposed of everything in law or fact that can be legally urged on either side which should be considered by the judge when dealing with the issues raised by the petition and the answer thereto if one has been filed. He is authorized, and he alone, as the judge to try the merits to decide not only the questions before him raised by the evidence but *every question of law.* He may be the same judge who decided as to the preliminary objections, but if so he has no longer any control as to the preliminary questions pointed out by the statute, and his whole jurisdiction is *as to the merits of the petition* including as well all legal questions as matters of fact. The two tribunals are as distinct from each other as if the trial of the preliminary questions was to take place in one court and the trial of the merits of the petition in another. The judge who tried the preliminary objections fulfilled his whole duty when he decided as to them, and then the statute provides that the trial judge shall be seized of the *whole jurisdiction* to determine every matter of law or of fact necessary for a final judgment upon the merits either to dismiss the petition or to set aside the election and report to the Speaker of the House of Commons as pro-

vided by the act.

After the preliminary objections were disposed of, there appear to have been several orders passed from time to time, appointing the time and place for the appearance of the respondent to be examined, and for the hearing of the merits of the petition. The orders were made by judges acting, as they must have done, as trial judges. The matter was at issue on the 25th of August, 1887, and every motion and order made after that time had reference to the trial of the merits of the petition, and were inseparably connected therewith. On the 29th November, 1887, an order *nisi* was obtained on the part of the respondent to dismiss the petition on the ground that the six months' prescribed for the commencement of the trial had elapsed. That order was subsequently made absolute and the petition dismissed. From the latter order the appellant appealed to this court; and, as previously stated, the right of appeal in such a case is contested. That question calls for our judgment.

The Legislature, having first provided an appeal from the judgment of the trial judge on all matters of law or of fact, subsequently provided for an appeal from the judgment of the judge who tried preliminary objections in all cases where the judgment put an end to the petition, or might have done so if the judge had so decided. The intention of the Legislature was evident that in all cases where the decision of the judge who tried the preliminary objections set aside the petition, or might have done so, or the trial judge on any question of fact or law did so, an appeal should lie. No interregnum could take place—as soon as the preliminary objections were disposed of adversely to the party taking them the trial judge became, *eo instanti*, seized with the power and duty of disposing of every matter of law or of fact as to the adjudication *on the*

1888

QUEBEC COUNTY ELECTION CASE.

Henry J.

merits of the petition. I feel bound to hold therefore that the question of law raised as to the six months prescribed for the commencement of the trial was a matter of law to be decided alone by the trial judge and that it was to all intents included as one of the matters of law to be decided by him, and an appeal from his decision is provided.

Having arrived at the conclusion that the subject matter of the appeal is regularly before us I must deal with the decision appealed from.

In order to arrive at a satisfactory construction of section 32 chapter 9 of the revised statutes of Canada I have referred to sections one and two of the Controverted Elections' Act of 1875, chap. 10, from which sec. 32 was taken and condensed. Section 1 provides that

> Whenever it appears to the court or a judge that the respondent's presence at the trial is necessary, the trial of an election petition shall not be commenced during any session of Parliament, and in the computation of any delay allowed for any step or proceeding in respect of any such trial or for the commencement of such trial under the next following section, the time occupied by any such session shall not be reckoned.

Section 2, as far as touches the present inquiry, is as follows;

> Subject to the provisions of the next preceding section (* * *) the trial of every election petition shall be commenced within six months from the time when such petition has been presented and shall be proceeded with *de die in diem* until the trial is over, unless on application supported by affidavit it be shewn that the requirements of justice render it necessary that a postponement of the case should take place. * * * *

It is in my opinion clear, under the provisions of the two sections just quoted, that the time of sitting of Parliament was provided to be reckoned only in the case mentioned in the first section and not applicable to any other. Comparing the provisions of those sections with those of section 32, before mentioned, I have arrived at the conclusion that the latter section

was not intended to and did not essentially amend the provisions in the two other sections. The object in the revision of the statutes was not to amend but to consolidate and condense them; and unless a manifest change of provision was made I think that courts should not impute any intention of doing so.

I am therefore of the opinion that the decision of the trial judge on the point in question was correct and should be affirmed.

By the second section referred to it is provided that the trial shall be commenced within the six months,

Unless on application supported by affidavit it be shown that the requirements of justice render it necessary that a postponement of the case should take place.

If then in the course of a trial a motion should be made for a postponement of the case under that section I should be inclined to the opinion that the decision thereon would be appealable to this court. Such an application is not, in my opinion, addressed merely to the *discretion* of the judge. If then a strong case was made out for or against the decision this court, in my opinion, could review the judge's decision.

Section 33 of the Controverted Elections' Act, ch. 9 of the Revised Statutes, is different in its wording from the provision in section 2 before cited.

Following section 32 it provides that

The court or a judge may, notwithstanding anything in the next preceding section, from time to time enlarge the time for the commencement of the trial, if, on application for that purpose supported by affidavit, it appears to such court or judge that the requirements of justice render such enlargement necessary.

That provision is wholly directed to the discretion of the court or a judge and the decision is final. If therefore the judge should decide that an enlargement should be made, his decision cannot be reviewed, and if within the prescribed six months he enlarges the time for the commencement of the trial within the terms of the section beyond the six months his

1888

QUEBEC COUNTY ELECTION CASE.

Henry J.

decision is final. The section requires the motion for such enlargement to be supported by an affidavit which should disclose facts and reasons to justify the enlargement.

The record of the case shows that on the 23rd of August a motion was filed to appoint a time and place for the hearing of the petition. On the 26th the motion was continued to the 5th September. On the 12th September the hearing was ordered to take place on the 31st October. On the 26th September a motion was filed to fix a time and place for the examination of the respondent. On the 28th of September the motion was continued to the 30th September. It was further continued to the 4th of October, and on that day continued to the 10th October, and on the latter day, to the 11th October. It was subsequently ordered, by the consent of the respondent's counsel, that the 31st of October should be fixed for the production of proof of the allegations of the petition and hearing. On the 10th of October, and by the same consent, the time was changed to the 19th of December for the hearing and the production of proof, and the 26th November for the appearance and examination of the respondent, and an order therefor was made. The respondent having failed to appear at the time and place named in the order, an order *nisi* was passed on the 30th November that in consequence of the respondent having been absent on public business the time for his examination should be postponed to the 10th January, and the hearing and production of proof to the 27th January. An order *nisi* was obtained on the part of respondent on the 30th November to dismiss the petition returnable on the 2nd December, and on the 27th of the same month the order absolute to dismiss the petition was passed.

The petition having been presented on the 9th of

April, the prescribed six months expired on the 9th of October. The record shows that on the 8th of October, after several adjournments, an order was passed, that the petition to fix a day for the personal examination of the respondent stand continued to the 10th of October, the day after the expiration of the six months, and on the latter day the petitioners moved, by consent, to fix a day for the examination of the respondent, for filing particulars and for the trial of the petition upon which an order was passed postponing the hearing of the petition from the 31st October to the 19th of December. It is evident from the record that the appellants were from the month of August desirous to bring on the hearing but delay took place from time to time in consequence of the failure of the respondent to appear as ordered for personal examination to enable the petitioners to file their particulars as alleged, and thus the cause was delayed until, according to my views, the prescribed six months had expired.

By section 33 of cap 9 R. S. C., the power of enlargement beyond the six months, as I read it, is given to the court or a judge from time to time, if on an application *for that purpose* supported by affidavit, *it appears to such court or judge* that the requirements of justice render such enlargement necessary; and I think that if an application had been made supported by affidavit before the expiration of the six months the trial judge had power to enlarge the time from time to time and that his decision would be final. If it appeared to him that the affidavit was insufficient and he declined to order the enlargement the expiry of the six months put an end to the petition. I cannot find, however from the record that any such application was made supported by affidavit, and as the legislature has stipulated that the power of

1888

QUEBEC COUNTY ELECTION CASE.

Henry J.

enlargement must be on an application supported by affidavit I am of the opinion no application could be otherwise made, nor could any valid order be made. As the result of the governing decisions on the point I am also of the opinion that the application must be made before the expiration of the prescribed six months.

As the continuances, as stated in the record, were by consent, it is contended that the respondent must be taken to have waived any objection. By his counsel he certainly agreed to do so and, in ordinary cases, would be bound by the agreement, but in the present it is different on principle from most others. Here at the expiration of the prescribed six months the statutory functions and jurisdiction of the judge are at an end unless he has enlarged the time for the hearing as prescribed in section 33, and the mere agreement of the parties could not confer upon him any judicial power or jurisdiction.

After the expiration of the prescribed six months during which the legislature has limited the time for the commencement of the trial a judge could not try the case unless he went contrary to the provision of the statute. If, then, he had no jurisdiction as to the trial, if he could not try the merits of the petition, say, three days after the expiration of the prescribed six months, how could he give himself jurisdiction by enlarging the time to a future day? I can find no decision nor any principle upon which such a proposition could be sustained.

For the reasons given I am of opinion that the case came legitimately before this court by appeal.

I am, however, of opinion, that for the reasons I have given it should be dismissed with costs.

TACHEREAU J.—Whether an appeal lies to this court

or not, from the decision of Mr. Justice Caron, has been settled by this court in three cases during the present sittings of the court. The question is therefore settled and cannot be re-opened. I am of opinion that the appeal should be quashed.

GWYNNE J.—I am of opinion that the statute which regulates appeals in Controverted Election Petitions gives no appeal to this court from a rule or order of the nature of that which is the subject of the present appeal, namely, a rule of the Superior Court of the Province of Quebec, (in which court the Controverted Election Petition in the present case was pending) dismissa such petition for want of prosecution.

The Legislature has restricted appeals to this court in these Controverted Election Petitions to two cases, one of which is from the judgment of the Superior Court in which the election petition is filed or of a judge thereof, and the other from the judgment of the judge presiding in the trial court, (a court wholly distinct from the Superior Court in which the petition is filed) after the trial of the issues joined on such petition upon the merits, upon any question of law or fact arising upon such trial. The former is an appeal from a judgment upon a preliminary objection. Now the term "preliminary objection" as used in the statute, has a special meaning which, as appears by the 5th and 12th sections of ch. 9, of the Revised Statutes, is an objection to the sufficiency of the contents of the petition, or to the status of the petitioner, "*or to any further "proceedings on the petition by reason of the ineligibility "or disqualification of the petitioner.*" In the present case the respondent did, under the provisions of these sections, file certain preliminary objections, which were disposed of by an order of dismissal of the date of the 30th May, 1887,

Whether the respondent filed an answer to the peti-

1888

QUEBEC COUNTY ELECTION CASE.

Gwynne J.

tion after the dismissal of his preliminary objections does not appear, but whether he did or not the cause and matter of the petition was at issue upon the merits at the expiration of five days from such dismissal of the preliminary objections, and no other *preliminary objections*, in the sense in which that term is used in the statute, or so as to make any decision thereon appealable to this court, could thereafter be taken. The order of the 30th May exhausted the respondent's power to make any other preliminary objection in the sense in which that term is used in the statute. It is impossible therefore to read the statute as was contended for by the learned counsel for the appellants, as constituting any objection made anterior to the trial to be a preliminary objection within the statute, and so the decision upon it appealable to this court. The order, therefore, of the Superior Court, dismissing the petition out of that court for want of prosecution, is not made by the statute appealable to this court, and we have no jurisdiction to entertain an appeal from such decision.

So neither can such decision be regarded as a decision upon a question of law or fact arising upon a trial of the matter of the petition which has never taken place, and which, if it had, would have been a proceeding in a wholly different court, namely, the trial court. It was quite competent for the Legislature in their discretion to leave the decision of a motion to dismiss a Controverted Election Petition for want of prosecution to the absolute discretion and judgment of the court in which the petition was filed, there to be dealt with according to the course and practice of the court, and this is what, in my opinion, the statute in effect does. The appeal, therefore, in the present case, must be quashed with costs for want of jurisdiction in this court to entertain it.

Appeal quashed with costs (1).

Solicitor for appellants: *Joseph Martin.*

Solicitors for respondent: *Casgrain, Angers & Hamel.*

(1) The appeals in the Montmorency and L'Islet controverted elections were also quashed for the same reason.

1888

P. PURCELL (RESPONDENT).....APPELLANT;

AND

ALEXANDER KENNEDY (PETITIONER) RESPONDENT.

ON APPEAL FROM THE JUDGMENT OF MR. JUSTICE ROSE SITTING FOR THE TRIAL OF THE GLENGARRY CONTROVERTED ELECTION CASE.*

Election petition—Ruling by judge at trial—Appeal—Dominion Controverted Elections Act (ch. 9, R. S. C., secs. 32. 33 and 50)—Construction of—Time—Extension of—Jurisdiction.

Held, 1st. That the decision of a judge at the trial of an election petition overruling an objection taken by respondent to the jurisdiction of the judge to go on with the trial on the ground that more than six months had elapsed since the the date of the presentation of the petition, is appealable to the Supreme Court of Canada under sec. 50 (*b.*) ch. 9 R.S.C., Gwynne J. dissenting.

2nd. In computing the time within which the trial of an election petition shall be commenced the time of a session of parliament shall not be excluded unless the court or judge has ordered that the respondent's presence at the trial is necessary. (Gwynne J. dissenting.)

3rd. The time within which the trial of an election petition must be commenced cannot be enlarged beyond the six months from the presentation of the petition, unless an order had been obtained on application made within said six months. An order granted on an application made after the expiration of the said six months is an invalid order and can give no jurisdiction to try the merits of the petition which is then out of court. (Ritchie C.J. and Gwynne J. dissenting) (1).

The following are the material sections of ch. 9 R.S.C., and upon which the court were asked to put a construction:

50. An appeal shall lie to the Supreme Court of Canada under this act by any party to an election petition who is dissatisfied with

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

1888

GLENGARRY ELECTION CASE.

PPEAL from a judgment of Mr. Justice Rose claring the election of a member for the house of commons for the electoral district of Glengarry void by reason of corrupt practices and disqualifying the appellant.

The petition against appellant was presented and fyled on the 25th April, 1887. Parliament was in

---

the decision of the court or a judge;

(*a*) From the judgment, rule, order or decision of any court or judge on any preliminary objection to an election petition, the allowance of which objection has been final and conclusive, and has put an end to such petition, or which objection, if it had been allowed, would have been final and conclusive and have put an end to such petition; Provided always that, unless the court or judge appealed from otherwise orders, an appeal in the last mentioned case shall not operate as a stay of proceedings, nor shall it delay the trial of the petition;

(*b*) From the judgment or decision on any question of law or of fact of the judge who has tried such petition.

32. The trial of every election petition shall be commenced within six months from the time when such petition has been presented and shall be proceeded with from day to day until such trial is over; but if at any time it appears to the court or a judge, that the respondent's presence at the trial is necessary, such trial shall not be commenced during any session of parliament; and in the computation of any time or delay allowed for any step or proceeding in respect of any such trial, or for the commencement thereof as aforesaid, the time occupied by such session of parliament shall not be included;

2. If at the expiration of three months after such petition has been presented, the day for trial has not been fixed, any elector may, on application, be substituted for the petitioner on such terms as the court or a judge thinks just.

33. The court or a judge may, notwithstanding anything in the next preceding section, from time to time enlarge the time for the commencement of the trial, if, on an application for that purpose supported by affidavit, it appears to such court or judge that the requirements of justice render such enlargement necessary;

2. No trial of an election petition shall be commenced or proceeded with during any term of the court of which the judge who is to try the same is a member and at which such judge is by law bound to sit.

Sec. 64. The court or a judge shall, upon sufficient cause being shown, have power on the application of any of the parties to a petition, to extend, from time to time, the period limited by this act for taking any steps or proceedings by such party.

session from 23rd of April, 1887, to 24th June, 1887. The following order was made by the court of common pleas on the 1st December, 1887, extending the time for trial to 31st January, 1888.

ORDER ENLARGING TIME FOR TRIAL.

Thursday, the 1st day of December, 1887.

Upon reading the notice of motion given by the petitioner herein during this present sitting the admission of service of the said notice of motion, and the affidavits and papers filed in support of this motion and upon hearing counsel for the parties on both sides, and it appearing to the court that the requirements of justice render such an enlargement necessary.

1. It is ordered that the time for the commencement of the trial of the petition herein be and the same is hereby extended for a period of two months, up to and inclusive of the first day of February next.

2. It is further ordered that the costs of and incidental to this application be costs in the cause.

On motion of *Robinson* Q.C., of counsel for petitioner.

And on the 17th December, 1887, the following order fixing place of trial was made.

ORDER FIXING PLACE OF TRIAL.

Saturday, the 17th day of December, A.D., 1887.

Upon reading the notice of motion given by the petitioner herein during this present sitting, the admission of service of the said notice of motion and the affidavits and papers filed in support of this motion.

And upon hearing counsel for the parties on both sides, and it appearing to the court that special circumstances exist which make it desirable that the petition herein should be tried elsewhere than within the said electoral district of Glengarry.

1. It is ordered that the election petition herein be tried at the court house in the town of Cornwall in the county of Stormont, on Thursday the 12th day of January, A. D., 1888, at the hour of ten o'clock in the forenoon, and on such other subsequent days as may be needful.

2. It is further ordered that the costs of and incidental to this application be costs in the cause.

On motion of Mr. *C. Robinson* Q.C., of counsel for the petitioner.

The trial commenced on the 12th January, Mr. Justice Rose presiding, and the following is an abstract

1888

GLENGARRY ELECTION CASE.

of what took place at the opening of the trial as appeared in the printed case for appeal:—

PROCEEDINGS AT TRIAL.

IN THE HIGH COURT OF JUSTICE COMMON PLEAS DIVISION.

The Dominion Controverted Election Act.

Re GLENGARRY.

ALEXANDER KENNEDY, petitioner.

P. PURCELL, respondent.

Tried before Hon. Justice Rose at Cornwall, on 12th January, 1888.

COUNSEL PRESENT:

Mr. *D. MacMaster* Q.C., Mr. *E. H Tiffany* and Mr. *McLellan* for petitioner.

Mr. *W. Cassels* Q.C. and Mr. *D. B. MacLennan* Q.C. for respondent.

Mr. Cassels—Before the case is gone on with we wish to have the objection noted that your Lordship has no jurisdiction to try it. Three judges of the Court of Appeal have stated that the time of the session is not excluded. We say you have no power to extend the time. The Quebec Court of Appeal and the New Brunswick Court of Appeal have in effect held that there is no jurisdiction.

His Lordship—I rule with you that the time of the session is not excluded but that there is power to extend the time.

After the taking of evidence on the 13th January Mr. Justice Rose found as follows:—

FINDINGS OF JUDGE AT THE TRIAL.

I find that corrupt practices have been proved to have been committed by D. H. MacKenzie, an agent of the respondent, to wit: advancing by way of loan to Francis Saucier, $100, John Tyo, $200, and Alexander Vanier $100, they being voters, in order to induce such persons to vote for the respondent.

I also find that such corrupt practices were committed by and with the knowledge and consent of the respondent.

I further find that a corrupt practice was committed by the respondent, to wit: advancing by way of loan to one Peter Kennedy, a voter, the sum of $100, in order to induce such person to procure, or endeavor to procure, the return of the respondent to serve in the House of Commons.

I determine that the election was and is void by reason of such corrupt practices, and direct that the respondent pay the costs, charges and expenses, of and incidental to the presentation of the petition and the proceedings consequent thereon, save and except such costs, charges, and expenses as are by the Controverted Elections Act otherwise provided for.

(Signed,) JOHN E. ROSE, J.

Jan. 13th, 1888.

The question upon which this appeal was decided was whether or not the court or judge, on the 12th January, 1885, had jurisdiction to try the merits of the petition, six months having elapsed since the date of the presentation of the petition.

S. Blake, Q. C., *Walter Cassels*, Q. C., (*O'Gara*, Q, C. with them) for appellant, contended:—

1st. There was no jurisdiction to try this matter. The petition was out of court at the time of trial and the judge should so have determined and dismissed the petition.

2nd. The learned judge erred in finding the present appellant guilty of bribery, and his judgment, assuming that he had jurisdiction to try the petition, should be reversed so far as the finding on the personal charges is concerned.

3rd. The learned judge should not, on the evidence, have found in favor of the petitioner on the charge of bribery by an agent and should not have voided the election.

The statutes, authorities, and cases cited are reviewed in the judgment of Mr. Justice Taschereau hereinafter given.

McMaster Q.C. and *MacLennan* with him for respondent contended:

1. That there was no appeal from the order extending the time. 49 Vic. ch. 9, s. 50.

2. The court or judge had the amplest power to extend the time. 49 Vic., ch. 9, s. 64.

3. The apparent exception in sec. 32 in the same act, requiring the commencement of the trial to be within six months of the date of presentation of petition, is itself the subject of a special exception in sec. 33, which empowers the court or a judge to "enlarge the time "for the commencement of the trial," in the interests of justice, "notwithstanding anything in the next

1888

GLENGARRY ELECTION CASE.

"preceding section," (that is the section in which the six months provision is); and hence the 32nd section must be regarded as directory.

4. If the 32nd section be not directory, but imperative, then the time occupied by the session of parliament and the terms of the Common Pleas division of the High Court of Justice must be deducted; and the order for the extension or enlargement was made within six months of presenting petition; and the trial was held within the period of the enlargement.

5. But even if the session of parliament and the terms of the court are included, in computing the six months from presentation of petition, the extension or enlargement might be made after the lapse of the six months, and the order of 1st December is good.

The following cases were relied on:—*West Middlesex case* (1); *Maskinonge case* (2); *Rex* v. *Loxdale* (3); *Addington case* (4); *Addington case* (5); *Ex parte Campbell* (6); *Rhodes* v. *Airdale Commissioners* (7); *Kingston case* (8); *Quebec West case* (9); *Wheeler* v. *Gibbs* (10); *Banner* v. *Johnson* (11); *Lord* v. *Lee* (12); *Sheffield* v. *Sheffield* (13).

On the merits the learned counsel commented on the evidence and contended that the decision of the court below should be affirmed.

Sir W. J. RITCHIE C. J.—But for the diversity of judicial opinion I should have thought the construction of the 32nd section very plain. We have the limit within which the trial of every election petition shall be commenced, namely within six months from

(1) 10 Ont. P. R. 27.
(2) 15 Rev. Lég. 615.
(3) 1 Bur. 447.
(4) 39 U. C. Q. B. 131.
(5) 12 L. J. N. S. 117.
(6) 5 Ch. App. 703.
(7) L. R. 1 C. P. 391.
(8) 39 U. C. Q. B. 139.
(9) 15 Rev. Lég. 609.
(10) 3 Can. S. C. R. 374.
(11) L. R. 5 H. L. 157.
(12) L.R. 3 Q. B. 404.
(13) 10 Ch. App. 206.

1888

GLENGARRY ELECTION CASE.

Ritchie C.J

the time when such petition shall have been presented. and shall be proceeded with from day to day until such trial is over.

But it is said that in the computation of this six months the time during which any session of parliament is being held is not to be taken into account. But where in the statute is to be found authority for any such proposition? Had such been the intention of Parliament surely it would have been expressed in simple, plain, unmistakeable language, in some such words as these—"The trial shall be commenced within six months but in the computation of such six months the time during which a session of Parliament is being held shall not be computed."

Where the language of the act is plain and unambiguous we should not, I think, go outside of it to seek a construction at variance with such language. This view, that the sessions of parliament are to be excluded in all cases, is, in my opinion, entirely inconsistent with what follows in the statute:—"But if, at any time, it appears to the court or a judge that the respondent's presence at the trial is necessary, such trial shall not be commenced during any session of parliament." Is not the irresistible inference from this that sessions of Parliament are included in the six months, and that it is only when the presence of the respondent is necessary at the trial that proceedings shall not go on during the session? If no proceedings can be had during any session then the provision referred to would be meaningless, certainly wholly unnecessary and not capable of being acted on, and also the provision "that in the computation of any time or delay allowed for any step or proceeding in respect of any such trial, or for the commencement thereof as aforesaid, the time occupied by such session of parliament shall not be included." I think the time occupied by any such ses-

1888

GLENGARRY ELECTION CASE.

Ritchie C.J.

sion of parliament refers to the session of parliament provided for by the section and not to sessions of parliament when the necessary presence of the respondent has not been made to appear and when it is not even claimed that the respondent's presence is necessary, and, in my opinion, very clearly negatives the idea that any session of parliament is to be excluded, but the one for which the special provision is made.

Upon the authority of *Wheeler* v. *Gibbs* (1) in this court, and *Banner* v. *Johnson* (2) I think the court had power to enlarge the time for the commencement of the trial though such order was not made within the six months from the time of the presentation of the petition, it appearing that the requirements of justice rendered such enlargement necessary, and I am therefore of opinion that the time was duly extended or enlarged and the judge was properly seized of the case. The respondent did not move to dismiss the petition as he might have done, and not having done so the petition remained in court subject to the jurisdiction of the court and to the discretion and power of the court or judge to extend the time, although the six months had expired. I do not think the limit in sec. 33 can be read into sec. 32 or be used in any way to affect the right to extend as provided by the latter section because it is expressly provided that the court or judge may notwithstanding anything in the preceding section which is sec. 32, from time to time enlarge the time for the commencement of the trial. I concur with the Court of Appeal of Ontario and the other judges who have taken and acted on this view.

A majority of the court being of opinion that the time occupied in the session of parliament is not to be included, and that as there is no power to extend the time after the six months has elapsed there has been

(1) 3 Can. S. C. R. 374 (2) L. R. 5, H. L. 157.

no legal trial, I think it would be as improper, as it would certainly be utterly useless, for me to discuss the merits of this case as they appeared on the alleged trial; such a discussion must, necessarily, be purposeless and productive of no possible results. In fact, if the judge had no legal right to proceed with the trial, and the trial is, consequently, of no legal effect, in other words no legal trial, there are no merits to discuss, for the simple reason that if there was no trial there were no merits of which this court, or any other court, could take cognizance.

Mr. McMaster, in his factum, objects that there was no appeal from the order extending the time and it was submitted that there is no appeal from it.

That would be so under our late rulings, but there was no objection raised in this case by the learned counsel for the respondent, in his factum or in his argument, that there was no appeal to this court against the ruling of the learned judge on the point of law on the trial. It certainly was, as appears by the record, a point raised on the trial and adjudicated on by the learned judge, and therefore would seem to come, as at present advised, within the express words of the statute. The language of the statute is "an appeal shall lie from the judgment or decision, on "any question of law or of fact, of the judge who has "tried such petition." The majority of the court entertain no doubt on this point, and therefore the appeal will be allowed.

FOURNIER J.—Le jugement rendu en cette cause, le 13 janvier dernier, a déclaré l'élection nulle pour cause de corruption par les agents du membre siégeant et par lui-même personnellement. L'appel de ce jugement n'a pas mis seulement en question le bien jugé sur le mérite de la cause, mais il soulève également la ques-

1888

GLENGARRY ELECTION CASE.

Fournier J.

tion de savoir si le juge avait le pouvoir de procéder au procès, après l'expiration du délai de six mois fixé par la sec. 32 du ch. 9 des Statuts Revisés du Canada. Dans les autres causes d'élections entendues et décidées pendant le présent terme, la cour n'a pas décidé la question de l'interprétation à donner à cette section, parceque dans la forme où se présentaient ces causes, l'unique question à décider était de savoir si les jugements dont on se plaignait étaient appelables. Mais dans le présente cause, l'appel étant du jugement final, il a l'effet de soumettre à la revision de la cour toutes les questions de droit ou de faits décidées sur les divers incidents de la cause. Sur ce point il ne peut y avoir de difficulté. La cour est donc appelée à se prononcer sur l'effet de la sec. 32, décrétant que le procès d'une pétition d'élection devra être commencé pendant les six mois qui ont suivi la présentation de la pétition. L'interprétation de cette section soulève aussi la question de savoir si dans les six mois de délai, le temps de la session doit être exclu dans tous les cas.

Dans le cas actuel, la pétition a été présentée le 25 avril 1887. La réponse du membre siégeant a été produite le 30 juin 1887. La production de particularités a été ordonnée le 23 septembre, et elles ont été produites le 23 décembre.

L'appointement pour l'audition préliminaire du membre siégeant qui devait être examiné comme témoin le 9 novembre fut continué de consentement au 20 décembre. Ce jour-là il fut procédé à son examen.

Le 17 décembre un ordre fut prononcé fixant le palais de justice de Cornwall comme le lieu où se ferait le procès de la dite pétition.

Le 1er décembre une demande, appuyée d'affidavits, fut présentée pour faire étendre de deux mois le délai pour commencer le procès. Le dispositif de cet ordre est comme suit :

1888

GLENGARRY ELECTION CASE.

Fournier J.

It is ordered that the time for the commencement of the trial of the petition herein be, and the same is hereby extended for a period of two months, up to and inclusive of the first day of February next.

Au 12 janvier 1888, jour fixé pour le procès, les parties se présentèrent devant l'honorable juge Rose, chargé du procès de la pétition. Le membre siégeant par le ministère de W. Cassels, C.R., protesta contre l'instruction du procès de la manière suivante :

Before the case is gone on with we wish to have the objection noted that Your Lordship has no jurisdiction to try it.... We say you have no power to extend time....Three Judges of the Court of Appeal have stated that time of the Session is not excluded. We say you have no power to extend the time. The Quebec Court of Appeal and the New Brunswick Court of Appeal have in effect held that there is no jurisdiction.

L'honorable juge prononça sa décision sur les deux objections du savant conseil dans les termes suivants :

I rule with you that the time of the Session is not excluded, but that there is power to extend the time.

D'après sa décision le temps de la session n'est pas exclu des six mois pour le commencement du procès—et ce délai peut être étendu. Ces deux questions ayant été décidées par un ordre du juge chargé du procès (Trial Judge) et jugées au procès même, on ne peut soulever dans ce cas, la question qui s'est élevée dans les autres causes jugées pendant le terme, de savoir s'il y avait appel d'une décision renvoyant la pétition sur une motion déclarant que les six mois expirés, la cour n'avait plus de juridiction pour faire le procès—car dans le cas actuel, ce n'est pas la cour qui a jugé, mais le *trial judge*, et la question tombe clairement sous l'effet de la sec. 50 (*b*) déclarant qu'il y a appel—

From the judgment or decision on any question of law or of fact of the judge who has tried such petition.

Le droit d'appel est donc ici incontestable et la décision de ces deux questions doit être revisée par cette cour.

Il est sans doute regrettable qu'il ait été procédé au

1888

GLENGARRY ELECTION CASE.

Fournier J.

procès avant que la question du pouvoir du juge d'en agir ainsi ait été finalement réglée, car maintenant nous sommes en présence d'une enquête révélant des faits suffisants pour décider le mérite de cette affaire, mais dans la position où cette cause nous est présentée pouvons-nous nous en occuper? La réponse à cette question dépend entièrement de la solution de la question de juridiction. Si le juge était sans pouvoir pour juger, quelles que soient les conséquences, nous devons le déclarer et annuler le procès. Le respect dû à l'autorité de la loi l'exige.

Les objections du savant conseil étaient fondées sur la sec. 32 déclarant—

Sec. 32. The trial of every election petition shall be commenced within six months from the time when such petition has been presented, and shall be proceeded with from day to day until such trial is over; but if at any time it appears to the court or a judge, that the respondent's presence at the trial is necessary, such trial shall not be commenced during any session of Parliament; and in the computation of any time or delay allowed for any step or proceeding in respect of any such trial, or for the commencement thereof as aforesaid, the time occupied by such session of Parliament shall not be included;

2. If, at the expiration of three months after such petition has been presented, the day for trial has not been fixed, any elector may, on application, be substituted for the petitioner on such terms as the Court or a judge thinks just.

Quoique les opinions se soient partagées sur l'interprétation à donner à cette section, il me semble que dans la première partie, il est dit clairement que le procès de toute pétition d'élection devra être commencé dans les six mois de la date de sa présentation. Il n'est apporté à cette prescription impérative qu'une seule exception, celle que le procès ne sera pas commencé pendant une session, s'il a été démontré au juge que la présence du membre siégeant est nécessaire au procès. Ce tempérament était nécessaire pour corriger ce qu'aurait eu de trop rigoureux l'obligation de procéder dans tous les cas en l'absence du député élu. En procédant

pendant la session c'était le mettre dans la position ou de manquer à ses devoirs parlementaires, s'il s'absentait pour surveiller ses intérêts au procès, ou bien le priver de l'avantage de confronter ses accusateurs, s'il assistait au parlement. La loi me paraît avoir adopté un moyen de concilier les deux intérêts en permettant de suspendre la procédure pendant la session s'il était démontré à la cour ou au juge que la présence du membre siégeant était nécessaire au procès. C'est évidemment dans ce but qu'après avoir imposé d'une manière absolue l'obligation de commencer le procès dans les six mois, vient l'exception : " But if at any " time it appears to the Court or a judge that the respon- " dent's presence at the trial is necessary, such trial shall " not be commenced during any session of parliament." Cette disposition n'accorde au membre siégeant qu'une faculté dont il peut ou non se prévaloir, mais dont il ne peut obtenir le bénéfice qu'à la condition de démontrer au juge que sa présence est nécessaire au procès. S'il n'a pas jugé à propos de se conformer à cette condition, le temps de la session devra compter dans les six mois.

La règle établie au sujet de la computation du temps dans la dernière partie de la clause 32 en disant " the " time occupied by such session of parliament shall not " be included "—ne peut avoir un effet absolu et s'appliquer indistinctement à tout procès de pétition d'élection. Les mots *such session* se rapportent suivant moi à une session pour laquelle le juge a déclaré sur demande à cet effet, que la présence du membre siégeant était nécessaire. Autrement il y aurait contradiction manifeste entre cette disposition et la précédente : la première dirait que l'intervention du juge est nécessaire pour suspendre la procédure pendant la session, et la seconde dirait, au contraire, que cette intervention n'est pas nécessaire si le temps de la session doit être exclu. Ces raisons me paraissent suffi-

1888

GLENGARRY ELECTION CASE.

Fournier J.

santes pour en conclure que le temps de la session doit être compté dans les six mois, si un ordre n'a pas été donné par le juge pour suspendre la procédure pendant la session. Il n'y en a pas eu dans cette cause, et l'honorable juge a eu, suivant ma manière de voir, raison de juger que le temps de la session ne devait pas compter dans les six mois. Sous ce rapport je suis d'avis que son jugement doit être confirmé.

En peut-il être de même de sa décision sur la deuxième question déclarant que le temps du commencement du procès peut-être étendu au-delà des six mois fixé par la sec. 32 ?

On a vu d'après l'exposé des procédures donné plus haut, que dans les six mois qui ont suivi le 25 avril, il n'a été fait aucune demande à la cour ou au juge pour une extension de délai ni pour fixer le procès. Ce n'est que le 17 novembre que le lieu du procès a été fixé et, le 1er décembre, plus de sept mois après la présentation de la pétition, que le délai pour commencer le procès a été étendu jusqu'au 12 janvier dernier. Ces deux ordres ayant été prononcés après l'expiration des six mois, la cour possédait-elle encore le pouvoir de rendre de tels ordres ? La réponse dépend de l'effet que l'on doit donner à la première partie de la sec. 32. Si on le considère comme une injonction formelle et absolue de commencer le procès dans les six mois, il faut en conclure que la cour n'avait plus alors le pouvoir de prononcer les ordres en questions.

Tous les juges sont d'accord que la législature en faisant ce délai de six mois a voulu rendre beaucoup plus prompte qu'elle ne l'était auparavant, l'expédition des procès d'élection,—mais ils diffèrent d'opinion sur l'effet à donner à cette disposition. N'est-elle qu'un délai de procédure susceptible, malgré son caractère impératif, d'être considérée comme simplement directoire, ou bien cette disposition ne fait-elle pas plutôt essentiellement partie de la juridiction transférée des

comités parlementaires aux tribunaux civils sur les contestations d'élections ? Dans la section 2, il est formellement déclaré que cette juridiction sera sujette aux dispositions de cet acte (ch. 9.)

Après avoir réglé le délai pour la présentation, le service de la pétition, le délai pour la production des objections préliminaires, la manière dont la contestations serait liée, vient l'injonction formelle que le procès devra être commencé dans les six mois de la présentation de la pétition et se continuer de jour en jour jusqu'à ce qu'il soit terminé. C'est dans cette section que le juge qui préside au procès doit trouver la source du pouvoir qu'il doit exercer. Il lui est enjoint d'une manière absolue de commencer le procès dans les six mois—il doit y procéder de jour en jour. Le caractère impératif de cette clause ne lui laisse aucune discrétion à cet égard. Le délai fixé, expiré, la juridiction cesse, à moins qu'elle n'ait été conservée en vertu de la sec. 33, par le procédé qu'elle autorise. Mais si aucun procédé de ce genre n'a été adopté pendant les six mois de la présentation de la pétition, le juge ou la cour est sans pouvoir pour fixer une autre époque pour le procès que celle indiquée par la sec. 32.

Le pouvoir donné par la section 33, peut-il être exercé après les six mois ? s'il le peut, la section 32 perd nécessairement son caractère impératif et absolue et devient tout-à-fait inutile. C'est la faire disparaître du statut. Si l'objet était réellement d'assurer une prompte expédition des affaires d'élection, il a été tout-à-fait manqué et la loi devient sans effets. Mais ses dispositions sont trop formelles pour qu'on puisse en arriver à une pareille conclusion. La section 33 qui aurait l'effet d'anéantir la section 32, cesse de produire cet effet et ne fait qu'assurer les fins de la justice, si on considère qu'elle n'a été introduite que pour remédier à ce que pourrait avoir, en certains cas, de trop rigoureux le délai de six mois. Il peut arriver fréquemment

1888

GLENGARRY ELECTION CASE.

Fournier J

qu'un procès commencé dans les six mois et conduit avec diligence se trouve tout-à-coup arrêté par l'absence, ou la maladie des témoins indispensables, faudra t-il dans ces cas pour obéir à la règle des six mois sacrifier les intérêts de la justice ? Non, la loi a voulu pour obvier à ces inconvénients que la juridiction puisse, dans ces cas, se continuer au delà des six mois.

Elle en indique le moyen dans la section 33. Mais ce moyen doit être employé pendant que la juridiction existe encore et avant l'expiration des six mois. S'il pouvait l'être après les six mois, la section 32 serait illusoire. En exerçant dans les six mois la faculté donnée par la section 33, chacune des deux sections 32 et 33 peut recevoir son entière exécution. Si les six mois de la section 32 sont expirés sans que le procès ait été commencé, la juridiction cesse et cette section reçoit son effet. Si les intérêts de la justice, d'après des faits qui doivent être établis par affidavit, sont jugés suffisants par le juge pour étendre le délai, la section 33 reçoit alors son effet et le but de la loi est rempli.

A part de la sec. 33, l'intimé a invoqué encore les sec. 2 et 64 du ch. 9 comme autorisant la cour ou le juge à étendre le délai au delà de six mois. La sec. 2 dit que les cours autorisées à décider les élections contestées auront, sujettes aux dispositions de cet acte..... (ch. 9) les mêmes pouvoir et juridiction dans les affaires d'élections qu'elles ont dans les matières civiles de leur juridiction ordinaire.

Cette disposition générale est faite pour rencontrer les cas non prévus par le statut et autoriser pour ces cas les cours à faire application aux affaires d'élection des règles de procédure et de pratique de leur propres tribunaux. Cette disposition ne peut être considérée comme pouvant annuler les dispositions spéciales ou y être substituée. Lui donner un semblable effet, ce serait mettre de côté la règle d'interprétation bien établie que les dispositions générales ne peuvent annuler les

dispositions spéciales d'un statut. On ne peut en conséquence s'appuyer sur cette sec. 2 pour annuler l'effet de la sec. 32 qui contient une prescription formelle au sujet du délai dans lequel doit se faire le procès. Le même argument doit s'appliquer à la sec 64 donnant le pouvoir d'étendre les délais.

Aprés avoir examiné l'acte des élections contestées dans son ensemble et comparé ses diverses sections les unes avec les autres, j'en suis venu à la conclusion que pour donner à cette loi son véritable effet, je dois adopter l'opinion que le temps de la session doit compter dans les six mois, s'il n'y a pas eu demande au contraire,—et que le délai de six mois pour commencer le procès est de l'essence de la juridiction donnée—et qu'il n'est pas susceptible d'être prolongé au delà, à moins d'une demande spéciale faite conformément à la sec. 33, avant l'expiration des délais. En conséquence, je suis d'avis que le présent appel doit être alloué sur le principe que le juge n'avait pas le pouvoir de faire le procès de l'appelant.

S'il y a plusieurs points importants auxquels je n'ai point fait allusion, comme par exemple l'état de la jurisprudence en Angleterre sur la prorogation des délais d'appel, les deux décisions de cette cour dans *Wheeler* v. *Gibbs* (1), etc., etc., c'est que l'honorable juge Taschereau ayant eu l'obligeance de me communiquer les notes si savantes et si complètes qu'il a préparées sur cette cause, j'ai trouvé ces questions si bien traitées qu'il m'a paru impossible d'y rien ajouter. Non-seulement sur ces questions particulières, mais aussi sur celles de la computation du délai de la session—et de la limite à six mois de la juridiction pour commencer le procès,—questions qui ont été si complétement développées dans ses notes,—je suis heureux de pouvoir dire que je partage entièrement ses vues.

HENRY J.—In my judgment in the *Quebec County*

(1) 3 Can. S. C. R. 374.

1888

GLENGARRY ELECTION CASE.

Henry J.

Election Case (1), delivered a few days ago, I held that the time of the sitting of Parliament, as referred to in section 32 of the controverted elections' act, was not to be added to the six months prescribed in that section for the trial of an election petition, unless in the particular circumstances referred to in that section.

I also held, in that case, that under the provisions of section 33 the court, or a judge, had no power to enlarge the time for the commencement of the trial of an election petition unless such enlargement were made by an order previous to the expiration of the prescribed six months, and I gave my reasons for arriving at those conclusions.

There is a general power given by sub-section 4 of section 31 of the act, to the judge at the trial to adjourn the same from time to time and from one place to another in the same electoral district, but in view of the provisions of section 32 a judge could not enlarge the time for the *commencement* of a trial beyond the prescribed six months from the presentation of the petition, unless by the terms of that section it was made to appear to the court or a judge that the respondent's presence at the trial was necessary in which case the time occupied by the session of parliament would be added to the prescribed six months.

No such application was made in this case and, therefore, the time for the commencement of the trial herein expired at the end of six months from the presentation of the petition.

No application was made to the court or a judge in this case under section 33 within the prescribed six months from the presentation of the petition, and I adhere to my holding in the *Quebec County Election Case* that the court or judge had no power to enlarge the time for the commencement of the trial by an order made subsequent to the expiration of the prescribed six months.

(1) P. 443 *ante*.

1888

GLENGARRY ELECTION CASE.

Henry J.

My conclusion in this case, therefore, is that the prescribed six months having expired the judge who tried the merits of this case had no jurisdiction or power to do so and that this court has no power to decide on the merits of the case by an appeal from his decision.

I think, therefore, the appeal should be allowed and the petition herein dismissed with costs.

TASCHEREAU J.—By sec. 32 ch. 9 of the Revised Statutes of Canada, it is enacted that:—

Sec. 32. The trial of every election petition shall be commenced within six months from the time when such petition has been presented, and shall be proceeded with from day to day until such trial is over; but if at any time it appears to the court or a judge, that the respondent's presence at the trial is necessary, such trial shall not be commenced during any session of parliament; and in the computation of any time or delay allowed for any step or proceeding in respect of any such trial, or for the commencement thereof as aforesaid, the time occupied by such session of parliament shall not be included.

In the case now submitted the petition was presented on the 25th day of April, 1887, during a session of parliament which was closed on the 23rd June; subsequently on the 1st day of December following, that is to say, more than six months after the presentation of the petition, but within six months of the prorogation of parliament, an order was obtained from the Common Pleas Division extending the time for the commencement of the trial of the said petition for a period of two months, and on the 17th of December the trial thereof was definitely fixed for the 12th day of January, on which day it was held. At the opening of the case objection was taken by the respondent to the said petition to the jurisdiction of the court, on the ground that more than six months had elapsed since the presentation of the petition, and that the order extending the time for the commencement of the trial thereof was void and illegal because it had

1888

GLENGARRY ELECTION CASE.

Taschereau J.

been given after the expiration of the six months and, therefore, given without jurisdiction. The learned judge presiding at the trial ruled that the time of the session was not excluded, and that the six months had elapsed, but at the same time ruled that the time had been legally extended. This trial therefore proceeded, and judgment was given setting aside the election for corrupt practices committed by the appellant. Upon the present appeal the same objections are taken on the part of the appellant, and are, of course, to be first determined.

First in order comes the question whether the delay of six months enacted by the aforesaid section 32 of the statute, for the commencement of the trial, is interrupted or suspended by a session of parliament in all cases, and whether or not it has been made to appear to the court or judge that the presence of the respondent at the trial is necessary. Upon this question there is, in my opinion, no room for doubt. As I read the statute, the general rule is that the trial of every election petition must be commenced within six months. The law enacts it in so many words. Can anything be clearer than its terms?—"The trial of every election petition shall be commenced within six months from the time when such petition was presented." To me it seems that, so far, the letter of the law is as plain and unambiguous as it can possibly be, and that it leaves no room for interpretation.

What does this clause next enact? It enacts, in clear terms again, that if at any time it appears to the court or a judge that the respondent's presence at the trial is necessary such trial shall not be commenced during a session of parliament. Now, this is plainly enacted by way of exception to this general rule laid down in the first part of this clause. Within six months this trial must commence except, not when a session of parliament intervenes, that is not what this act says,

but when and only when upon an application on his part it is made to appear to the court that the presence of the respondent at the trial is necessary. If there is no such application, or if upon such an application the court is not satisfied that the presence of the respondent is necessary, the time runs, and the trial may be commenced during any session of parliament. All this seems to me so plain, that with the greatest respect for the contrary judicial opinions expressed on the point I cannot but say that it is, to my mind, inconceivable that any doubt could ever have arisen upon it.

It is argued further, however, that under the last part of this said section the time occupied by a session of parliament is not to be included in the six months. But this construction is, it seems to me, totally repugnant to the other parts of the section. If in all cases a session of parliament is a suspension of the delay, as contended for by the respondent, why should the act oblige the sitting member, in order that the trial be not commenced during such session, to apply to the court, and to make it appear that his presence at the trial is necessary? Not only is he obliged to make an application for that purpose, but the court, before granting his prayer, must be satisfied by affidavits or otherwise that his presence is necessary, and, I repeat it, may if not so satisfied, fix a day for the trial to commence during and notwithstanding a session of parliament. It seems to me that if, in all cases, parliament had intended that the time occupied by a session should be excluded in the computation of the six months, it would have said so in so many words. This subject would have been accomplished by simply leaving out of this section 32, the middle part of it, so as to make it read: "The trial of every election petition shall be commenced within six months from the time when such petition has been presented, and shall be proceeded with from day to day until such trial is over;

1888

GLENGARRY ELECTION CASE.

Taschereau J.

but in the computation of any time or delay allowed for any step or proceding in respect of any such trial, or for the commencement thereof as aforesaid, the time occupied by any session of parliament shall not be included." That is how the respondent reads the statute, but that is not the statute; that construction leaves out a part of it, and this cannot be done. I am therefore of opinion that the six months mentioned in the said section expired in the case submitted on the 25th October.

Now, was the order of the 1st December extending the time for the trial of this petition valid and legal, or, in other words, can the time for commencing the trial be fixed or enlarged, under sec. 33 of the act, after the expiration of the six months mentioned in sec. 32?

The court or a judge may, notwithstanding anything in the next preceding section, from time to time enlarge the time for the commencement of the trial, if, on an application for that purpose supported by affidavit, it appears to such court or judge that the requirements of justice render such enlargement necessary.

The appellant contends that this power to enlarge the time for the commencement of the trial expires with the six months referred to in the preceding clause. On the part of the respondent it is urged that this power exists even after the expiration of the six months.

As a first ground in support of the legality of the orders of the Common Pleas Division in this case, sections 2 and 35 of the act have been relied upon by the respondent. These sections enact, in substance, that as to election petitions the courts in the different provinces and the judge at the trial shall have the same power, authority and jurisdiction as if such petition were an ordinary cause within the jurisdiction of the said court or judge, but subject always to the provisions of the act. It is argued that as under rule 462 of the Ontario Judicature Act the power to extend the time for doing

an act or taking any proceeding is, in express terms, given to the court even after the time has expired, consequently the court, on an election petition, has the same power and may extend the time for the commencement of the trial, even after the expiration of the six months. But that argument upon reasoning and authority is groundless. The words "subject to the provisions of this act" govern these enactments.

We consequently have first to ascertain what are the provisions of the act, and when any special provisions on any matter are found, they must be given full effect to, independently of the said sections 2 and 35 To hold such special provisions nullified or controlled by general clauses of this nature would be contrary to well settled rules on the construction of such statutory enactments. The case of *Maude* v. *Towley* (1) is a clear authority on this point. There an amendment had been allowed after the presentation of an election petition. The court, in ordinary causes, had full power to amend, and by an enactment exactly similar to those contained in sections 2 and 35, in question here, the election act which governed the case gave to the court, on election petitions, the same power and authority they had in ordinary causes, subject, however, as here, to the provisions of the act. It was argued that as the court had the power to amend in ordinary causes, it had the same power on an election petition. But the court rejected that contention. "It must be remembered that our jurisdiction in these matters is limited," said Lord Coleridge, C.J., and the court granted an order to set aside the amendment, on the ground that the words "subject to the act" governed the clause, giving them the same power as in ordinary cases, and that to allow the enlargement of the petition or an addition to it by an amendment after its presentation, would be to nullify the clause of the act which

(1) L. R. 9 C. P. 165.

1888

GLENGARRY ELECTION CASE.

Taschereau J.

enacted that it should be presented within a certain time. This decision was approved of and followed in the more recent case of *Clark* v. *Walland* (1), and the court also then held that an amendment of an election petition enlarging the allegations of the petition and adding to it could not be allowed for want of jurisdiction. Referring to the words and subject to this act, in the clause there under consideration, Gwynn J. said: "Now, it cannot be contended that we can strike out these words of the section. We must give them some meaning, and the only meaning that can be given to them is, subject to the provisions of this act. We must therefore look to the provisions of this act." These cases are clearly in point.

In *Alldridge* v. *Hurst* (2) also, Grover J. said upon the same clause:—

> It will be observed that the powers there given shall be subject to the provisions of the act, and we think it clear that the jurisdiction conferred by the act cannot in all respects be the same as that of the court in ordinary causes.

It seems to me clear, therefore, that sections 2 and 35 of the act can have no application to the commencement of the trial because special provisions have been enacted in the act upon the matter. For the same reason, I do not think that section 69 has any application here. That section enacts that the court shall have power to extend from time to time the period limited for taking any steps or proceedings. Now, by a well settled rule of construction, this general enactment of the statute cannot be extended to the commencement of the trial, because, for this proceeding, special provisions are enacted in the statute, sec. 33.

Now what is the interpretation to be given to this sec. 33? To answer this question, it would be manifestly contrary to all rules to read this section as if it were standing alone and by itself in the statute. The purport and intention of the legislature must be

(1) 52 L. J. Q. B. 321. (2) 1, C. P. D. 410.

ascertained before we can correctly construe any particular clause of any act, and that, obviously, cannot be done without taking into consideration and weighing attentively all the act and more specially the clauses of it bearing particularly on the same identical matter. Now, here, this section 33 has relation to the time for commencing the trial of an election petition. A reference to section 32 immediately preceding it shows that this also contains an enactment on the same subject. Therefore, we cannot construe section 33 without taking into consideration sec. 32. One must be read in the light of the other.

Now this sec. 32 enacts in so many words that the trial shall commence within six months. This is a clear, positive enactment, mandatory in its form. To say that it is merely directory is to read it out of the statute. If the parties are at liberty by simply not proceeding to tacitly consent that the trial should be held two, three, four years afterwards, or even not at all, the clear intention of the legislature is set at naught.

The policy of the law is to prevent the delays which, when the election petitions were tried by committees of the House of Commons, very often rendered these proceedings nugatory, and it has unquestionably enacted this period of six months for the commencement of the trial to force the petitioner to proceed. This enactment cannot have been made only in favor of the respondent, or of any of the parties to the cause, but it is undoubtably based on reasons of public policy. The legislature intended that the state of excitement, agitation, and uncertainty in which it necessarily placed the constituency concerned in the election petition should not be unduly prolonged. Moreover the composition of the House of Commons and the representation of any one constituency is a matter that concerns the Dominion at large. I take it then that the legislature hav-

1888

GLENGARRY ELECTION CASE.

Taschereau J.

ing so clearly expressed its intention that the trial of election petitions should not be unduly delayed, we are bound to see if the act does not bear a construc ion which will give effect to this intention. Now, to read sec. 32 as a mandatory enactment and as a peremptory limitation of time, at the expiration of which the petitioner is out of court, is the only possible way to attain that result. Otherwise, there would be no sanction to the command of the law. It would be leaving the law as if that six months' enactment were not in it, and operate as a virtual repeal of it.

By the construction which I think should be given to both these sections, 32 and 33, I give full effect to both; the trial must be fixed to commence within six months, but if at any time, on an application supported by affidavits, after a day has been so fixed by either of the parties, before the day so fixed, the court or a judge is satisfied that the ends of justice require it, the time so fixed may be enlarged. When section 33 speaks of the time for the commencement of the trial, it necessarily speaks of a time within the six months enacted in sec. 32. It is impossible to apply this sec. 33 to the judge at the trial, for, as to him, his powers to adjourn the trial, or postpone it from time to time, are regulated by sec. 31, sub-sec. 4.

It has been urged that by this construction of clause 32 means are given for collusion between the petitioner and respondent to allow the petition to lapse, inconsistently with the numerous precautions prescribed in the act respecting the withdrawal of a petition in order to protect the public interest. But there is no ground for this contention, as by sub-sec. 2 of that very same section 32, and, it seems to me, for the very purpose of preventing such collusion, at any time after the expiration of three months after such petition has been presented any elector may, if the trial has not been fixed, be substituted for the

petitioner.

Then, does not the construction contended for by the respondent here itself allow means, and I should think much easier means, of collusion between the parties to the petition? For according to this construction, not only is the petitioner not bound to proceed during the six months, but if in collusion with the respondent he may never proceed at all.

The case of *Banner* v. *Johnson* (1) has been mentioned by the respondent in support of his contention, but in my opinion that case is entirely distinguishable. The holding there was that under a statute which enacted that an appeal should be taken within three weeks from the date of the judgment unless such time was extended by the Court of Appeal, an extension of time could be granted by such Court of Appeal after the expiration of the three weeks. But that was a case, it must be remembered, under the Companies Act, and where private interests only were in question. Then the clause there under consideration before the House of Lords was standing alone and entirely unconnected with any other part of the act. The reasoning upon which I have endeavored to show that upon the wording of section 32 on grounds of public policy the intention of the legislature was that no undue delay should retard the trial of elections petitions could clearly not have applied to the statute under consideration in the House of Lords. Here, as I have observed, it is not only one clause of the statute that we have to construe, but these two clauses 32 and 33 together. We must put such a construction on them that, if possible, both should have their full force and effect. Now the construction put upon section 33 by the respondent virtually repeals section 32 and frustrates the express enactment of the legislature that the trial should commence within six months. Under

(1) L. R. 5 H. L. 157.

1888

GLENGARRY ELECTION CASE.

Taschereau J.

that construction the trial may be delayed indefinitely, while the construction I think should be given presents in the fullest manner the policy and object of the legislature, and at the same time gives effect to both of these sections, which in my opinion we are, according to well understood canons of construction, bound to do.

The case of *Wheeler* v. *Gibbs* (1) in this court also relied upon by the respondent is also on a statute entirely different from this one. The question there to be determined turned upon the construction of sec. 48 of the Supreme Court Act, now sec. 51, ch. 9, of the Revised Statutes, as to the three days notice required by that section that the appeal has been set down for hearing. Now there, as in *Banner* v. *Johnston*, the clause under consideration stood in the act by itself and unconnected with any other clause of the act. The legislature while clearly enacting that the trial should commence within six months has omitted to provide as clearly for the appeal, and the consequences of this omission are exemplified in a striking manner by that very case of *Wheeler* v. *Gibbs*, wherein a judgment annulling the election given in February, 1879, was not heard in appeal till March, 1880, and the appeal not determined till June, 1880, sixteen months after the original judgment. The clause of the statute that governed *Wheeler* v. *Gibbs* left it open to the parties to postpone indefinitely and at their will and pleasure, by consent and without affidavits, the hearing of the appeal, while the clauses that govern the present case fix a limit of six months for the commencement of the trial and authorize an enlargement of time only upon application supported by affidavits. The same ground of distinction exists as to *Banner* v. *Johnston*. The court would not enlarge the time if not satisfied by the affidavits that there are good grounds for it,

(1) 3 Can. S. C. R. 374.

but then what becomes of the petition? Is it to be considered as having been out of court at the expiration of the six months, or if not at what period? Then, the petitioner may never apply for an enlargement of time and the respondent is not bound to move to dismiss it. Is the petition to stand till the expiration of parliament? Is a whole constitutency thus to be left indefinitely in a state of uncertainty as to its representation in parliament? Has the house of commons thus indefinitely to suffer that one of its members sits there with a cloud on his title?

His Lordship the Chief Justice in rendering judgment in the case of *Wheeler* v. *Gibbs*, said:—

Full effect should be given to the clear and definite words of the legislature, there being nothing on the face of the statute to indicate a contrary intention.

And the doctrines so laid down cannot be questioned. It is clear and sound law. But in the present case, on the face of the statute, as I read it, there is as regards the trial, the enactment of sec. 32 indicating that the power to enlarge the time for the commencement of the trial given by section 33 cannot be exercised after the expiration of the six months, an enactment similar to which none was applicable in *Wheeler* v. *Gibbs*. Otherwise, I repeat it, sec. 32 as to the six months' limit is useless and without any meaning. It must be noticed also in the case of *Wheeler* v. *Gibbs* that the delay of three days given for the notice of appeal there in question, was so short that the court would reasonably not construe the statute strictly, specially in a case of appeal, the right to which is always favorably viewed, and protected as much as possible by the courts. Here the delay given is certainly not short. In *Banner* v. *Johnston* I also remark one of their lordships, Lord Cairns, seems to have been greatly influenced by the consideration that if the House of Lords could not extend the time after the

1888

GLENGARRY ELECTION CASE.

Taschereau J.

three weeks allowed by the statute, the House would virtually be without jurisdiction, or unable to exercise their juridiction for about one half of the year, a consideration which does not apply here. These two cases of *Banner* v. *Johnson* and *Wheeler* v. *Gibbs* are clearly distinguishable upon another ground. In the enactments there under consideration the proceeding, for doing which the courts held that the time could be extended even after the expiration of the time fixed by the statutes which ruled these cases, was a proceeding that could be done by one of the parties only. The notice of appeal could, of course, be given only by the appellant and the extension of time be asked only by him. Here it is clear that the extension of time for the commencement of the trial can be asked, under section 33, by any of the parties to the petition, and by the respondent as well as by the petitioner. It is a right common to them both. Now, it is evident that it is only within the six months from the date of the presentation of the petition that the respondent can require, or have any object in asking, an extension of time for the commencement of the trial. If, within the six months, the petitioner has not proceeded to get the trial fixed, and if he, by his not proceeding, leaves the respondent undisturbed in possession of his seat, the respondent has no enlargement of time to ask. He does not require any, or rather he gets all the enlargement possible by the simple non-proceeding of his adversary. This again shows that the enlargement of time permissible under section 33 must be an enlargement within the six months mentioned in section 32. Otherwise, while this enactment would, within the six months, apply to both parties, it would, after the six months, apply to the petitioner alone.

And what again shows clearly that this limitation of six months was intended to be peremptory is that

any other elector, if the petitioner does not proceed, can ask to be substituted for the petitioner at the expiration not of six months, but of three months, so that even in such a case the trial should commence within the six months. The petitioner is in default if he does not proceed within three months, and a new petitioner can be substituted for him. But, in any case, the trial must commence within six months. At the end of the three months in the first case, the petitioner is out of court, but the petition remains; but at the end of six months, the petition itself is out of court, if the trial has not been commenced, or the time therefor enlarged.

It has been further argued on the part of the respondent as one of the grounds in support of his contention that the enactment of sec. 32 as to the six months is directory only and not mandatory; that in various acts, where the legislature has intended that proceedings should not be taken after a certain time, the clause limiting such time contains the words "and not after-"wards," and as example of this we have been referred to ch. 8 of the revised statutes, sec. 117; ch. 32, sec. 240, and to an Imperial Act. To this the answer is obvious. When such a clause has these words, "and "not afterwards" it is plain and plainer than the present one; there is then no room for interpretation. But I fail to understand that we are to infer from that where these words are not in a statute, that a limitation of time therein means nothing and that proceedings for which a time is limited can always and in every case be done after the time so limited. There are a number of statutes where clauses limiting a time to do an act or take a proceeding have not the words "and "not afterwards," and yet such act or proceeding clearly cannot be done or taken after the time limited. Take the very statute now under consideration, the

1888

GLENGARRY ELECTION CASE.

Taschereau J.

Controverted Elections Act, sec. 12 thereof for instance enacts that within five days after the service of the petition, the respondent may present any preliminary objections he may have against the petition. Now, if I am not mistaken, it has never been contended that preliminary objections to a petition could be presented after the five days. Yet, the act does not say "and not afterwards." Another similar instance of this is to be found in section 51 of this very same act, which directs that a party desiring to appeal to this court shall within eight days deposit $100 as security. I do not think it could have been contended that an appeal could be taken after the eight days, though there are no negative words in the clause. The case *Peacock* v. *R.* (1) is in that sense. There the right to appeal was given by a statute, upon the party dissatisfied with the judgment applying in writing within three days to the justice to sign a case. The appellant had allowed more than three days to elapse before making his application. The Court of Appeal quashed his appeal. "We have no jurisdiction, said the court, unless the provisions of the act are strictly complied with." Yet, there again the statute under consideration, limiting the time to three days, had not the words "and not afterwards."

The case of *Lord* v. *Lee* (2) has also been cited by the respondent in support of this contention that an extension of time may be granted in certain cases after the time first given to do any act has expired, but that case, which was on an arbitrator's award, was determined on the ground that the extension of the time within which the arbitrator has to make the award amounts to a ratification, a doctrine which clearly is not applicable to the present case. There as in *Banner* v. *Johnston* private interests only were in con-

(1) 27 L. J. P. 224. (2) L. R. 3 Q. B. 404.

troversy and the parties to the cause only could be affected by any of the proceedings, or by the result of the cause. And that obviously is why the statute which governed that case not only allowed an extension by the judge of the time for filing the award but also specially enacted that the time could be extended by consent of the parties. Now, under the act now under consideration, there is no such enactment; and, clearly, for obvious reasons, such an enactment would be repugnant to the whole policy of the act. It is evident that an enactment by which the parties to an election petition could be allowed, by consent, to enlarge the time for the trial thereof, or postpone it at their will and pleasure, would open the door to collusion between the parties which the legislature in so many parts of the act endeavored to prevent. But the respondent's contention is that, though the parties cannot by an express consent delay the trial, yet they may do it by a much easier mode, that is tacitly, and impliedly, by both agreeing not to proceed at all. Is it possible that the legislature intended it to be so and that the parties can so be at liberty to do indirectly, that which they cannot directly do, and so openly defeat and nullify the intention of the legislature?

I hold, for these reasons, that the judge in this case proceeded wholly without jurisdiction, and that all the proceedings before him were *coram non judice.* The appellant appeals from his judgment at the trial, and from that judgment an appeal clearly lies; and the objection to his jurisdiction was clearly open to the appellant as a reason of appeal. The judge decided as a question of law that he had jurisdiction, and sec. 50 of the act gives an appeal from the decision on any question of law of the judge who tried the petition. I need hardly add that if the judge had no jurisdiction,

1888

GLENGARRY ELECTION CASE.

Taschereau J.

the Court of Common Pleas' orders of the 1st and 17th of December could not confer on him any.

To give to these orders the effect of a kind of revivor order, by which a petition out of court was restored and brought into a new vitality, cannot, it seems to me, be seriously contended for. It follows in fact from what I have said that, in my opinion, these orders were made without jurisdiction, and are themselves null and void. I would allow this appeal with costs.

In the cases of *L'Islet*, *Montmorency*, *Quebec County* and *L'Assomption*, we recently held that there was no appeal to this court under section 50 of the act, because the appeals therein were not either from judgments on preliminary objections, or from the judgment or decision of the judge who had tried the petition, the only two appeals given by that section. Here the appeal is from the judgment of the judge who tried the petition, from which an appeal clearly lies.

GWYNNE J.—The election petition in this case was filed in the Common Pleas Division of the High Court of Justice for Ontario. By rule 23 of the rules of court enacted under the provisions of section 44 of 37 Vic., c. 10, (sec. 66, ch. 9 of the Revised Statutes,) it was enacted that,

> The time and place of the trial of each election petition shall be fixed by the court and notice thereof shall be given in writing by the clerk of the court by affixing the same in some conspicuous place in his office, sending one copy by the post to the address given by the petitioner, another to the address given by the respondent, and a copy by the post to the sheriff fifteen days before the day appointed for the trial. The sheriff shall forthwith publish the same in the Electoral Division.

By an order of the said Common Pleas Division of the High Court of Justice made on the 17th December, 1887, under the said rule No. 23, the issues joined in the said election petition were sent down to be tried at the town of Cornwall, in the county of Stormont,

upon the 12th day of January, 1888. Upon that day the trial court for the trial of the said issues, and which by the statute is made an independent court of record wholly distinct from the court in which the petition was filed, was opened as prescribed by the rule or order of the Common Pleas Division. Before the trial was entered upon counsel for the above appellant, the then respondent, objected to the jurisdiction of the said court to try the petition upon the naked ground that six months had elapsed since its presentation, and he asked the learned judge to note his objection, whereupon the trial proceeded and at its close the learned judge who presided at the trial court rendered his judgment in the following terms (1):—

From this judgment the now appellant has appealed to this court on the ground :

Ist. That the said trial court had no jurisdiction to try the petition; that the petition was out of court at the time of the trial, and that the judge presiding at the said trial court should have so determined and dismissed the petition.

2. That the learned judge should not, upon the evidence, have found in favor of the petitioner on the charges of bribery by an agent and should not have avoided the election, and

3. That the learned judge erred in finding the present appellant guilty of bribery and his judgment, assuming that he had jurisdiction to try the petition, should be reversed so far as the finding upon the personal charges is concerned.

As to the first of these objections I am of opinion that the learned judge had jurisdiction to try the petition and that he did right in proceeding with the trial, and that he not only should not have dismissed the petition, if he had had authority so to do, but that he had no

(1) See p. 456.

1888

GLENGARRY ELECTION CASE.

Gwynne J.

authority to dismiss the petition upon the ground suggested or upon any ground. I am of opinion that the petition was not out of court at the time of the trial; and further that the reason suggested why the learned judge should not have proceeded with the trial cannot be made a ground of appeal to this court against his decision upon the trial of the matter of the petition.

The trial court over which the learned judge who tried the petition presided is, as already pointed out, made by the statute a wholly distinct court from the court in which the petition was and still is pending. That Court was the Common Pleas Division of the High Court of Justice for Ontario, which court having, by the order dated the 17th December, 1887, sent the case down to be tried by a trial court, this latter court had no jurisdiction to enquire or decide whether the petition had, or had not, been sent down for trial regularly by the court making the order for such trial.

The Controverted Elections Act authorises the court in which the petition is pending from time to time to enlarge the time for the commencement of the trial of the election petition beyond the period of six months named in the act if, on an application for that purpose supported by affidavit, it appears to such court that the requirements of justice render such enlargement necessary. Now the trial court had no right to enquire or decide whether or not such enlargement had in point of fact taken place, or if it had, whether or not the order making the enlargement had been obtained regularly, at a proper time or upon proper material. Questions as to the validity of the order if obtained, or whether any such order had in fact been obtained, were questions with which the trial court had nothing whatever to do, and upon which it had no right to pronounce any judgment. Its jurisdiction was limited to trial of the issues sent down by the

1888

GLENGARRY ELECTION CASE.

Gwynne J.

Common Pleas Division to be tried, just as the jurisdiction of the old court of assize and *nisi prius* was limited to the trial of the issues of fact sent down by the court in which the action was pending to be tried by the court of assize and *nisi prius*; the duty of which court was to try such issues regardless of all questions whether the case was regularly sent down for trial or not, or whether sufficient or any notice of trial had been given or not, or the like. By sec. 13 of of 37 Vic. ch. 10, corresponding with sec. 31 of ch. 9 of the revised statutes, now replaced by sec. 3, of 50-51 Vic. ch. 7, it is enacted that it shall be competent for the judge who tries an election petition "to decide "any question raised as to the admissibility of the "evidence offered or to receive such evidence under "reserve subject to adjudication at the final hearing."

Apart from questions of law as applicable to the evidence given, questions as to the improper reception or rejection of evidence seem to me to be the only questions of law which can arise upon the trial of the matter of an election petition. The only matter in respect of which an appeal is given to this court after the trial of an election petition is, by the statute, declared to be, "the judgment and decision of the "judge who tried the petition upon any question of "law or of fact," that is to say, as it appears to me, the decision of the learned judge upon the matters of fact and law involved in the issues of fact joined upon the petition, and his decision, if any there be, affecting the reception or rejection by him of evidence tendered in respect of such matters of fact.

It is the matter only of the petition as appearing on the record of the case, that is to say, the pleadings and the evidence which the statute authorises to be set down for hearing in appeal from the decision of the judge who tried the case, with this addition that in

1888

GLENGARRY ELECTION CASE.

Gwynne J.

case it should appear to the court that any evidence duly tendered at the trial was improperly rejected the court may cause the witness to be examined before the court or a judge or upon commission. From the above clauses of the controverted elections' act it appears to me that the only matter which is appealable after trial is the judgment and decision of the judge upon the matters of fact and law involved in the issues joined upon the matter of the petition and upon any question of law arising in the course of the trial, affecting the decision upon the matters of fact, as the improper reception or rejection of material evidence.

In the appeal case before us it appears, although it does not seem to have been offered, or to have been admissible, in evidence upon the trial of the petition, that upon the 1st December, 1887, an order was made in the matter of the petition by the Common Pleas Division of the High Court of Justice where the petition was pending which is in the following terms (1):

Now it is, I think, very obvious that the trial court had no authority whatever to call in question the validity of this order or of that of the 17th December or to disregard them.

The suggestion made to the trial judge before the commencement of the trial to the effect that he had no jurisdiction to try the case was a vain, useless and irrelevant objection. It did not submit to his judgment and decision any point arising on the trial of, or affecting the matter of, the petition nor did it call for, nor could he legally make nor did he make, any judical decision upon it. He simply proceeded to try the case in obedience to the order of the court in which the petition was pending as it was his duty to do. Whether or not an order had been issued by the Common Pleas Division within six months from

(1) See p. 455.

the presentation of the petition for extending the time for the commencement of the trial, of which order that of the 1st December was but in continuance, were matters not within the judicial cognizance of the trial judge at all. His judicial functions were limited to trying the matter of the issues joined on the petition sent down to him by the Common Pleas Division for trial. Anything therefore which may have been said by the trial judge in relation to the objection was, as it must needs have been, quite extra-judicial, for as judge presiding at the trial court in obedience to the orders of the Common Pleas Division of the High Court of Justice of the 1st and 17th of December, no question could legally have been submitted to his adjudication, calling for, or justifying him in giving, any judicial decision as to the validity or invalidity, the sufficiency or insufficiency of those orders. The Common Pleas Division was alone responsible for them. Under color however of an appeal from the judgment and decision of the trial judge rendered upon a trial of the petition upon the merits, the case has been turned into an appeal against the above orders of the Common Pleas Division against which, as was decided by this court in the present term in the L'Assomption, L'Islet, Montmorency and Quebec County election cases, no appeal lies whether the decision of the court which made the orders was right or wrong.

As an appeal to this court after the trial of an election petition can only be from the judgment and decision of the trial judge upon some question of law or fact arising upon the trial of the matter of the petition which it was competent for him and it was his duty to decide upon such trial; and as it was not competent for him to call in question the validity of the orders of the 1st and 17th of December, or to disregard them; and as in point of fact he did not

1888

GLENGARRY ELECTION CASE.

Gwynne J.

make any adjudication or decision, nor, upon the trial of the matter of the petition, was it necessary that he should have made any decision, affecting the validity of the said orders, it is impossible, in my judgment, that upon this appeal, which is from the judgment and decision of the learned judge who presided at the trial court upon the merits of the matter of the petition, a point should be entertained by us affecting the validity of orders not made in the course of the trial—not affecting the matter of the petition which was being tried—not made by the judge of the trial court at all but by a wholly different court—a point in fact which it was not competent for the learned judge of the trial court to have decided and which was wholly collateral to, and forms no part of, the decision of the learned judge upon the merits which alone forms the subject of the present appeal.

We should be very careful not to defeat the object which the legislature had in view when it submitted all questions affecting the return of members of parliament and the purity of elections to judicial enquiry in the courts of law, and when after a trial of an election petition it limited an appeal to this court to an appeal from the decision upon any question of law or fact of the judge who has tried the petition.

In the present case a trial has taken place, witnesses have been called, examined and heard upon both sides, the merits of the case have been fully gone into and gravely argued by counsel, and the learned judge who tried the petition has pronounced the election to be void for corrupt practices, committed by the sitting member and his agents, whereby the sitting member procured his return as a member of the house of commons. From this decision an appeal has been taken, on which appeal the statute provides that it is the record of the case as tried which shall be set down for hearing in this court, which record presents only the

question whether or not the corrupt practices charged in the petition have been committed as the learned judge whose decision is appealed from has found them to have been. If we should now decline to adjudicate upon an appeal from this decision of the trial judge upon the merits so tried and adjudicated upon by him, and should so withhold from the house of commons the report required by the statute to be made to it, in relation to the corrupt practices found by the trial judge to have been committed, upon the ground that he had no jurisdiction to try the case, and that the orders of the 1st and 17th Dec., made by the divisional court, and in obedience to which the parties came before him and he tried the case, were made without any jurisdiction, we shall convert the appeal from one against the decision of the learned judge who tried the case, which is the only appeal authorised by the statute, into an appeal against the orders of the 1st and 17th Dec. and, we shall thus, I fear, be defeating the object of the legislature, which enacted that an appeal shall lie only from the judgment and decision of the judge who has tried the petition, and that upon such appeal it is the record of the case as tried which shall be set down for hearing by this court, and we shall be assuming a jurisdiction which, as we have already decided in the cases above mentioned, we do not possess.

But assuming the point to be open upon this appeal there is, in my opinion, nothing in it, for:—

1st. The time occupied in a session of parliament is, in my opinion, by the express terms of the act excluded in the computation of the time allowed for every step or proceeding in the matter of the petition necessary to be taken in order to bring the petition down to trial, and in such case the six months from the presentation of the petition had not expired when the order of the 1st of December was made, and

1888

GLENGARRY ELECTION CASE.

Gwynne J.

2nd, Even if the six months from the presentation of the petition had then expired the order of the 1st of December was, in my opinion, a good and valid order within the provision of the statute as to enlargement of the time for the commencement of the trial.

Now that the time occupied in a session of parliament is not to be included in the computation of the time allowed for taking the several steps and proceedings necessary or authorised to be taken in respect of and for the purpose of bringing the matter of the petition down to trial and for the commencement thereof is, I think, very apparent if we refer to the steps and proceedings which are necessary or authorized to be taken, and to the statute 38 Vic. ch. 10, the substance of which the revised statute ch. 9 does not alter, although by altering the collocation of the sentences it creates some apparent confusion.

By 37 Vic. ch. 10, sec. 9, five days are allowed after presentation of the petition within which it may be served. By sec. 10 five days are allowed after service for the respondent to file any preliminary objections which he may have to urge. By sec. 11 five days were allowed after the dismissal of such preliminary objections, if dismissed, for the respondent to file an answer to the petition, and to serve a copy thereof on the petitioner, and it was by that section enacted that whether such answer should or not be filed, the petition should be deemed to be at issue after the expiration of the said five days, and the court, that is to say the court in which the petition was filed, was authorised at any time thereafter, upon the application of either party, to fix some convenient time and place for the trial of the petition. By sec. 13 it was enacted that notice of the time and place fixed for the trial of the petition should be given not less than fourteen days before the appointed day. By section 14 and the subsequent sections to 21 provision is made for the examination of

the parties, petitioner and respondent, after the petition is at issue and before trial for the purpose of obtaining evidence to be used at the trial; of which examination 48 hours notice is required to be given to the party to be examined. So in like manner by sec. 24 the petitioner or respondent may, after issue is joined on the petition, obtain a side bar rule or order of the the court, still meaning the court in which the petition is pending, requiring the adverse party to produce within ten days after the service thereof, under oath, all documents in his custody or power relating to the matters in question, such production being also for the purposes of the trial and to be used as evidence thereat.

Such being the proceedings necessary and authorized to be taken before the petition should be brought down for trial and for the purposes of such trial the 38 Vic. ch. 10, sec. 1 enacts that:—

Whenever it appears to the court or judge that the respondent's presence at the trial is necessary, the trial of an election petition shall not be commenced during any session of parliament, and in the computation of any delay allowed for any step or proceeding in respect of any such trial or for the commencement of such trial under the next following section the time occupied by any such session shall not be reckoned.

Now the only "delays allowed for any step or proceed- "in respect of such trial" are the several times allowed and prescribed for the several steps and proceedings required or authorized to be taken in order to bring the petition down to trial, as above extracted from 37 Vic. ch. 10; there are no other steps or proceedings in an election petition case either before or after the commencement of the trial, consequently if the words "and in the computation of any delay allowed for any step or proceeding in respect of any such trial," are not construed as applying to such steps and proceedings, no application whatever can be given to them and they become in effect absolutely eliminated from the statute. The words "such trial" as used in this

1888

GLENGARRY ELECTION CASE.

Gwynne J.

section plainly apply to the previous words "the trial of an election petition, and the words "such session" to the antecedent words "any session of parliament." The 2nd sec. of 38 Vic. ch. 10, subject to certain provisions therein contained as to enlargement of the time of trial by the court and other matters to which it is not necessary here to refer, enacted that the trial of every election petition should be commenced within six months from the time when the petition was presented.

Now, ch. 9 of the revised statutes while it alters the collocation of the sentences in 38 Vic. ch. 10, does not, in my judgment, make any alteration in the substance. It incorporates for consolidation into one act the several acts relating to controverted elections, including the several sections and provisions above extracted from 37 Vic. ch. 10, and as to the point now under consideration, which is the consolidation of 38 Vic. ch. 10 with 37 Vic. ch. 10, it places the sentences of the 1st and 2nd sentences of 38 Vic. in a different order from that in which they are placed in 38 Vic. without, in my opinion, altering the construction. Thus it enacts in sections 32 and 33 as follows:—

Sec. 32. The trial of every election petition shall be commenced within six months from the time when such petition has been presented and shall be proceeded with from day to day until such trial is over; but if any time it appears to the court or a judge that the respondent's presence at the trial is necessary, such trial shall not be commenced during any session of parliament; and in the computation of any time or delay allowed for any step or proceeding in respect of any trial or for the commencement thereof as aforesaid, the time occupied by such session of parliament shall not be included.

2. If at the expiration of three months after such petition has been presented, the day for trial has not been fixed, any elector may, on application, be substituted for the petitioner on such terms as the court or judge thinks just.

33. The court or judge may, notwithstanding anything in the next preceding section, from time to time enlarge the time for commencement of the trial, if, on an application for that purpose supported by affidavit, it appears to such court or judge that the requirements of justice render such enlargement necessary.

2. No trial of an election petition shall be commenced or proceed-

ed with during any term of the court of which the judge to try the same is a member and at which such judge is by law bound to sit.

Now it cannot be doubted that the words "such trial" where they first occur in the above 32nd section relate to the words in the commencement of the section "the "trial of every election petition," and there is no reason whatever why when the same words occur twice again in the same section they should receive any different interpretation—they all refer to the same words namely, "the trial of every election petition." The contention, however, is that in the sentence, "and in "the computation of any time or delay allowed for any "step or proceeding in respect of any such trial, or for "the commencement thereof as aforesaid, the time occu-"pied by such session of parliament shall not be in-"cluded," the above words "time or delay allowed for "any step or proceeding in respect of such trial" do not relate to the times and delays allowed by the statute for steps or proceedings required to be taken in respect of the trial of election petitions generally, but to a case (after all these steps and proceedings have already been taken, and the petition has been brought down to trial), of no trial taking place by reason of the trial judge refusing to commence it because of the respondents presence thereat appearing to him to be necessary, a stage in the case of an election petition when no steps or proceedings in respect to the trial of it remain to be taken, and for which therefore no delays are by the statute provided or allowed. So likewise it is contended that the words "such session ' in the sentence "the time occupied by such session of "parliament shall not be included" have not reference to the precedent words in the section "any session of "parliament," but only to a session during which a judge may have refused to try a petition upon the ground of his being of opinion that the respondent's

1888

GLENGARRY ELECTION CASE.

Gwynne J.

presence at the trial is necessary. Such a construction, as I have already shown in my observations upon sec. 1 of 38 Vic. ch. 10, would render wholly nugatory the words "in the computation of any time or delay allowed for any step or proceeding in respect of any such "trial" for after the postponement of the trial by a judge upon the ground of the respondent's presence at the trial appearing to him to be necessary, there is no step or proceeding whatever necessary to be taken or provided for in the statute, and for which any delay is allowed thereby. The plain meaning of the section appears to me to be that it is the trial judge who is prohibited from commencing the trial of an election petition during any session of parliament if the respondent's presence at the trial appears to him to be necessary. He is the person to form the opinion as to the necessity of the respondent's presence at the trial, and he is to exercise his own judgment on that question, notwithstanding that the petition may have been sent down for trial regularly by the court in which the petition is pending; and the residue of the section is (as was sec. 1 of the 38 Vic. ch. 10) for the purpose of providing that the time occupied in any session of parliament shall not be included in the computation either of the times and delays allowed by the act for the taking any steps or proceedings necessary to be taken in order to bring the case to trial, or for the commencement thereof. The section then will read thus:—

"The trial of every election petition shall be commenced within six months from the time when such "petition" (that is the election petition to be tried) "has been presented and shall be proceeded with from "day to day until such trial is over" (that is to say the trial of every election petition once commenced shall be proceeded with until the trial is over), "but if at any "time it appears to the court or a judge that the respon-

" dent's presence at the trial is necessary such trial shall " not be commenced during any session of parliament" (that is to say, if upon the trial of any election petition coming on at any time, the respondent's presence at the trial or, at *such* trial, appears to the trial judge to be necessary, the trial of such election petition, or "such " trial" shall not be commenced during any session of parliament) and in the computation of " any time or " delay allowed for any step or proceeding in respect of " any such trial, or for the commencement thereof as " aforesaid, the time occupied by such session of parlia- " ment shall not be included." That is to say the trial of an election petition shall not in a certain case be commenced during any session of parliament, nor shall the time occupied by such, that is by " any session of " parliament," just spoken of, be included in the computation of the times and delays allowed for taking the several steps and proceedings necessary to be taken in order to bring the case of an election petition to trial or for the commencement of such trial. This construction gives effect to every word of the section while the construction contended for by the appellant absolutely eliminates from the section or renders nugatory the chief part thereof as already shown, and the result, as it appears to me, is that while the parties may, if they think fit, during any session of parliament take all the steps and proceedings necessary to be taken in order to bring an election petition down to trial, and may even commence and proceed with the trial, yet they can not be compelled to do so for the time occupied in any session shall not be included in the computation of the times and delays by the act allowed for taking the several steps and proceedings in the cause in respect of bringing the case to trial or for the commencement thereof. This I confess appears to me to be the true, natural and reasonable construction of the statute,

1888

GLENGARRY ELECTION CASE.

Gwynne J.

Now as to the validity of the order of the 1st Dec., assuming the time occupied in the session of parliament to be included in the computation of six months from the presentation of the petition allowed for bringing the case down to trial. The petition was filed during a session of parliament, upon the 25th April, 1887; the contention of the appellant is that upon the expiration of six months from that date, no rule of court for enlarging the time having been obtained during such six months, the election petition was out of court and that therefore the court had no jurisdiction to make any order in it, and in support of this contention two cases are cited, namely *Whistler* v. *Hancock* (1); and *King* v. *Davenport* (2). In those cases orders had been made dismissing the actions for want of prosecution unless a statement of the plaintiff's claim in the respective cases should be delivered within certain periods named in the orders, and such periods having elapsed without the delivery of such statements of claim it was held that in the terms of the orders *eo instanti* of the expiration of the periods named in the orders the actions became dismissed, and that thereafter no motion could be made in them; but these cases have no application to the present case for the statute does not what those orders did, it does not declare or enact that election petitions shall stand dismissed or shall be deemed to be out of court unless the trial shall be commenced within six months from the presentation of the petition; it simply directs as a matter of procedure that the trial shall be commenced within six months from the presentation of the petition with this proviso added, in sec. 33 of the act, ch. 9, revised statutes, that notwithstanding such direction the court may from time to time enlarge the time for the commencement of the trial if, on an application for

(1) 3 Q. B. D. 83. (2) 4 Q. B. D. 402.

that purpose supported by affidavit, it appears to the court that the requirements of justice render such enlargement necessary; and with this further provision, contained in the 64th sec. of the act, that "a court "or a judge shall, upon sufficient cause being shewn, "have power on the application of any of the parties "to a petition to extend from time to time the period "limited by this act for taking any steps or proceed-"ings by such party." Now in these cases of election petitions the ends of justice may as much require after as before the expiration of six months from the presentation of the petition that the time for commencement of the trial of the matter of the petition should be enlarged, as is the language of one of these sections, or extended which is the language of the other, and as the statute does not enact that the petition shall be deemed to be out of court or shall stand dismissed at the expiration of the six months from presentation of the petition unless the trial shall before then be commenced or an order for enlargement of the time for commencement of the trial shall before then be obtained the case was still in court and in the jurisdiction and under the control of the court upon the 1st December, and upon principle as well as the reasoning of *Banner* v. *Johnson* (1), *Lord* v. *Lee* (2) I am of opinion that the order of that date was good and valid even though the time occupied in the session be included in the computation of the six months from the presentation of the petition allowed for the commencement of the trial of it. When the legislature enacted that notwithstanding anything contained in the section which directs the trial to be commenced within six months from the presentation of the petition, the court might from time to time enlarge the time for the commencement of the trial if upon an application for that purpose supported by affidavit it

(1) L. R. 5 H. L. 157. (2) L. R. 3 Q. B. 404.

1888

GLENGARRY ELECTION CASE.

Gwynne J.

should appear to the court that the requirements of justice rendered such enlargement necessary, and in another section that the court should upon sufficient cause shown have power upon the application of any of the parties to the petition to extend from time to time the periods limited by the act for taking any steps or proceeding by such party, I find it difficult to bring my mind to the conclusion that the intention of the legislature was that *eo instanti* of the expiration of six months from the presentation of the petition without an order having been made for extension of the time for commencement of the trial the court should become paralysed and its jurisdiction absolutely ousted, however much the ends of justice might require that the trial should be proceeded with, and that the corrupt practices charged in the petition should be investigated, but for the reasons already given this point is not, in my judgment, of importance in the present case. Entertaining this opinion I feel it to be my duty to express my opinion upon the merits of the case as the only matter which, in my opinion, is before us in the present appeal our duty in relation to which is plainly, as it seems to me, plainly pointed out in the statute.

The objection that the learned judge who tried the case should not, upon the evidence, have avoided the election on the ground of bribery by an agent appears to me to be quite untenable and indeed frivolous in view of what occurred at the trial. After the examination of the above appellant, the then respondent, (taken before a local master before the trial) had been read and after his oral examination at the trial and after much evidence had been given by persons who were his agents and others as to the general conduct of the election, and after evidence had been given upon three specific charges of corrupt acts alleged to have been committed by one McKenzie, the appellant's agent, by

loaning money to three persons of the names of Vanier, Saucier, and Tyo with corrupt intent, which charges are contained in items numbered respectively 35, 36 and 37 in the bill of particulars, and after the respondent at the election trial had given all the evidence he had to offer in respect of these charges, the learned judge addressed the respondent's counsel as follows, as appears by the printed case laid before us,

I will hear you Mr. Cassels, the question of agency being admitted, on the question of corrupt practices by the agent.

Whereupon the learned counsel addressed the court as follows:—

There is no doubt there is an agency. As to the corrupt practices by the agent I am free to admit, it just depends upon how your lordship views the evidence. I am quite free to admit, even if these were *bonâ fide* loans, if the loans were induced or brought about by reason of a desire on the part of the agent to procure the votes or to influence the votes whether the loans were *bonâ fide* or not I suppose it would be within the statute a corrupt act, and the point comes down to the question of evidence as to what view your lordship takes about it. There is no doubt the facts are suspicious; the very fact of having lent the money on the eve of an election, and the very fact as it were of negotiations for the loans taking place at the time of a meeting, are all circumstances of suspicion. Then of course there is the evidence of these three men for what it is worth to the effect that they themselves stipulated that they should receive the loan as the price of their votes; my impression is that two of them really did not understand what they were saying; that they evidently talked French and rather in a broken way but, still, there is their evidence. As against that there is only the evidence of McKenzie. Now I cannot say one way or the other, and it is for your lordship to determine the fact. It is really a question of fact, for if you think the statement of these three men is correct that they put forward as a reason for the getting of this money that they would vote or not vote then, although the loans are genuine and *bonâ fide*, I think within the statute it is a corrupt act.

That the question was, as put here by the learned counsel, in effect only to be determined by the judge according to the view he should take of the evidence and of the credibility of the witnesses there can be no doubt, and the argument of the learned counsel seems

1888

GLENGARRY ELECTION CASE.

Gwynne J.

to me to convey internal evidence of the great difficulty under which he labored of withholding in his argument an expression in justification of the judgment which he expected from the learned judge, namely, that the monies were corruptly loaned. His lordship in reply to this argument of counsel appears by the case to have said as follows :—

> The way the evidence strikes me with reference to that is, we find an election meeting is being held of some character or another in the interests of Mr. Purcell on that evening; that there are three men who by some peculiar free masonry all learn that they can obtain money, and they attend there for that purpose, men whose needs have been pressing for various periods of time, but who never had made any application in the same quarter for relief; on that evening they met and all three of them made application for loans; all three of them obtained promises of loans and I cannot agree that they did not understand what they were saying because I took particular pains to endeavor to ascertain from them after counsel were through how they desired to place the facts; I think they understood they were obtaining loans, and were obtaining them as a condition for exercising their franchise and I think the way that was managed was this, that Leclair and Rousseau used their influence with these men to negotiate, and that McKenzie advanced the money and kept himself apart from any direct negotiations as to the voting. It seems to me that there is a clear lending of money by McKenzie as agent, using Leclair and Rousseau for the purpose of working out the scheme.

Upon hearing this enumeration of opinion from the learned judge, the above appellant's counsel said, "on "these facts I do not want to waste time explaining the law." Now upon this it appears to me that this was an acceptance by the respondent's counsel of the soundness of the opinion of the learned judge upon the question of corrupt practices by the agent, and that the trial would have closed here with the assent of the respondent without any appeal whatever if the petitioner had been willing to waive all claim to a judgment upon that part of the petition which related to the charges of the candidate's connection with corrupt practices, committed by his agents for him and on his behalf,

and to the charges of direct bribery and corruption committed by himself personally. But, however that may be, as the cases upon which the learned judge expressed his opinion as above involved matters of fact only determinable by himself and depending upon the view taken by him of the credibility of witnesses examined before himself, an appeal from his determination of such pure matters of fact can not be entertained consistently with the decisions and uniform practice of this court to regard the decision of the trial judge in such cases as final.

Upon the counsel for the respondent at the trial having expressed himself, as above stated, as unwilling to waste time explaining the law after hearing the judge's opinion on the facts the learned judge enquired of the counsel for the petitioner—"Do you intend to "press the personal charges?" to which the counsel replied "Yes"; whereupon the learned judge said

I shall declare the election void by reason of corrupt practices by an agent so that whatever evidence you desire to further advance will be as to corrupt practices by respondent for the purpose of personal disqualification.

To which the petitioner's counsel replied

There are other agents

Upon which the learned judge said

As it has been said, and well said, I do not sit here inquisitorially. Having accomplished the purposes of the trial on any issue, I shall decline to receive further evidence for the mere purposes of enquiry. If the Parliament desire, upon my report, to have further inquiry as to corrupt practices in the constituency it will be in their province to appoint a commission for such purpose. I shall report as far as the evidence now appears to me that corrupt practices did extensively prevail in the constituency.

Now what the learned judge intended to convey by these observations was, clearly, as it appears to me, that being satisfied as to the committal of corrupt practices by an agent sufficient to avoid the election, and that corrupt practices

1888

GLENGARRY ELECTION CASE.

Gwynne J.

did extensively prevail at the election, he would report the latter fact to the House who might institute if they should think fit further enquiries into such general corrupt practice, but that he would only receive evidence during the remainder of the trial upon all personal charges made against the respondent for the purpose of his disqualification.

Now as to the objection that the learned judge erred in finding the present appellant guilty of bribery and that this judgment should be reversed so far as his finding upon the personal charges is concerned. The argument of the learned counsel for the appellant upon this objection appeared to me, I must confess, to be rested upon what I think was hypercritical criticism of certain passages in the language used by the learned judge in certain conversations which took place between him and counsel during the progress of the trial rather than upon the merits of the case.

The learned counsel for the appellant complained of the manner in which the learned judge approached, and proceeded with the trial—that he took a mistaken view of the nature of the evidence required to substantiate charges of the nature of those under consideration—that he ignored in fact the maxim that in a criminal case the accused is entitled to the benefit of a doubt—that in effect he first found that the advances made by McKenzie referred to already as being contained in items 35, 36 and 37 of the bill of particulars were not made with the knowledge and consent of the appellant and that notwithstanding he afterwards gave judgment against the appellant that those advances were made with his knowledge and consent.

These grave imputations upon the conduct of the learned judge who presided at the trial might well have been spared without any prejudice to the interests of the appellant, as will appear, I think, upon a careful perusal

of the proceedings as reported to us on the appeal case.

And as to the last of those imputations first. The charges involved in items 35, 36 and 37 of the bill of particulars were that one McKenzie, an agent of the respondent at the election, gave to the respective parties named in those items the respective sums therein also mentioned for the corrupt purposes therein also respectively mentioned, and that he did so with the knowledge and consent of the respondent.

When dealing with the learned judge's judgment upon the point of corrupt practices by this agent I have already shewn that after the respondent had given in all the evidence he had to offer upon the charge of the advances having been made corruptly by the agent the learned judge addressing the respondent's counsel said that he would then hear him "upon the "question of corrupt practices by the agent," thus expressly limiting the question to the first branch of the charge, and after hearing counsel and expressing his opinion that there was a clear lending of money by McKenzie, the agent, for the corrupt purposes charged, he asked the petitioner's counsel whether he intended to press the personal charges, and being informed that he did, the learned judge said that he would declare the election void by reason of corrupt practices by the agent McKenzie, and that he would report that corrupt practices extensively prevailed in the constituency and that the trial should proceed upon the personal charges.

Now among the personal charges so to be proceeded with were those that the three several sums advanced by McKenzie to the respective persons named in the items 35, 36 and 37 were so advanced with the knowledge and consent of the respondent. Those charges were as much open as any other personal charges against the respondent. Hitherto the action of the

1888

GLENGARRY ELECTION CASE.

Gwynne J.

judge had been confined to an inquiry whether the advances had been made corruptly by McKenzie. The charge of corruption in the respondent personally in relation to those advances was in no manner concluded by or involved in the result arrived at by the learned judge as to the fact of the advances having been made corruptly by McKenzie. In fact, of necessity, this latter question had to be determined first, and independently of the charge of corrupt knowledge and consent of the respondent, for the monies must be first found to have been advanced corruptly by McKenzie before the question as to their having been so advanced with the knowledge and consent of the respondent could arise. Now that both parties at the trial were well aware that the charge against the respondent personally, involved in the items 35, 36, and 37, remained to be tried appears from this that after two other charges of personal corruption had been entered upon and judgment upon one had, after argument of counsel thereon, been reserved, and the other had been dismissed as not proven, the petitioner's counsel, without any objection or remonstrance whatever, stated that he desired to examine the respondent further in relation to the three notes given by the three persons to whom the monies had been advanced by McKenzie, in fact in relation to the personal charges involved in items 35, 36, and 37, and he did accordingly submit the respondent to a further long and searching examination bearing upon those items and the respondent's general conduct during the election and his credibility, and at the close of the case, as I shall show by-and-bye, the learned judge, not only without objection or remonstrance of respondent's counsel but with his consent, proceeded to express the opinion which he had formed on the charges against the respondent involved in these three items, and in the charge upon which he had

reserved judgment, known as the Kennedy charge, for the apparent purpose of curtailing the proceedings and dispensing with the necessity of taking further evidence upon the very numerous charges of the respondent's personal connection with the very general corruption which, in the opinion of the learned judge as already expressed, had prevailed in the constituency at the election.

Now some discretion must be allowed to a judge presiding at the trial of so very numerous charges of a grave nature as to the mode in which the trial shall be conducted and the time when it may without injustice be closed; and when the mode adopted meets with the approbation and consent of counsel employed at the trial, as it appears to have done in the present case, it seems to me, I confess, to be strange that this mode of conducting the trial should afterwards be impugned as a grave error in the judge, and should be made a ground of appeal against his judgment.

The imputation that the learned judge ignored the maxim that in a criminal case the accused is entitled to the benefit of a doubt, and that he took a mistaken view of the nature of the evidence required to substantiate charges of personal corruption which are attended with such consequences as the disqualification of the candidate, rests not upon anything in the matured judgment pronounced by the learned judge after an apparently very careful and complete consideration and analysis of the evidence bearing upon the points dealt with, but upon a conversation which passed between the learned judge and the respondent's counsel during the progress of the trial.

At the close of the evidence given in relation to the Kennedy charge, the learned counsel for the respondent having been called upon to say what he had to say

1888

GLENGARRY ELECTION CASE.

Gwynne J.

upon this charge argued to the effect following :—

I say it is not proven. In the first place I understand that this charge is one of personal disqualification, and under the authorities when it comes to a criminal charge the court requires a larger amount of evidence than in the ordinary cases of avoiding an election, in fact there should be the clearest possible conviction.

Upon which his lordship is reported as observing:

There should be belief.

Upon which the counsel for respondent continued:

Positive belief. If it is doubtful—if the evidence is of a doubtful character---then it being of a criminal nature the court will find in favor of the respondent.

Upon which his lordship observed :—

I desire personally to say I have no rule of evidence differing in a criminal from that in a civil case, nor *vice versâ*, whether a man is to be mulcted in a sum for damages or imprisonment. When proof has to be given and the proof is given, whether criminal or civil, the consequences must follow. I draw no distinction having regard to the result. The conscience of a jury or a judge must be satisfied, and when the fact is found let the consequences take care of themselves.

Upon these observations is based the grave charge that the learned judge took a mistaken view of the nature of the evidence required to support the charges and that he ignored the maxim that a person should not be convicted of a crime upon doubtful evidence, and that in case of doubt the accused is entitled to the benefit of it, whereas a less prejudiced and more candid criticism would, I think, lead to the conclusion that the learned judge was guilty of no such error as that imputed to him and that what he intended to convey and what his language does convey in this conversation is that with the consequences resulting upon the finding of the facts in issue he had nothing to do—that in civil as in criminal cases the common rule is that when the proof which has to be given in order to establish a fact in issue is given "the consequences must follow"—and that whether the trial be by a jury or by a judge without a jury "the conscience of the jury or the judge as the case may be must be satisfied

that the proof necessary to establish the fact in issue is given and then when such fact is so established neither jury nor judge have anything to do with the result"; so reading the learned judge's observations I do not see in what they are open to objection, and that this is the proper reading of them appears further from this, that the respondent's counsel having replied to them that

No finding of facts should be given unless the judge is satisfied as to the truth of the facts.

The judge concurred in this observation of counsel, saying

Quite so. I think we may agree upon that definition of the rules of evidence.

The minds of judge and counsel having been thus brought into accord upon the subject of this little interlude, the learned counsel proceeded with his argument to its close, insisting upon the insufficiency of the evidence, in his view of it, to establish the charge, and the learned judge reserved his judgment to which I shall now refer for the purpose of showing how unfounded is the imputation that the learned judge took a mistaken view of the duty imposed upon him on the trial of these charges.

Upon the opening of the court on the morning of the 13th January, the learned judge having asked the petitioner's counsel to what particular point he then proposed to direct his evidence, he replied that he proposed to show that the candidate had knowledge of the general corruption which prevailed at the election. After some further remarks passed between counsel and the judge the latter, who had apparently employed the previous night in studying and weighing the evidence bearing upon the charges as to the knowledge and consent of the candidate to the advances made by McKenzie to the persons named in the items 35, 36 and 37, and upon the Kennedy case, addressed the counsel of both parties as follows—

1888

GLENGARRY ELECTION CASE.

Gwynne J.

I may say that I have made up my mind, without announcing what conclusion I have arrived at, on the evidence of Rousseau (this related wholly to the three advances made by McKenzie) and the evidence in respect of Kennedy. It may be that if I declare my opinion in respect of that counsel may feel justified in acting upon it or may not. If the counsel desire it I will give it.

To this suggestion counsel consented, that is to say, they consented to the learned judge's then announcing the conclusion he had arrived at upon these charges. The respondent's counsel does not appear to have then entertained the idea that the personal connection of the respondent with the advances made by McKenzie, mentioned in items 35, 36, and 37 was no longer a matter before the court, or to have been taken by surprise at the judge's intimation that he was then prepared to give judgment upon those charges as well as on the Kennedy case; nor did he, either then or after hearing the judgment, complain that in the judge's then giving it there was any irregularity or anything whatever of which the respondent had reason to complain; on the contrary, he assented to the learned judge giving his judgment, who, thereupon, in a clear and exhaustive review, more especially of the evidence bearing upon the charge that the advances made by McKenzie were made with the knowledge and consent of the respondent, and also of the evidence in the Kennedy case, announced the conclusion at which he had arrived. He pointed out that the whole matter he had to decide depended upon the credit to be attached to the evidence of the several persons who had given evidence, and in a judgment which no one, I think, can read without being convinced that the learned judge was fully impressed with the responsibility of the duty he was discharging and was most anxious to arrive at a just conclusion, and to proceed only upon what appeared to him to be undoubted evidence, he concluded as follows:—

I feel bound, therefore, with regard to the evidence as to Kennedy, to credit the evidence of the bookkeeper; I credit it entirely. I

discredit the evidence of Kennedy where it is contradicted and I find with reference to that, that out of monies of the respondent, under the direction of the respondent, the witness Evans, his book-keeper, paid to Kennedy one hundred dollars for the purpose of being used in the election, and in order to induce Kennedy to procure the return of the respondent.

I consider this evidence at this point not only in respect of the particular charge but also in connection with the evidence of Rousseau and what took place at Martintown, and finding as I do against the *bona fides* of the action of the respondent and against his evidence in respect to the transaction with Kennedy, the conclusion to my mind is irresistible that Rousseau is telling what really did occur, when he states that the respondent instructed him that the money might be advanced, and that he was to give that information to McKenzie; for I find that the conduct of the respondent is consistent alone with such a line chosen for himself and that the statement of the respondent that he gave no such instructions—that all the monies advanced by him were advanced for ordinary business purposes, loans upon security of personal credit or responsibility and which he purposes calling in—is not consistent with his conduct, is not consistent with what was done by McKenzie at Martintown, is not consistent with his dealings with Kennedy.

I therefore find that the action of McKenzie was under instructions, with the privity, consent and knowledge of the respondent and that the money which was paid out by McKenzie was paid out of monies which were placed to his credit by the respondent, and that the use of those monies for corrupt practices, in respect of which I have already avoided the election, was with the knowledge and consent and under the direct instructions of respondent.

The learned judge thus held that what evidence the respondent gave in his own favor was not worthy of credit—as was neither the evidence of McKenzie nor that of Kennedy where he was contradicted; and being of that opinion it was impossible for the learned judge, as he very clearly shows in his exhaustive review of the evidence, to have arrived at another conclusion than one in affirmation of the truth of the charges. With a conclusion so arrived at, upon the ground of the view entertained by the judge who tried the case as to the credibility of the witnesses and the degree of credit to be attached to that of each, we cannot interfere without reversing numerous decisions of this court

1888

GLENGARRY ELECTION CASE.

Gwynne J.

and transgressing the inviolable rule that in such a case a court of appeal cannot interfere.

Having announced his judgment as above, the learned judge asked the petitioner's counsel if he desired to offer any further evidence and being answered in the negative proceeded with his judgment as follows:—

> There must be a time appointed for the trial of corrupt practices. The parties who will be summoned for that trial are the three parties who received the money at Martintown, namely Saucier, Tyo, Vanier, McKenzie and the respondent, and also Kennedy. I do not add to those names the name of the bookkeeper because I am not clear upon the evidence that he knew, although he might have suspected, the purpose for which the money was given, and he was acting under the direct instructions of his employer. It would have been more correct if he had assumed a more independent position in reference to it, but I give him the benefit of the doubt in my mind as to the reasons of his conduct, and I therefore do not require him to be summoned.
>
> With respect to Rousseau there is no direct evidence that he did more than act with McKenzie and Purcell at Martintown. I should have added his name to the others did I not think, and I am shut up to the conclusion that he supposed he was acting upon the strength of the section which I read to him, and was giving his evidence under the protection of the section. If I had not given him that information I would not have been free to leave his name out from those who are to be tried for corrupt practices.
>
> I find as a fact that the evidence he has given is reliable evidence and that his statements were true, and being given in the interests of the public and for the purity of elections I think I would not be carrying out the spirit of the clause if after such information I should require him to answer at the court for the trial of corrupt practices.

I have extracted this latter part of the judgment of the learned judge as it seems to show how careful he was to give to every one the benefit of any doubt existing in his mind upon the evidence, the contrary of which was so freely imputed to him in the argument addressed to us on behalf of the appellant.

In my opinion the appeal should be dismissed, and the judgment of the trial judge should be maintained

and reported to the House of Commons, as provided by the statute.

1888

GLENGARRY ELECTION CASE.

Gwynne J.

Appeal allowed with costs (1).

Solicitors for appellants: *MacLennan, Liddell & Cline.*

Solicitor for respondent: *E. H. Tiffany.*

(1) Application for leave to appeal to the Judicial Committee of the Privy Council was made in this case and refused.—*Canadian Gazette*, vol. xi. p. 346.

ALBERT HENRY HOVEY AND OTHERS (DEFENDANTS)..... } APPELLANTS;

AND

MATTHEW WHITING AND OTHERS (PLAINTIFFS)..... } RESPONDENTS.

1886

*Nov. 13.

1887

*March 14.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Corporation—Powers of directors—Assignment for benefit of creditors—Description of property—Change of possession—R. S. O. c. 119 *s.* 5—*Interpleader issue—Appeal from judgment on.*

The decision of a judge of the High Court of Justice (which by sec. 28 of the Judicature Act is the decision of the court) on an interpleader issue to try the title to property taken under execution on a final judgment in the suit in which it is issued, is not an interlocutory order within the meaning of that expression in sec. 35 of the Judicature Act, or if it is it is such an order as was appealable before the passing of that act and in either case it is appealable now.

An assignment by the directors of a joint stock company of all the estate and property of the company to trustees for the benefit of creditors is not *ultra vires* of such directors, and does not require special statutory authority or the formal assent of the whole body of shareholders.

Quære. Is such an assignment within the provisions of the Chattel Mortgage Act of Ontario, R.S. O. c. 119?

Where such an assignment was made, and the property was formally handed over by the directors to the trustees, who took possession and subsequently advertised and sold the property under the deed of assignment:

Held, that if the assignment did come within the terms of the act its provisions were fully complied with, the deed being duly

---

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

1886

HOVEY v. WHITING.

registered and there being an actual and continued change of possession as required by section 5.

In such deed of assignment the property was described as "all the real estate, lands, tenements and hereditaments of the said debtors (company) whatsoever and wheresoever, of or to which they are now seized or entitled, or of or to which they may have any estate, right or interest of any kind or description, with the appurtenances, the particulars of which are more particularly set out in the schedule hereto, and all and singular the personal estate and effects, stock in trade, goods, chattels, * * * and all other the personal estate, and effects whatsoever and wheresoever, whether upon the premises where the debtors' business is carried on or elsewhere, and which the said debtors are possessed of or entitled to in any way whatever.

The schedule annexed specifically designated the real estate and included the foundry, erections and buildings thereon erected, and all articles such as engines, &c., in or upon said premises:

Held, that this was a sufficient description of the property intended to be conveyed to satisfy section 23 of R. S. O. ch. 119. *McCall* v. *Wolff* (1) approved and distinguished.

But see now 48 Vic. ch. 26 sec. 12 passed since this case was decided.

APPEAL from a decision of the Court of Appeal for Ontario (2) reversing the judgment of Ferguson J. in the Chancery Division (3) in favor of the appellants.

The facts of the case are as follows: The "Farm and Dairy Utensil Manufacturing Company" was incorporated by letters patent, dated the 27th July, 1881, under the Canada Joint Stock Companies' Act, 1877.

The company being unable to meet their liabilities a meeting of the board of directors was held on the 14th August, 1884. At this meeting a resolution was passed that the company should make an assignment of all their estate and effects, and that the president and secretary should execute such assignment to the respondents, which they did on the 15th August, 1884.

The assignment was executed by the president and

(1) 13 Can. S. C. R. 130. (2) 13 Ont. App. R. 7.
(3) 9 O. R. 314.

the secretary of the company, by the trustees, and by a creditor, and was registered in the registry office for the county of Brant and in the office of the clerk of the county court of the same county on the 16th August, 1884. It purports to convey all the real estate of the debtors as set forth in the schedule annexed thereto, and also their personal estate and effects, goods and chattels, which were described as follows: "The "personal estate and effects, stock in trade, goods, "chattels, rights and credits, fixtures, book debts' "notes, accounts, books of account, choses in action, "and all other personal estate and effects whatsoever "and wheresoever, whether upon the premises where "the debtors' business is carried on or elsewhere, and "which the said debtors are possessed of or entitled to "in any way whatever."

The trusts of the deed were for the conversion of the property into money if required, payment of debts, and payment over of any surplus to the company.

There was no by-law, or any assent of the shareholders, or any authority from the shareholders, at a meeting of the shareholders duly called or otherwise, to the said assignment.

The appellants, execution creditors of the company, caused the property comprised in said deed to be seized to satisfy their several executions, and an interpleader order was obtained to test the validity of the deed and ascertain the title to such property. The interpleader issue was tried before Mr. Justice Ferguson who gave judgment in favor of the execution creditors, holding that the description of the property in the deed was insufficient within the meaning of sec. 23 of R.S. O ch. 119, and inasmuch as there was no immediate delivery to the trustees, followed by an actual and continued change of possession, the assignment was invalid. The Court of Appeal reversed this decision, and held

1886

HOVEY v. WHITING.

that although the description of the property was not sufficient, there had been such an actual and continued change of possession as would vest the property in the trustees. The Court of Appeal also held that the directors had power to make the assignment. The execution creditors appealed from the last mentioned judgment to the Supreme Court of Canada.

The questions argued before the Court of Appeal, and submitted to the Supreme Court of Canada are :—

1. That the said judgment of Mr. Justice Ferguson, delivered on the 17th day of February, 1885, being an interlocutory judgment, no appeal lay therefrom to the Court of Appeal.

2. That the directors of a manufacturing and trading company, such as the "Farm and Dairy Utensil Manufacturing Company" was, had no power or capacity, without the assent and authority of the shareholders, duly evidenced by by-law at a meeting called for that purpose or otherwise, to authorise the execution of an assignment of the company's estate and effects for the benefit of creditors.

3. That the assignment for the benefit of creditors was within the act relating to chattel mortgages and bills of sale relating to personal property (R. S. O., ch. 119.)

4 That the description of the property assigned by the said deed of assignment, bearing date the 15th day of August, 1884, was insufficient to satisfy the requirements of sec. 23 of R.S.O., ch. 119.

5. That the sale of the goods and chattels purported to be conveyed by the said deed of assignment was not accompanied by an immediate delivery and followed by actual and continued change of possession as is required by sec. 5 R.S.O., ch. 119.

Robinson Q. C. and *Hall* for the appellants.

As to the right of the plaintiff to appeal from the

judgment of Ferguson J. see *McAndrew* v. *Barker*, (1); *King* v. *Simmonds*, (2).

The directors could not make this assignment without the consent of the shareholders, as each shareholder has a right to have a voice in the disposal of the property of the company. See *Donly* v *Holmwood*, (3); *Beaston* v. *Farmers' Bank of Delaware*, (4); *McNeil* v. *Reliance Ins. Co.* (5).

The description of the property was insufficient according to the decision of this court in *McCall* v. *Wolff* (6) and *Kinloch* v. *Scribner* (7).

The authorities cited on the hearing before Mr. Justice Ferguson (8) were also relied on.

Dr. *McMichael* Q.C. and *S. H. Blake* Q.C. (*Wilson* Q. C. with them) for the respondents.

The question raised as to the right of appeal is not open to the parties here, but if it is it is untenable. See *Dawson* v. *Fox* (9); *Robinson* v. *Tucker* (10).

That the assignment is not beyond the powers of the directors is clear from the authorities *Eppright* v. *Nickerson* (11); *White Water Canal Co.* v. *Vallette* (12). Brice on *Ultra Vires* (13).

On the other points raised for argument the learned counsel relied on the authorities cited in the report of the case in the Chancery Division (14).

Sir W. J. RITCHIE C. J.—In this case I think the appeal to the court below was rightly taken, and with reference to the first proposition, that the directors had no right to assign the property to trustees for the payment of their debts, I am clearly of opinion that they

(1) 7 Ch. D. 701.
(2) 7 Q. B. at p. 311.
(3) 4 Ont. App. R. 555.
(4) 12 Peters (U.S.) 102.
(5) 26 Gr. 567.
(6) 13 Can. S. C. R. 130.
(7) 14 Can. S. C. R. 77.
(8) 9 O. R 314.
(9) 14 Q. B. D. 377.
(10) 14 Q. B. D. 371.
(11) 18 Central L. J. 130.
(12) 21 How. (U. S.) 414.
(13) 2 Ed. p. 824.
(14) 9 O. R. 314.

1887

HOVEY v. WHITING.

Ritchie C.J.

not only had the right to do it, but that, whenever they found the company were unable to meet their engagements and were in an unquestionably insolvent condition, and that individual creditors were seeking to obtain judgments by which they might sweep away from the body of the creditors, for their individual benefit, the assets of the company, they not only had the right, but it was their bounden duty, in honesty and justice, to take such steps in their management of the affairs of the company entrusted to them by law as would preserve the property for the general benefit of all the creditors without priority or distinction, and this without any special statutory provision, upon general principles of justice and equity, and without the formal sanction of the whole body of shareholders. The board of directors, in my opinion, has unlimited powers over the property of the corporation so to deal with it as to pay the just debts of the corporation.

As to the question whether the statute applies to an assignment such as this for the general benefit, I do not think it necessary to enter upon a discussion of this question upon which there seems to be some diversity of opinion among the judiciary of the province of Ontario, because it is not necessary, in my opinion, for the determination of this case, for, assuming for the purposes of this case that such an instrument does come within the terms of the Ontario act, I am of opinion that there was a sufficient description of property. I have nothing to add to what I said in the case of *McCall* v. *Wolff* (1), and I said nothing in that case which interferes with the judgment of the court below in the present case, there having been, in this case, sufficient material on the face of the mortgage to indicate how the property might be identified after proper inquiries were instituted. I am also of opinion that

(1) 13 Can. S. C. R. 130.

the statute has been, in other respects, complied with. The instrument appears to have been duly registered, and there was evidence of an actual and continued change of possession before the issuing of the execution in this case. I therefore think this appeal should be dismissed.

STRONG J.—I entirely concur in the judgment delivered in the Court of Appeal by the learned Chief Justice of that court so far as the same relates to powers of the directors; and I particularly agree in that passage of his judgment in support of which he cites the observations of Blackburn J. in the case of *Taylor* v. *Chichester Ry. Co.* (1) Further, I agree in the judgment of Patterson and Osler JJ. as to the evidence being ample to show that there was a taking of possession sufficient to meet the requirements of the statute.

For these reasons I am of opinion that the appeal should be dismissed with costs.

FOURNIER J.—I am of opinion that the appeal in this case should be dismissed.

HENRY J.—I entirely agree with my brother Strong in the opinions which he has expressed on every point in this case, as to the possession, the actual and continued change of possession, and the sufficiency of the description of the property as required by the act, even if it was necessary to comply with its provisions; and I am of opinion that a sale or transfer by the directors of a company, as in this case giving everything up to secure to their creditors, share and share alike, all the property of the company, was an act which the directors had full authority to do, and that their affixing the seal of the corporation to the document, which I am of opinion they likewise had authority to

(1) L. R. 2 Ex. 356.

1887

HOVEY v. WHITING.

Henry J.

do, made it the act of the corporation.

I am also of opinion that such a document as that is not one which requires to be registered, nor do I find that in such a case in Ontario there has been any decision to the contrary. It has been held that where an assignment giving a preference has been made registration is necessary, but not for such a deed as the one in the case before us.

So that on all the points in the case I think the judgment of the court below was correct, and am in favor of affirming it and dismissing the appeal with costs.

GWYNNE J.—This is an appeal from the judgment of the Court of Appeal for Ontario reversing a judgment of the High Court of Justice of Ontario on an interpleader issue tried by Ferguson J. without a jury. The interpleader issue was between the above respondents as plaintiffs claiming, as assignees in trust for the benefit of all the creditors of a certain company called The Farm and Dairy Utensil Manufacturing Company, limited, certain goods and chattels seized and taken in execution, as the property of the said company, at the respective suits of the above named four appellants, who were made the defendants in the said interpleader issue. The learned judge before whom the issue was tried without a jury rendered judgment upon the issue in favor of the defendants, the execution creditors, finding the assignment to the plaintiffs in trust for creditors to be invalid as against the defendants under ch 119 of the Revised Statutes of Ontario The grounds of appeal stated are: (1).

As to the first of the above grounds, by the 28th section of the Judicature Act it is enacted that every action and proceeding in the High Court of

(1) See p. 518.

Justice and all business arising out of the same should, so far as practicable, be heard, determined and disposed of before a single judge, and that a judge sitting elsewhere than in a Divisional Court is to decide all questions coming properly before him, and is not to reserve any case or any point in any case for the consideration of a Divisional Court, and that in all such cases any judge sitting in court should be deemed to constitute a court.

The judgment therefore which is appealed from is a judgment pronounced by the High Court of Justice upon the matters in question in the interpleader issue, and in its terms it is a "judgment in favor of the de- "fendants in the issue, the execution creditors, with "costs."

Now by order 1 in the schedule to the Judicature Act, it is provided that with respect to interpleader the procedure and practice then used by the courts of common law under the Interpleader Act, ch. 54 of the revised statutes of Ontario, should apply to all actions and to all divisions of the High Court of Justice, and that the application by a defendant should be made at any time after being served with a writ or summons and before delivering a defence.

The application for an interpleader issue in the present case not being by a defendant, but by the sheriff on account of a claim made by the above respondents to goods and chattels seized by the sheriff as the property of the Farm and Dairy Utensil Manufacturing Company under executions issued upon judgments recovered against them at the suit of divers persons, proceedings were taken under the provisions of the 10th section of the Interpleader Act, for the relief of sheriffs, and a feigned issue was ordered at the suit of the claimants (the above respondents) as plaintiffs against the execution creditors (the above appellants)

1887
HOVEY
v.
WHITING.
Gwynne J.

as defendants to try whether the property seized by the sheriff under the executions was in fact the property of the claimants or not as against the rights acquired by the execution creditors in virtue of their judgments and executions Now the finding and judgment having been in favor of execution creditors that judgment was a judicial determination by the High Court of Justice upon the merits of the matter in contestation, as much as a like judgment upon matters in contestation between plaintiffs and defendants in an action originating in a writ of summons would be; and the judgment might have been entered of record under the provisions of the 19th section of the Interpleader Act, and execution might have been issued thereon for the costs adjudged to the defendants if not paid within the time prescribed in the 20th section. As to the actions at the suit of the defendants against the Farm and Dairy Utensil Manufacturing Company, in which actions the judgment on the interpleader issue is contended to be an interlocutory judgment, they had already been reduced to final judgment and nothing more remained to be done in them except to obtain the fruits of the judgments under the executions; an order it is true might be required to be made, consequential upon the adjudication on the merits of the matter in contestation in the interpleader issue being absolute, for the payment out of court of such monies as may have been, if any had been, realised by the sheriff by sale of the property seized and paid into court to await the determination of the interpleader issue; but such an order could have no effect whatever of the nature of making the adjudication upon the merits of the question tried on the interpleader issue a whit more final than it already was by the judgment of the court rendered in favor of the execution creditors, and if no such monies

1887

HOVEY v. WHITING.

Gwynne J.

had been realised and paid into court no such order would be required and nothing would remain to be done but to enter the judgment of record and for the sheriff to proceed to realise the amounts ordered to be levied by the executions in his hands. The judgment of the court upon an interpleader issue tried on the application of a sheriff for protection from claims made to property seized in execution, affirming the validity of the seizure in execution and determining conclusively, until reversed by some court of competent jurisdiction, the rights of the execution creditors to the fruits of the seizure as against the claimants, is, in my opinion, of a different character from a judgment on an interpleader issue ordered in the progress of a suit for the purpose of determining a point necessary, in the opinion of the court, to be determined before judgment should be pronounced on the matters in contestation in the suit, during the progress of which the interpleader had been ordered. Such was the case of *McAndrew* v. *Barker* (1); the order there was purely interlocutory and the subject of it was deemed necessary to be determined preliminary to rendering judgment on the merits in the two cases then pending in the court in the progress of which the interpleader issue had been ordered and tried; and there the question was not whether or not there was an appeal from an interlocutory order, but whether it had been brought in time. The case of *Cummins* v. *Herron* (2) was a similar case. Now, what the 35th section of the Judicature Act enacts is, that there shall be no appeal to the Court of Appeal from an interlocutory order in case before the passing of that act there would have been no relief from a like order by appeal to the Court of Appeal. The contention is that the judgment of the

(1) 7 Ch. D. 701. (2) 4 Ch. D. 787.

1887

HOVEY v. WHITING.

Gwynne J.

court presided over by Mr. Justice Ferguson on the trial of the above interpleader issue is an "interlocutory order" within the meaning of the above section, and it is said that before the passing of the Judicature Act there would have been no appeal from a like order to the Court of Appeal for Ontario. Now, as the judgment of Mr Justice Ferguson on this interpleader issue is, by the Ontario Judicature Act, a judgment of the High Court of Justice, and not merely in the nature of a finding of a jury or of a judge sitting alone without a jury under the provisions of the Administration of Justice Act of 1873, to find a like order, on an interpleader issue before the passing of the Judicature Act, to that contained in the judgment of Mr. Justice Ferguson in the present case we must look for a judgment of one of the Superior Courts as formerly constituted upon the matter in contestation on a like interpleader issue. Such a case was *Wilson* v. *Kerr* (1). There an interpleader issue ordered at the instance of a sheriff, as in the present case, came on to be tried before a jury, the only tribunal then recognised for trial of issues of fact in the courts of common law. At the trial before the late Sir John Robinson, then Chief Justice of the Court of Queen's Bench for Upper Canada, it was agreed, upon the evidence being taken, that the matter in issue should be left to the court to determine upon the evidence as taken, the court being at liberty to draw such inferences as they might think a jury should. The court rendered their judgment for the defendants the execution creditors just as Mr. Justice Ferguson has in the present case rendered the judgment of the High Court of Justice for Ontario. From that judgment an appeal was taken to the Court of Error and Appeal and the objection was taken that the judg-

(1) 17 U. C. R. 168 and in appeal 18 U. C. R. 470.

ment of the Court of Queen's Bench on the interpleader issue being only interlocutory there was no appeal from such judgment to the Court of Appeal but the court held that there was, and they heard the appeal, upon the authority of *Withers* vs. *Parker* (1). There the Court of Exchequer held that the English Common Law Procedure Act of 1854 gave an appeal to the Court of Appeal from the decisions of the courts of law upon interpleader issues equally as in all other cases, it being considered that the mischief to be remedied being as great in an interpleader issue as in any other the Legislature intended that there should be an appeal in the one case equally as in the other. This was a decision under the provisions of the Common Law Procedure Act of 1854 incorporated into the Upper Canada Common Law Procedure Act of 1856. We find then that under the Common Law Procedure Act of Upper Canada there was an appeal from the judgment of a court of common law upon the matters in contestation on the trial of an interpleader issue. Then in 1877 the Legislature of the Province of Ontario, by sec. 18 of ch. 38 of the Revised Statutes of Ontario, enacted that an appeal should lie to the Court of Appeal from every judgment of any of the Superior Courts, or of a judge sitting alone as and for any of such courts, in a cause or matter depending in any of the said courts or under any of the powers given by the Administration of Justice Act. Now the words in this section—"Judgment in a cause or matter depending, &c.,"—are abundantly sufficient to include and must be construed to include an interpleader issue and the matter in contestation therein.

It follows, therefore, that the judgment of the High Court of Justice of Ontario pronounced by Mr. Justice Ferguson on the interpleader issue under consideration here, which judgment conclusively determined the

(1) 4 H. & N. 810; 6 Jur. N.S. 22.

1887

HOVEY v. WHITING.

Gwynne J.

rights of the parties to the matter in contestation in such interpleader issue unless and until reversed by some court of competent, that is to say, appellate, jurisdiction, is either not an "interlocutory order" within the meaning of that expression in the 35th section of the Ontario Judicature Act, or if it be that it is such an order as was appealable to the Court of Appeal for Ontario prior to the passing of the Judicature Act, and in either of such cases it is appealable now. It would be singular if it should be otherwise, for the Ontario Interpleader Act gives an appeal expressly to the Court of Appeal from any decision of a county court or a county judge upon any question of law or fact arising on an interpleader issue.

The second of the above objections calls in question the validity of the assignment upon the contention that the directors of the company had no power or capacity to affix the corporate seal to the instrument without the assent and authority of the shareholders first obtained at a meeting of the shareholders duly convened for the purpose of authorising the execution of the assignment. If the execution of the assignment was absolutely illegal and void for want of such prior authority of the shareholders it is no doubt competent for the defendants in the interpleader issue to avail themselves of such invalidity, but if the assignment was voidable merely and not absolutely void for want of such prior authority it could only be avoided at the instance of some shareholder who should consider his interest prejudiced by such unauthorized, if it was an unauthorized, act of the directors, and until so avoided it would be valid and binding upon the company and could not be impeached by strangers, "for every shareholder may waive any right which is "given to him for his own protection only; and if he "has either expressly or tacitly done so, he can no longer "object; and neither a stranger nor the body corporate

"itself can raise such an objection to a contract made by "the corporation if no shareholder chooses to raise it for "himself." This is the language of Blackburne J. concurred in by Willes J. in *Taylor* v. *Chichester and Midhurst Railway Company* (1).

In connection with this point it has been urged that the assignment was not executed *bonâ fide* because, at the time of its having been executed, the directors contemplated endeavouring to procure all the creditors of the company to execute a deed of composition upon their being paid 50 cents in the dollar on their claims. I confess that I am unable to appreciate the force of the argument upon which this imputation of *mala fides* is rested; the deed was prepared for execution and was executed at the instance of, and in pursuance of a resolution of a majority of, the creditors of the company convened on the 14th of August, 1884, for the purpose of considering the condition of the affairs of the company; it is, in its terms, an absolute assignment of all the estate real and personal of the company to trustees upon trust to sell and to apply the proceeds in payment of all the creditors of the company without preference or priority, except such as had legal right to priority, ratably and in proportion to the amounts due to them respectively, and after payment in full of all the debts of the company and of the costs and charges attending the execution of the trusts of the deed upon trust to pay over any balance, if there should be any, to the company.

This deed executed under the corporate seal of the company was immediately after its execution registered in the registry office of the County of Brant, in which county the lands conveyed by the deed were situate, and in the office of the clerk of the county

(1) L. R. 2 Ex. 379.

1887

HOVEY v. WHITING.

Gwynne J.

court of the County of Brant, with the affidavits required by ch. 119 of the Revised Statutes of Ontario for the registration of bills of sale of chattels coming within the operation of that statute. The utmost publicity which registration could give was thus given. The instrument was executed not only with the knowledge of, but in pursuance of a resolution of a majority of, the creditors of the company and, as pointed out by the Chief Justice of the Court of Appeal for Ontario in his judgment, with the knowledge and consent also of the holders of shares in the company to the amount of $40,000 out of a total capital of $47,500. On the 18th of August a deed of composition was prepared for execution and was subsequently executed by a large majority of the creditors agreeing to accept in satisfaction 50 cents on the dollar on their claims conditional upon all the creditors accepting the like terms, which deed became inoperative by reason of a few of the creditors refusing to accept the composition. Now how can the fact that, at the time of the execution of the deed of assignment in trust for creditors, the directors may have entertained the hope that all the creditors would accept terms of composition which a majority of them were willing to accept affect with the taint of *mala fides* a deed of trust absolute in its terms providing for all creditors alike and prepared and executed at the instance of a majority of the creditors? The fair and reasonable construction of the whole matter, in my opinion, is that in the interest of the creditors of the company the deed of assignment was executed at the request of the majority of them as an absolute instrument and *bonâ fide* for the trust purposes declared therein, and that a number of the creditors having expressed their willingness to accept a composition of 50 cents on the dollar a deed of composition was prepared with intent of operating

1887

HOVEY v. WHITING.

Gwynne J.

only, as it only could operate, in the event of all the creditors giving their consent, which consent when given would operate in the interest of the stockholders. Now who are the persons who, under these circumstances, could with any propriety be heard to say that the trust deed of assignment was tainted with *mala fides* I fail to see; it surely cannot be in the power of a creditor who is provided for by the deed equally with all the other creditors to make such a charge in order that he may sweep away, it may be for his own benefit, all the property appropriated by the deed for the equal benefit of all.

Assuming then the trust assignment to be, as I think it is, free from any just imputation of want of *bona fides*, the case in so far as the point now under consideration is concerned is, since the judgment of the Exchequer Chamber in *Taylor* v. *The Chichester and Midhurst Railway Company* has been overruled by the House of Lords, governed by the dissentient judgment of Blackburn and Wells JJ., in that case in the Exchequer Chamber and the cases relied upon by Blackburn J.(1); and the rule to be collected from those cases which is applicable to the present may I think be thus stated—All deeds executed under the corporate seal of an incorporated company which is regularly affixed are binding on the company unless it appear by the express provisions of some statute creating or affecting the company, or by necessary or reasonable inference from the enactments of such statute, that the legislature meant that such deed should not be executed; and the directors of the

(1) *The South Western Ry. Co.* v. *Gt. N. Ry. Co.*, 9 Ex. 84; *Chambers* v. *M. & M. Ry. Co.*, 5 B. and S. 588; *Wilson* v. *Miers*, 10 C. B. N. S. 364; *S. W. Ry. Co.* v. *Redmond*, 10 C. B. N. S. 675; *Bateman* v. *Ashton-Under-Lyne*, 3 H. & N. 323; The judgment of Erle J. in *Mayor of Norwich* v. *Norfolk Ry.*, 4 E. & B. 412; and of Lord Chancellor Cranworth in the *Shrewsbury & Birmingham Ry. Co.* v. *N. W. R. Co.*, 6 H. L. Cas. at p. 136 and 3 Jur. N. S. at p. 781.

1887

HOVEY v. WHITING.

Gwynne J.

company have authority to affix the seal of the company to all such deeds not so, as above, forbidden by the legislature to be executed, unless they are by the express provisions of, or by necessary or reasonable inference from, the enactments of such statute forbidden to affix the seal of the company to the particular deed for the time being under consideration without compliance with some condition precedent prescribed as being essential to the validity of such deed, and which condition precedent has not been complied with.

It is not contended that the deed in question is illegal in the sense of the company being forbidden by any statute to execute such a deed, but it is contended that it is illegal and void by reason of the directors not having, as is contended, any power or capacity to affix the corporate seal to such a deed without a resolution of the company being first passed at a meeting of shareholders authorising the directors to execute the deed, or in other words, that the deed is illegal and void although the corporate seal has been affixed to it by resolution of the directors having charge of the seal and although the deed is signed by the proper persons to sign deeds which are binding on the company, because, as is contended, a statutory enactment either in express terms or by necessary implication forbids the directors to affix the corporate seal to a deed of the nature of that under consideration without the authority of such a resolution of the shareholders first passed as a condition precedent necessary to be complied with. The only statutory enactments in relation to the matter are contained in the 26th and 32nd sections of the Dominion statute, 40 Vic. ch. 43, respecting the incorporation of joint stock companies by letters patent, the former of which sections enacts that:

1887

HOVEY v. WHITING.

Gwynne J.

The affairs of the company shall be managed by a board of not less than three nor more than fifteen directors.

And the latter:—

That the directors of the company shall have full power in all things to administer the affairs of the company and to make or cause to be made for the company any description of contract which the company may by law enter into.

Now, it is contended that a deed purporting to transfer all the estate, real and personal, of an incorporated company for the benefit of the creditors of the company, it being in a state of insolvency, is, in effect, terminating the existence of and amounts to a winding up of the company instead of administering its affairs, which words, it is contended, necessarily imply that the power of the directors is confined to the management of the affairs of the company as a going concern and, consequently, to the period during which the company continues to be solvent.

Now, not to omit, although it is unnecessary to dwell upon, a plain answer to this contention, it by no means must necessarily follow that a deed conveying all the property of a company in trust for payment of its creditors amounts to a winding up of the affairs of the company and the termination of its existence, for although the creditors of the company have a just claim upon the company to have all the property of the company secured, so that it shall be appropriated in payment of the creditors equally, still it may be found that a sale of part only will prove sufficient and that a balance will remain which would enable the company to renew its operations. But assuming a company to be so insolvent that the whole assets of the company conveyed in trust for the payment of the debts of the company should be insufficient to pay those debts in full, and that nothing should remain to be paid over to the company, and so that the necessary result should be the winding up of the affairs of the

1887

HOVEY v. WHITING.

Gwynne J.

company, still the making provision for payment o the debts by the trust deed was no less part of the affairs of the company because of its insolvent condition. It cannot be said that the affairs of a company cease to require the management and administration of those to whom is specially intrusted the management of its affairs when it becomes unable to pay its debts in full. The insolvency, as it appears to me, makes it to be the first duty of those having intrusted to them the management and administration of the whole of the affairs of the company to take prompt measures to secure the assets of the company for distribution among all the creditors proportionably and equally without preference or priority, and the balance, if there be any, after payment of all the debts in full, for the shareholders. When the company is in insolvent circumstances the greatest care, as it appears to me, is necessary and the best management is required to prevent the assets of the company being wasted in litigation or lost by sacrifice at forced sales under execution, in order to preserve equal distribution among the creditors and if possible something out of the wreck for the shareholders of whose affairs the directors are given the management and administration. The statute, in my opinion, warrants no such limitation of the power of the directors, for it is the management of all the affairs of the company and power to make any description of contract which the company may legally make which is vested in the directors. If then the company could legally by a vote and resolution of its shareholders make a contract the effect of which would be to appropriate its assets in payment of its creditors equally and ratably without preference or priority, the statute in express terms declares that the directors may make for the company such a contract, and if such contract in order to be perfect requires the

seal of the company to be affixed to it, the directors must have authority to affix it. However, the language of Willes J. in *Wilson* v. *Miers* (1) is strangely misinterpreted and misapplied for the purpose of supporting the contention that directors have no power to affix the seal of the company to such a deed without special authority by vote of the shareholders first given to them; the language so relied upon, separating it from its context, is as follows (2):—

> Then I apprehend there is another principle of law which applies and which makes the transaction valid, that the court is not to assume that parties propose to carry their intentions into effect by illegal means if their intention can be carried into effect by legal means. There is no presumption that the directors did in this case intend of their own heads and without consulting the company to effect a winding up. The court ought rather to presume that the directors would have been well advised and would have acted according to their duty; and on obtaining the £60,000 instead of proceeding forthwith to make a winding up of their own authority, they would have held a meeting and taken the opinion of the shareholders as they were bound to do on the subject.

This language has been referred to as if in using it the learned judge was laying down a general principle of law applicable to all cases making it illegal for directors in the management of the affairs of a company to take any steps, however insolvent the company might be, to have the assets of the company appropriated to distribution among the creditors of the company without first calling a meeting of the shareholders and obtaining from them special authority to make such appropriation of the company's assets, whereas the languages is applied to the circumstances of the particular case then in judgment and to the duty imposed upon the directors of the particular company in question there by the articles of association of the company, the 161st clause of which provides:—

> That an absolute dissolution of the company shall be made under the following circumstances, that is to say, if a resolution for that

(1) 10 C B. N.S. 364. (2) At p. 366.

1887

HOVEY v. WHITING.

Gwynne J.

purpose shall be reduced into writing and shall be twice read and put to the vote, and shall be carried each time by a majority of at least two-thirds in number of the shareholders present personally or by proxy holding among them at least two-thirds of the shares of the company at an extraordinary general meeting, and if such resolution shall be confirmed by a like majority at a subsequent extraordinary general meeting to be held after the expiration of fourteen days but before the expiration of fourteen days next after the general meeting at which such first resolution shall have been passed, then the company shall be dissolved and it is hereby declared to be dissolved accordingly from the date of such second general meeting, except for the purposes mentioned in the next following article and without prejudice thereto.

This subsequent or 162nd article made provision for winding up the affairs of the company upon such dissolution being resolved upon. That it is to these clauses that the language of Willes J. applies is apparent on the face of the judgment itself, for in a previous part speaking of the directors and their powers he says:—

They have power in terms, by Art. 5, to sell the vessels belonging to the company. They then have in the same clause of the regulations, powers given not affecting that authority; and then they have powers conferred on them in the most sweeping terms to deal with all other matters in which the company are interested. Now there could be no doubt that the sale (which was in effect of all the assets of the company) was *primâ facie* within the authority of the directors; but it is said that that authority is taken away by the effect of the 161st and 162nd clauses of the regulations, which provide for the case of a dissolution of the company; and it is said that those provisions require, as they unquestionably do, the dissolution of the company to take place with the assent of a certain proportion in number and value of the shareholders, and that the assent of that proportion of the shareholders had not been obtained.

The whole judgment, in fact, is a strong argument in support of the validity of the deed in question here, in so far as the point now under consideration is concerned, for by statute the directors have been given in most sweeping terms power to manage and administer the affairs of the company in all things and make any description of contract which the company might legally make, and there is no clause in qualification of

this power, as there was in *Wilson* v. *Miers*, to which the language of Willes J. applies. A case of *Donly* v. *Holmwood* (1) was cited in which the Court of Appeal for Ontario held that a joint stock company incorporated under the joint stock companies letters patent act could not, without being specially authorized by the shareholders, make an assignment in insolvency under the 14th section of the Insolvent Act of 1875. In so far as this judgment is rested upon an implied prohibition to make such an assignment, if any there be, contained in the 15th sub-section of section 147 of the Insolvent Act, we are not called upon in the present case to express any opinion upon that judgment, but in so far as it is rested upon any supposed general principle of law applicable to all cases, or upon the language of Willes J. in *Wilson* v. *Miers*, in the absence of some statutory prohibition express or implied it cannot, in my opinion, be sustained.

Lastly, it was contended that as the Dominion statute 45 Vic. ch. 23 makes provision for the winding up of insolvent incorporated trading companies, such as the company in question here is, the proper procedure to have been taken was that authorized by this act. Well, that act enables a creditor for the sum of $200 to take proceedings under the act to bring a company become insolvent under its operation, and it is still quite competent for any such creditor, who thinks the dilatory and more expensive mode of procedure authorized by the act more beneficial to the creditors than carrying into effect the trust assignment which has been executed at their request, to petition the courts as they may be advised under the act. But the fact that it was competent for the creditors to have availed themselves of the provisions of that statute cannot make another proceeding, adopted in their interest and at

(1) 4 Ont. App. R. 555.

1887

HOVEY v. WHITING.

Gwynne J.

their request for the purpose of obtaining payment of their claims against the company in a less expensive manner, to be illegal. The deed therefore cannot, in my opinion, be assailed by the respondents upon the objection made as to the power of the directors to affix the seal of the company to it.

The 3rd and 4th grounds of appeal are that the trust deed of assignment in question is a deed of sale of goods and chattels within ch. 119 of the revised statutes of Ontario and that it is void under that statute as against the defendants in the interpleader issue, the above named execution creditors of the company executing the assignment, by reason of insufficiency in the description of the chattel property thereby assigned.

With respect to this ground of appeal, which brings in review for the first time before a Court of Appeal certain decisions of the Superior courts of common law before the passing of the Judicature Act of Ontario with which the unanimous judgment of the Divisional Court of Queen's Bench of the High Court of Justice in a recent case of *Robertson* v. *Thomas* (1) is said to be in conflict, before entering upon a consideration of the points involved in those several cases it may be premised that the case before us appears to be defective in this, that there is nothing to show what were the goods and chattels seized by the sheriff under the executions in his hands, the title to which alone was what was in question in the interpleader issue and which is now in question before us, and this is not an immaterial defect for from the language of the deed o assignment it may be that the assignees in trust for creditors have by the terms and operation of the deed, assuming it to be within the provisions of the above statute, perfect title to some of the goods and chattels assigned although not to others, that is to say, that some

(1) 8 O. R. 20.

1887

HOVEY v. WHITING.

Gwynne J.

of the goods and chattels assigned by the deed may be sufficiently described within the provisions of the statute although others may not be, and upon the question to which class, namely, to the sufficiently or to the insufficiently described goods the things seized under the executions belong may depend the question whether our judgment should be for the plaintiffs or the defendants in the interpleader issue. The consideration of this point which comes within the 4th ground of appeal I shall for the present defer until I shall have dealt with the point involved in the third ground of appeal which raises the question—Whether a deed executed *bonâ fide*, assigning all the estate real and personal of a debtor to trustees in trust for sale and an equal distribution of the proceeds amongst the creditors ratably and proportionably to the amounts due to them respectively without any preference or priority save such as the law may have established and given, and without any qualification, condition or provision for the release of the debtor, or for any benefit to him whatever until all his creditors should be paid in full, is a deed of sale within ch. 119 of the revised statutes of Ontario.

By a statute of the legislature of Canada, passed in the year 1849, 12 Vic. ch. 74, in its first section it was enacted that every mortgage or conveyance, intended to operate as a mortgage of goods and chattels, made in Upper Canada after the passing of the act which should not be accompanied by an immediate delivery and be followed by an actual and continued change of possession of the things mortgaged should be absolutely void as against the creditors of the mortgagor and as against subsequent purchasers and mortgagees in good faith unless the mortgage or conveyance, or a true copy thereof, together with an affidavit of a

1887

HOVEY v. WHITING.

Gwynne J.

witness thereto sworn before a commissioner of the Queen's Bench of the due execution of the mortgage or conveyance, or of the due execution of the mortgage or conveyance of which the copy to be filed purports to be a copy, shall be filed as directed in the 2nd clause of the act. It is to be observed that this act only related to mortgages, or "conveyances "intended to operate as mortgages of goods and chat- "tels." Now an instrument absolute on its face as a sale and conveyance of chattels might be intended to operate as a mortgage, the agreement for defeasance being contained in another instrument or being verbal, and by reason of the difficulty of proving, in the event of a claim being made by the bargainee in the bill of sale to the goods when seized in execution against the bargainor that the conveyance absolute on its face was intended to operate as a mortgage, the beneficial object of the act might be defeated. Whether this was or not the reason for passing the act 13-14 Vic. ch. 62 we cannot tell, but in 1850 that act was passed under the title of

An act to alter and amend the act requiring mortgages of personal property in Upper Canada to be filed.

And after reciting that the law in force in Upper Canada requiring mortgages of personal property to be filed requires amendment, so as to require that every sale of goods and chattels which should not be accompanied by an immediate delivery, and be followed by an actual and continued change of possession of the things sold, shall be in writing, it was enacted that the first section of

An act requiring mortgages of personal property in Upper Canada to be filed,

Should be amended by adding at the end thereof as follows:—

And that every sale of goods and chattels which shall not be accompanied by an immediate delivery and followed by an actual and

continued change of possession of the goods and chattels sold shall be in writing, and such writing shall be a conveyance under the provisions of the said act.

In 1857 these acts were amended by 20 Vic. ch. 3, by which forms of affidavit were prescribed applicable to the cases of a mortgage and of a sale respectively, and providing that mortgages might be executed to secure future advances in certain cases, and enacting that all instruments mentioned in the act, whether for the sale or mortgage of goods and chattels, should contain such sufficient and full description thereof that the same may be thereby readily and easily known and distinguished. The clause as to the sale of chattels was as follows :—

Every sale of goods and chattels which shall not be accompanied by an immediate delivery and followed by an actual and continued change of possession of the goods and chattels sold shall be in writing, and such writing shall be a conveyance under the provisions of this act, and shall be accompanied by an affidavit of a witness thereto of the due execution thereof, and the affidavit of the bargainee or his agent duly authorized in writing to take such conveyance, a copy of which authority shall be attached to such conveyance that the sale is *bonâ fide* and for good consideration as set forth in the said conveyance, and not for the purpose of holding or enabling the bargainee to hold the goods mentioned therein against the creditors of the bargainor, and shall be registered as hereinafter provided within five days from the execution thereof, otherwise such sale shall be absolutely void as against the creditors of the bargainor and as against subsequent purchasers or mortgagees in good faith.

The act contained other clauses not material to the point under consideration.

In 1858 it was enacted by 19th sec. of 22 Vic. ch. 96 that :—

If any person being at the time in insolvent circumstances or unable to pay his debts in full or knowing himself to be on the eve of insolvency shall make or cause to be made any gift, conveyance, assignment or transfer of any of his goods, chattels or effects or deliver or make over or cause to be delivered or made over any bills, bonds, notes or other securities or property with intent to defeat or delay the creditors of such person or with intent of giving one or more of the creditors of such person a preference over his other creditors or

1887

HOVEY v. WHITING.

Gwynne J.

over any one or more of such creditors, every such gift, conveyance, assignment, transfer or delivery shall be deemed and taken to be absolutely null and void as against the creditors of such person. Provided always that nothing herein contained shall be held or construed to invalidate or make void any deed of assignment made and executed by any debtor for the purpose of paying and satisfying ratably and proportionably and without preference or priority all the creditors of such debtor their just debts.

The deeds of assignment made void by this clause are only made so as against the creditors of the debtor. That is to say, they are the only persons who could impeach and invalidate the deeds, and they only because of the deeds having been made either with intent to defeat or delay the creditors of the person executing the deed as a class or with intent of giving one or more of the creditors of such person a preference over his other creditors. Now a deed of assignment of all the property of an insolvent made in good faith and effectually executed so as to be irrevocable in trust for the purpose of paying and satisfying ratably and proportionably all the creditors of such persons their just debts without preference or priority never could, although the proviso never had been inserted in this clause, have been construed to be a deed impeachable by the creditors of the insolvent as a deed made either with intent to defeat or delay the creditors of the insolvent or with intent of giving one or more of his creditors a preference over others. The proviso therefore was not necessary for the purpose of protecting and maintaining the validity of a deed which but for the proviso would, by the previous terms of the clause, have been made void as against creditors. It is however a legislative declaration that such a deed made for the benefit of all creditors without preference or priority could not be invalidated by the creditors of the person executing it.

The act 20 Vic. ch. 3 was incorporated in the consolidated statutes of Upper Canada, ch. 45, and is now

incorporated in the revised statutes of Ontario, ch. 119, and the above 19th sec. of 22 Vic. ch. 96 was incorporated in the 26th chapter of the consolidated statutes of Upper Canada, and is now the 2nd section of ch. 118 of the revised statutes of Ontario.

In *Taylor* v. *Whittemore* (1) which came before the Court of Queen's Bench for Upper Canada in 1853, the case was that one Mountjoy being largely indebted to divers persons in the sum of £5,864 made an assignment of his estate and effects upon trust to pay several preferred creditors several specified sums amounting in the whole to £1,750, and after payment of those preferred debts then on trust for the payment ratably and proportionably of the several debts mentioned in a schedule annexed to the deed provided the creditor should execute the deed within two months and thereby release Mountjoy. The deed provided that if the trustees should think it advisable, and the creditors who might sign the deed or a majority of them in value should assent thereto, they might carry on the business for the benefit of the creditors who should come into the assignment, and they might employ Mountjoy in carrying on the business for the trustees and the benefit of the creditors and, from time to time, out of the proceeds realised from the sale of the stock and merchandise assigned, might add to the said stock as the trustees might think it advisable until the same should be exhausted and disposed of, and then to wind up the said business and to collect and get in all the debts due and payable to Mountjoy, so assigned, and all debts which might grow due in the carrying on of the said business as soon as the trustees conveniently could, and at all events within two years from the date of the deed, unless the debts mentioned in the schedule

(1) 10 U. C. R. 440.

1887

HOVEY v. WHITING.

Gwynne J.

should be sooner paid, satisfied and discharged. The deed contained a release from the creditors of Mountjoy to him in full of their respective demands, also a provision that the trustees might permit Mountjoy to have use and occupy so much and such portions of his then household furniture and for such time and upon such terms as the trustees might think proper. This provision, however, did not in any way vest the property or title in such property or any portion of it in said Mountjoy. This transaction was assailed by creditors who refused to come into the assignment upon the contention that the assignment was fraudulent and void within the statute of 13 Elizabeth ch. 5, on the grounds following: "1st. For providing for the "employment of Mountjoy in carrying on the busi- "ness; 2nd. For providing that he might be allowed "to retain possession of the furniture; 3rd. Because it "contained provisions for carrying on the business; "and 4th. As providing for the payment of certain "debts in full instead of putting all on an equal foot- "ing." It was held that the deed was not impeachable within the statute of Elizabeth. The only point which was raised under 12 Vic. ch. 74, as amended by 13–14 Vic. ch. 62, was that inasmuch as it appeared that Mountjoy's household furniture was never delivered to the trustees it was contended that the deed was void as to those things which had been delivered, the deed not having been filed as required by those statutes; but it was held that the non-delivery could only affect the goods not delivered, leaving the deed good as to those which had been received into the actual possession of the trustees, and as the goods taken in execution were some of those which had been taken into their actual possession the trustees were held entitled to recover on the interpleader issue, it being held that the effect of the acts was to avoid

1887

HOVEY v. WHITING.

Gwynne J.

the deed *quoad* the subject matter of the suit, and as the household furniture had not been taken in execution the title as to it was not before the court, so that the objection as to the non-delivery of the household furniture into the actual possession of the trustees had no effect upon the matter in issue in the interpleader; it was assumed and not disputed that the deed in question there came within the operation of the act, 12 Vic. ch. 74, as amended by 13–14 Vic. ch. 62, but it must be observed that the deed before the court there was not a deed in trust for the payment of all the creditors of the debtor equally without preference or priority; on the contrary it was only for the benefit of such as should be content to take what should remain after payment of the preferred creditors the amounts to be first paid to them in full satisfaction of their debts, and this should release the debtor from all further claim.

In *Heward* v. *Mitchell et al.* (1) decided in the same term as was *Taylor* v. *Whittemore*, the point appears to have been taken that the trust deed there did not come within the statute, 12 Vic. ch. 74, as amended by 13–14 Vic. ch. 62, and the court held that it did. The deed of assignment there provided for the payment, in the first place, of certain notes which the trustees had endorsed for the benefit of the debtors who made the assignment, and then for the payment in full of the debts owing by the debtors to such creditors as should sign the deed; and although the deed contained no clause of release of the debtors by the creditors signing the deed it did contain a covenant by the signing creditors not to sue the debtors during a period of three years during which the trustees were to be at liberty in their discretion to add to the stock and carry on

(1) 10 U. C. R. 535.

1887

HOVEY v. WHITING.

Gwynne J.

the business. The assignment, therefore, was for the benefit only of the preferred creditors and such others as should be willing to take the benefit of the assignment subject to the condition of executing such a covenant. That was not an assignment for the benefit of all creditors alike without preference or priority, and subject to no conditions imposed in the interest of the debtor.

In *Olmstead* v. *Smith* (1) which was before the same court in 1857 the terms of the trust assignment are not set out and it does not appear whether or not it made provision for payment first of preferred creditors, or whether its benefits were or not limited to such creditors only as should signify their assent to the terms of the deed by signing it within any prescribed time, nor whether it was clogged with a condition releasing the debtor from all further claim whether the property assigned should or not pay all debts in full. It was assumed there, no doubt upon the authority of *Taylor* v. *Whittemore* and *Heward* v. *Mitchell*, that the deed came within the provisions of the statute 13-14 Vic. ch. 62, and the affidavit was held to be defective within the provisions of that statute; however, McLean J. though feeling bound by the prior decisions makes use of the following language showing grave doubt to exist in his mind as to the application of the statute to trust deeds executed for the benefit of creditors.

I do not see (he says) how the affidavit required by the statute can be taken by assignees in the position of the plaintiffs who take a conveyance of goods in trust for the benefit of creditors, the very object of the conveyance being to hold them against all creditors though with a view of distributing the proceeds ultimately among them or such as may choose to become parties to an assignment. It can scarcely be said that the plaintiffs are not to hold the goods of Trevor against his creditors because they were authorised to sell them and make specific payments. The creditors could not touch

(1) 15 U. C. R. 421.

1887

HOVEY v. WHITING.

Gwynne J.

the goods if the assignment is legal. The plaintiffs now are holding Trevor's goods against the defendants, his creditors, and how could they swear that they did not receive them for that express purpose.

The defect in the affidavit was that instead of saying in the words of the statute that the assignment was not made for the purpose of holding or enabling the assignees to hold the goods therein mentioned against the creditors of Trevor, the assignor, it said that the assignment was not made for the purpose of holding or of enabling Trevor to hold the goods therein mentioned against his creditors. The language of McLean J., (although susceptible of an answer when applied to cases of trust assignments such as were those in *Taylor* v. *Whittemore* and *Heward* v. *Mitchell* upon the assumed application of the authority of which cases, by which the learned judge and the court of which he was a member were bound, to *Olmstead* v. *Smith*, the latter case proceeded,) seems to me to be unanswerable when applied to the case of a trust assignment for the equal benefit of all creditors alike without preference or priority save such as the law has given ; for if the affidavit which is required by the statute in the case of every deed to which the statute applies cannot with truth be made in the case of such a deed, it must of necessity follow that such a deed cannot be within the intent and operation of the statute, a point which was decided by the same court in *Baldwin* v. *Benjamin* (1) in which it was held, however, that the affidavit could be made in the particular circumstances of that case which have no application to the point now under consideration.

Harris v. *the Commercial Bank* (2) was a case no doubt of the same description as *Taylor* v. *Whitlemore* and *Heward* v. *Mitchell*, that is to say, that the trust deed made provision for the payment first of certain

(1) 16 U.C. R. 52.

(2) 16 U. C. R. 437.

1887

HOVEY v. WHITING.

Gwynne J.

preferred creditors and that only such as should become parties to the deed should participate in its benefits, and that it contained a clause providing for the carrying on of the business by the trustees in their discretion and for release of the debtor from all further claims, for while the report does set forth a clause providing that such creditors only as should become parties to the deed within 90 days from notice of its execution, given to them or sent to them by mail, should participate in the benefits of the deed to the conclusion of all others, the non-insertion of the terms and conditions of the deed in the report is thus excused:

As the objections to its provisions independently of the statute were not pressed on the argument, only the description of the goods assigned is material to be given here.

And moreover Robinson C.J. in giving judgment says:—

I see nothing in the arrangements made by the deed which would warrant us in holding it void. They are such I think as MacDonell (the debtor) was then at liberty to make.

indicating by this language that the trust provisions were not simply for the benefit of all creditors alike without preference or priority, but that the assignment contained provisions which were objected to but not pressed as making the deed void under the statute of Elizabeth, as had been contended in *Taylor* v. *Whittemore*. He also says:—

I have doubts, which I believe, however, are not entertained by my brother judges generally, whether assignments of this description, namely, to trustees for the benefit of creditors, come within the provisions of our statute, 20 Vic. ch. 3.

Then referring to the language of the statute which speaks of "the sale of goods," as distinguished from mortgages, and speaks also of the "bargainor and bargainee," and of the sale being made *bonâ fide* and for "good consideration as set forth in the conveyance," he says:—

1887

HOVEY v. WHITING.

Gwynne J.

It is true that in respect to real property trusts are created by deeds of bargain and sale—I mean by a description of conveyance technically so called—although the grantor is not selling the estate nor the trustee buying it, and though no bargain in the common sense of the term is made between the parties; and it is true also that in the language of the courts all persons acquiring lands by deed or will or otherwise than by inheritance are said to hold as purchasers; but we have to deal here with goods and chattels, and it has not seemed to me that the Legislature has used the words "every sale of goods and chattels" in these statutes in any other sense than their common acceptation as applied to goods, that is, when the absolute beneficial interest passes from a seller to a buyer.

A more comprehensive construction, however, has been given to them by our courts, and they are held to comprehend assignments to trustees for the benefit of creditors like that before us.

It is clear, to my mind, that the case in which this language is used was one similar to that in *Taylor* v. *Whittemore* and in *Heward* v. *Mitchell*, where the application of the statute to deeds like that before the court in *Harris* v. *Commercial Bank* was decided by the court, and by which judgments the Chief Justice, although differing from them, deemed himself to be bound. Assuming then the deed in question there to be within the statute 20 Vic. ch. 3, the point decided by the judgment was that a description of the goods assigned as "all the goods, &c.," of the assignor being in and about his warehouse on T. street and all his furniture in and about his dwelling house on W. street, and all bonds bills and securities for money loans, stock, notes, &c., &c.. whatsoever and wheresoever belonging, due or owing to him was sufficient to satisfy the statute.

In *Wilson* v. *Kerr* (1) the assignment was of

All and singular the stock in trade of the assignor situate on Ontario street in said town of Stratford, and also all his other goods, chattels, furniture, household effects, horses and cattle, and also all bonds, bills, notes, debts, choses in action, terms of years leases and securities for money,

in trust for such creditors as should execute the deed within forty days. The deed contained a clause of

(1) 17 U. C. R. 168 and 18 U. C. R. 470.

1887

HOVEY v. WHITING.

GwynneJ.

release, by creditors executing, of all claim beyond what the dividends might produce, and the surplus, after paying out the proceeds ratably to the creditors who should execute, was by the terms of the trust to be paid over to the assignor. The deed also contained a clause empowering the assignee to return to the assignor the household furniture not exceeding £100 in value if he should see fit, which was done.

Robinson C.J. held the deed to be fraudulent and void against creditors, upon the ground:—

1st. That it was fraudulent for the assignor to assign only on the understanding that he should be allowed to keep possession of his household furniture which he did keep and enjoy as before.

2nd. That it was fraudulent by reason of the stipulation contained in the assignment that no creditor should share in the proceeds except such as should execute the assignment within forty days which assignment contained a release by the creditors who should execute of all the debts in full, on condition of their getting the dividend out of what the effects might produce, and a provision that after the executing creditors should be paid their dividend any surplus that there might be should go to the assignor; "it is" he said "an attempt to coerce the creditors to "come under a disadvantageous condition on the peril "of getting nothing," and he held

3rd. Assuming the deed to be within the intent of 20 Vic. ch. 3, the description of the goods intended to be assigned was insufficient.

Burns J. saying that the only point he had considered was this last, also held the description to be insufficient; the report says that McLean J. concurred, but whether or not with the whole of the judgment of the Chief Justice or only with that part which Burns J. had considered and in which he concurred is not stated.

The report of what took place in appeal in this case (1) is still more unsatisfactory for, notwithstanding the doubts which had been expressed by the Chief Justice and by McLean J. as to trust deeds for the benefit of creditors being within the statute, and as to the deed in *Wilson* v. *Kerr* being fraudulent and void for the reasons given by the Chief Justice, neither of these points appears to have been mooted or referred to in the case in appeal, the Court of Appeal resting their judgment affirming the judgment of the Court of Queen's Bench upon the point merely of the insufficiency of the description of the goods, assuming the deed to be within the operation of the statute, and this is the more remarkable because the Court of Queen's Bench, in the same term in which it had given judgment in *Wilson* v. *Kerr*, gave judgment in *Maulson* v. *Topping* (2) wherein it was held by the unanimous judgment of the court that a deed in trust for the benefit of such creditors as should execute the deed within a stated time, and which enacted a release in full from those who should execute it, was fraudulent and void against non-executing creditors, notwithstanding that the requirements of 20 Vic. ch 3 should be complied with.

In *Maulson et al* v. *Peck et al* (3) the deed in trust for creditors contained a provision :—

For payment in full of certain preferred creditors, and to pay, distribute and divide all the balance of monies arising from the property assigned ratably among the other creditors, according to the several amounts of their respective debts, in full satisfaction and discharge thereof, subject, however, to this proviso: that if any of the creditors of the assignors should refuse to come in and become parties to the deed of assignment or to accede thereto within two months after the date thereof, or such further time not exceeding four months as the trustees might extend to them, then that the dividends on such debts respectively should be paid to the assignors

(1) 18 U. C. R. 470. (2) 17 U. C. R. 183.
(3) 18 U. C. R. 113.

1887

HOVEY v. WHITING.

Gwynne J.

as part of their personal estate, and in order that the goods might be disposed of to the best advantage power is given to the assignees to purchase from time to time other stock to assort and sell with the assigned goods for the benefit of the estate.

It seems to raise a nice question to determine wherein a deed like this, which contained a clause that only the parties executing it, other than the preferred creditors, should participate in the balance remaining after payment of the preferred creditors, and which contained also a clause that those executing should accept whatever dividends the assigned property would give to each ratably to the respective amounts due to every creditor of the debtors after such payment in full satisfaction and discharge of their debts, and that the dividends attributable to the debts due to those who should not execute the deed should be paid over to the debtors, differs from the deed in *Maulson* v. *Topping*, which was declared to be fraudulent and void for exacting a release of the debtors by those who should execute the deed; however, no such point was taken in the case, and the only point which was taken and decided was upon a question whether or not, as was contended, the power given to the assignees to purchase additional stock from time to time made the executing creditors partners in the business, and whether the insertion of that clause did or not make the deed void, which questions were decided in the negative.

In *Hutchinson* v. *Roberts* (1), the only point decided was that the statute 20 Vic. ch. 3 did not apply to that case, because the trust deed for creditors was accompanied by an immediate and actual and continued change of possession.

In *Maulson et al.* v. *Joseph* (2) the terms of the deed which was an assignment for the benefit of creditors

(1) 7 U. C. C. P. 471. (2) 8 U. C. C. P. 15.

do not appear in the report. They probably were the same as those contained in the deed in *Maulson* v. *Peck* which was before the Court of Queen's Bench at the same time. The report does say that after the deed was executed the assignees carried on the business which was continued for some months. The case cannot, I think, be regarded in any stronger light than a confirmation of the judgment of the Queen's Bench in *Taylor* v. *Whitlemore* and *Heward* v. *Mitchell* notwithstanding the doubts of Sir John Robinson as to the statute 20 Vic. ch. 3 having any application to trust deeds in favor of creditors.

In *Arnold* v. *Robertson* (1) the trusts of the deed were declared in an instrument referred to in the deed of assignment, and they were, to sell the goods, chattels and effects specified in the bill of sale and to apply the proceeds in payment of all necessary and incidental expenses and then in payment of certain preferred claims in full, and to apply the residue towards the payment of the debts in schedule A. due to such of the creditors as should execute the assignment ratably, and to pay the surplus to the debtor, who was to be discharged from all further liability to the creditors who should execute the assignment. This case was expressly rested upon the authority of *Heward* v. *Mitchell*. Draper C. J. in giving the judgment of the Court of Common Pleas then says—

> Since the case of *Heward* v. *Mitchell* which has been followed in this court it is not a question open to argument that sales or assignments of goods for the benefit of creditors in trust to dispose of the proceeds thereof in payment of the creditors of the assignor are not within the statute.

This judgment simply affirms the authority of *Heward* v. *Mitchell*, saying that it has been followed, so that this case does not nor, indeed, do any of the reported cases go further than to recognise the judg-

(1) 8 U. C. C. P. 147.

1887

HOVEY v. WHITING.

Gwynne J.

ments in the early cases of *Taylor* v. *Whittemore*, *Heward* v. *Mitchell* and *Harris* v. *The Commercial Bank* as binding authorities unless and until reversed in a court of appeal.

It was contended that as the decisions in *Taylor* v. *Whittemore* and *Heward* v. *Mitchell* have been followed for a period of thirty years, a court of appeal even should not now reverse those judgments. That would be, I confess, in my opinion, a very strong argument if the decisions so followed for such a length of time had involved the construction of a statute in relation to real estate so as to maintain in their integrity the rights belonging to a fee simple estate, or if upon the faith of the decisions so followed large sums of money had been expended by the owners of land in fee in the improvement of their property, and if the reversal of the decisions would deprive such owners in fee, without giving them any compensation whatever, of the full enjoyment of their property, and of all benefit from the large sums of money so expended by them on its improvements; but even in such a case as I have described the judicial committee of Her Majesty's Privy Council of England, in the recent case of *Maclaren* v. *Caldwell* (1), seems to have felt no difficulty in reversing the unanimous judgment of this court which upheld the judgment of the Court of Common Pleas for Upper Canada, pronounced about twenty years previously and upon different occasions followed, putting a construction upon an act of the Provincial Legislature in a matter having relation to the condition of the province, with which the judges of the courts of the province at the time of the passing of the act, having had intimate knowledge, may be said to have had peculiar qualifications eminently fitting them to put a sound construction upon the act, and the effect of whose construction was to maintain

(1) 9 App. Cas. 392.

the fee simple proprietors of land in the full enjoyment of their property and of the benefit of all such sums as should be expended by them on its improvement, and the effect of the reversal of such their construction being to deprive such owners without any compensation whatever of the benefit of the outlay of immense sums of money expended by them upon the faith of the judgment pronounced shortly after the passing of the act, and followed without any doubt having been expressed as to its soundness during a period of about twenty years. But a judgment now putting upon the statute under consideration a different construction from that which was put upon it by the judgments in *Taylor* v. *Whittemore*, *Heward* v. *Mitchell*, and the other cases decided upon their authority would have no such effect; in fact no rights or interests whatever, whether acquired upon the strength of the former decisions or otherwise, would be effected injuriously or at all by their reversal. However, in none of the cases to which we have been referred, and in none of the reported cases that I have seen prior to *Robertson* v. *Thomas* (1), does any question appear to have arisen as to the application of the statutes under consideration to the case of a trust deed for the payment of all the creditors of the assignor ratably and proportionably to the amounts due to them respectively without any preference or priority and without any release of the debtor or any other benefit whatever reserved in the interest of the assignor. The deed in *Dolan* v. *Donelly* (2) may possibly have been such a deed, but if it was it is not made to appear so in the report; the only question there was as the sufficiency of the description of the goods, upon the assumption that upon the authority of *Taylor* v. *Whittemore* and *Heward* v. *Mitchell*, and the other cases follow-

(1) 8 O. R. 20. (2) 4 O. R. 440.

1887

HOVEY v. WHITING.

Gwynne J.

ing them the deed was one to which the statute applied. In *Robertson* v. *Thomas* the question does appear to have arisen and for the first time, so far as I have been able to find. There the divisional Court of Queen's Bench unanimously decided that an assignment in trust made for the *bonâ fide* purpose of paying and satisfying ratably and proportionably without preference or priority all the creditors of a debtor their just debts was not within the statute ch. 119 R. S. O.

This decision can, in my judgment, well stand without its being necessary to question the application of the statute to trust assignments drawn in such terms as were those in *Taylor* v. *Whittemore*, *Heward* v. *Mitchell* and *Harris* v. *The Commercial Bank*, and such like cases, for there is a vast distinction between a trust assignment made for the benefit of all creditors alike without preference or priority, not requiring the creditors to execute any release of the debtor, and an assignment in trust first for the payment in full of certain preferred creditors, and then for such only as should within a limited time prescribed by the debtor signify their acceptance of the terms of the trust assignment by signing it containing a release of the debtor, whether the property assigned should or not realize sufficient for payment of such creditors in full.

Although preference of one creditor over another be not in itself unlawful, unless the debtor making such preference be in insolvent circumstances and unable to pay all his debts in full, still the preferring one to another is an act injurious to all other creditors; and as the object of the statute under consideration was, in my opinion, to prevent the committal of fraud upon creditors by a debtor and to guard against pretended sales or secret incumbrances made and executed to the prejudice of the creditors of the assignor as a class, every creditor has an interest in knowing and a right

1887

HOVEY v. WHITING.

Gwynne J.

to know what disposition, if any, a debtor has made of property originally his own and still remaining in his actual possession and to all appearance his own, whether such disposition be made to a stranger or to, or in trust for, a preferred creditor. In such deeds of assignment therefore the statute may well be held to apply for the benefit of all non-preferred creditors who, as persons prejudiced by the trust assignment, refuse to accept the terms inserted in it in relation to their claims. But where a debtor makes an irrevocable assignment of property in trust for the benefit of all his creditors alike, without preference or priority, no creditor has any just right to complain of his being prejudiced by the terms of such a trust assignment. The statute does not avoid all conveyances by way of mortgage or sale of chattels as to which the terms of the statute are not complied with, but only avoids them in the interest of and at the suit of the creditors of the debtor making the assignment. But an individual creditor who, repudiating a trust assignment made in his favor equally with all the other creditors of the debtor, proceeds to judgment and execution, as he can not be said to have been prejudiced by the terms of the trust assignment he cannot in justice invoke the terms of the statute to aid him in obtaining a preference over all the other creditors who by the trust assignment were placed on precisely the same footing with himself. If the statute should be construed so as to aid an individual creditor in such an attempt it would be made to operate to the prejudice of the creditors whom, as a class, the statute was passed to protect. To hold that a trust assignment, such as that before us, made by an insolvent debtor at the request of the body of the creditors of the insolvent, for the benefit of all such creditors alike without preference or priority,

1887

HOVEY v. WHITING.

Gwynne J.

and which therefore makes the precise disposition, not only which the body of creditors desired but which in the case of insolvency was the disposition made by the Insolvent Act when in force, could be defeated by an individual creditor hurrying to judgment and execution upon the suggestion that in some particular the terms of chapter 119 of the R. S. O. had not been fully complied with in relation to the deed in question, and so upon such suggestion to aid an individual creditor to obtain a preference over all the other creditors whom, as a class, the statute was passed to protect, would be, in my opinion, at variance with the intent and object of the statute, as converting an act intended to protect creditors from acts of their debtor into an instrument by which one creditor placed honestly by his debtor upon an equal footing with all his other creditors, might perpetrate a fraud upon all such others; and by which one of several *cestuis que trustent* under the same deed might defraud the others. In my opinion the statute does not apply to such a trust assignment.

There is in the fourth of the above grounds of appeal a question involved upon which, as there seems to be some variety of opinion on a point of importance and as the question has been raised in a court of appeal, it should, I think, be disposed of. The question is as to the sufficiency of the description in the trust assignment before us, assuming it to be an instrument within the operation of the statute, of the goods seized. The question turns upon the construction of the 23 sec. of ch. 119 R. S. O. That section enacts that "all instru- "ments mentioned in the act, whether for the sale or "mortgage of goods and chattels, shall contain such "sufficient and full description thereof that the same "may be thereby readily known and distinguished."

By the deed of assignment, read in connection with

the schedule annexed thereto and made part thereof, the debtors, describing themselves as "The Farm and "Dairy Utensil Manufacturing Company," carrying on their business as manufacturers at the city of Brantford and declaring themselves to be in insolvent circumstances, granted, bargained, sold, assigned, &c., to trustees named :—

All and singular these certain parcels or tracts of land and premises situate lying and being in the city of Brantford in the county of Brant, being composed of town lots numbers 14, 15 and 16 on the east side of Waterloo street, and lots numbers two and three on the west side of Duke street running half-way through to Wadsworth street, in the said city of Brantford, with the appurtenances to the said lands belonging or in any wise appertaining and used or enjoyed therewith, and the foundry erections and buildings thereon erected and being, including all articles such as engine, boiler, cupola, machinery, and shaftings in and upon said premises. And all and singular the personal estate and effects, stock in trade, goods, chattels, rights and credits, fixtures, book debts, notes, accounts, books of account, choses in action, and all other the personal estate and effects whatsoever and wheresoever and whether upon the premises where said debtors business is carried on or elsewhere, and which the said debtors are possessed of or entitled to in any way whatever, on trust for sale and distribution of the proceeds among all the creditors of the debtors without preference or priority.

Now, from this deed it is, I think, abundantly apparent that the place where the debtors carried on their business as farm and dairy utensil manufacturers was on the lands described in the deed, which with the erections and buildings thereon and all articles such as engine, boiler, cupola, machinery and shafting in and upon the premises were conveyed by the deed. These latter articles, although conveyed with the land and buildings thereon, either passed to the trustees as part of the realty upon the authority of *Holland* v. *Hodgson* (1), or if they be regarded as pure chattels it cannot be doubted that they are sufficiently described so as to be readily and easily known and distinguished. In so far then as these articles are concerned, if they

(1) L. R. 7 C. P. 328.

1887

HOVEY v. WHITING.

Gwynne J.

were seized by the sheriff under the executions in his hands, the execution creditors could have no claim to them founded upon any insufficiency in their description. Then again as to all and singular the stock in trade, goods, chattels, &c, upon the premises where the said debtors' business is carried on, or which the said debtors are possessed of or entitled to in any way whatever, there can, I think, be no doubt that the locality of that place of business is sufficiently designated, assuming a statement of locality to be in such case necessary, whatever uncertainty of insufficiency the introduction of the words "wheresoever" or "elsewhere," in the connection in which they are used in the clause enumerating the several particulars of the personal estate and effects intended to be conveyed, may create in distinguishing what goods and chattels, personal estate and effects, are intended under the description of being situated elsewhere than on the premises where the debtors' business is carried on. There is no uncertainty as to the locality of those described as being on the premises where that business is carried on, these premises being plainly enough designated in the deed.

The question, therefore, as to the goods, &c., is, as it appears to me—Whether or not a conveyance by a debtor in the terms following, namely, all and singular the stock in trade, goods, chattels, fixtures, &c., upon the premises where the debtors' business is carried on, and which the debtors are possessed of or entitled to (such premises being plainly enough designated in the deed so as to remove all doubt as to their locality) is an insufficient description within the 23rd section of the statute to cover all or any "stock in trade," goods, chattels, fixtures, &c., situate on their premises and belonging to the debtors at the time of execution of the conveyance.

In *Ross* v. *Conger* (1), A.D. 1857, it was held that:—

(1) 14 U. C. R. 525.

1887

HOVEY v. WHITING.

Gwynne J.

All the stock of dry goods, hardware, crockery, groceries, and other goods, wares and merchandise in the store and premises occupied by the mortgagor, etc.

was a sufficient description within the statute to cover all such articles as were in the store at the time of the execution of the mortgage.

In *Harris* v. *The Commercial Bank* (1) it was held that a description of the goods assigned as :—

All the goods, &c., of the assignor being in and about his warehouse on T. Street, and all his furniture in and about his dwelling house on W. Street, and all bonds, bills and securities for money loans, stocks, notes, &c., whatsoever and wheresoever belonging, due or owing to him.

was sufficient within 20 Vic. ch. 3 s. 4.

In *Rose* v. *Scott* (2) the goods in a chattel mortgage were described as :—

Seven horses, three lumber wagons, one carriage, one pleasure sleigh, all the household furniture in possession of the assignor and being in his dwelling house, all the lumber and logs in and about the sawmill and premises of said assignor, and all the blacksmith's tools of said party of the first part, six cows and four stoves.

And it was held that the description was sufficient to cover the household furniture, lumber and logs, but that it was insufficient as to the other goods.

In *Fraser* v. *Bank of Toronto* (3) the goods were referred to in a chattel mortgage as set forth in schedules annexed ; two schedules were annexed, designated C. and D. The former was headed " Household furniture in J. E. W's. residence " and then followed an enumeration of articles, but no locality was stated for the residence of J. E. W. Schedule D was headed : " House- " hold furniture and property of J. R. McD," one of the assignors, and then followed an enumeration of articles ; it was held that the headings on both schedules sufficiently described the locality of the goods, for as to schedule C., J. E. W's. residence was readily ascertainable, and as to schedule D that the terms " House- " hold furniture and property of J. R. McD," sufficient-

(1) 16 U. C. R. 437. (2) 17 U. C. R. 385.
(3) 19 U. C. R. 381.

1887

HOVEY v. WHITING.

Gwynne J.

ly showed that J. R. McD's. dwelling house was their locality, which was readily ascertainable.

In *Powell* v. *the Bank of Upper Canada* (1), the property covered by a chattel mortgage was described as:—

> The goods, chattels, furniture and household stuff expressed in the schedule hereunto annexed.

Which schedule was headed:—

> An inventory of goods and chattels in the possession of J. R.

on a certain day, the locality of the house in which the goods were not being mentioned, and it was held a sufficient description of the goods intended to be covered by the mortgage in compliance with the statute.

In *Mills* v. *King* (2) the description of goods mortgaged was given in the mortgage as follows:—

> All and singular the goods and chattels, furniture and household stuff, and articles particularly mentioned and expressed in the schedule hereunto annexed, and which are now in the warehouse of James Reid, in the City of Hamilton, and are about to be placed in the building known as the Burlington Hotel.

The schedule mentioned then a long list of articles as situate in several rooms of the hotel, designating the rooms as parlor "C," parlor "H," &c. In some of the rooms there were goods as described in the schedule, in others there were no goods, and some of the goods described in the schedule were still in possession of Reid, who was the manufacturer of them; and it was held that all the goods in the schedule which were said to be in certain rooms in the hotel in which rooms there were such goods were sufficiently described, but that goods described in the schedule as being in certain rooms which were not in these rooms did not pass; and that all goods of the mortgagor that were in Reid's warehouse did pass as sufficiently described.

In *Sutherland* v. *Nixon* (3) the goods mortgaged were specified as—

> The goods, chattels, furniture and household stuffs particularly

(1) 11 U. C. C. P. 303. (2) 14 U. C. C. P. 228.
(3) 21 U. C. R. 629.

mentioned and described in the schedule thereunto annexed marked A.

In this schedule the chattels were put down without any other description than

One buggy, one cutter, one cart, one bread sleigh, two sets of harness, one horse, one chaff cutter, and the following household furniture, namely, in the small parlor, one stove, &c.,

and then the various articles of furniture were enumerated in the several rooms in the mortgagor's dwelling house, but where the dwelling house was situate did not appear. This description was held sufficient as to the furniture, but insufficient as to the other articles.

In *Mathers* v. *Lynch* (1) goods in a chattel mortgage were described as—

The following goods and articles being in the store of the party of the first part, on the corner of Queen and Main Streets, in the said town of Brampton, that is to say, 85 gallons of vinegar, &c., giving a long list, and also the following goods, being of the stock in trade of the party of the first part, taken in the month of April last, that is to say, 16 pieces of tweed, &c.

In this case the court had no difficulty in holding that the goods described as "being of the stock in trade, &c,," of the mortgagor were situate in the store previously mentioned, and that the goods enumerated as "the stock in trade" of the mortgagor were therefore sufficiently described.

Now as to the correctness of all those judgments, as to the sufficiency of the several descriptions which were held to be sufficient, there can not in my opinion be entertained a doubt; but the reasoning upon which the description in *Wilson* v. *Kerr* (2), was held to be insufficient appears to me to be hypercritical and to proceed upon what I think was a misconception of the object and intent of the statute.

The trust assignment in question there was executed by a trader who had become insolvent, and the person assailing it was an execution creditor of such trader.

(1) 28 U. C. R. 354.

(2) 17 U. C. R. 168; 18 U. C. R. 470.

1887

HOVEY v. WHITING.

Gwynne J.

Now a creditor of the assignor was the only person who could assail the mortgage and there can be little doubt that he well knew in what building on Ontario Street, in Stratford, the person who had become his debtor carried on his business, and if he knew the place where his debtor carried on his business and where his stock in trade was he could not have been prejudiced by reason of the mortgage not having more precisely stated a fact which may have been well known to him and all the creditors of the assignor and they were the persons, and not the court, for whose information the statute required the description of the goods assigned to be inserted in the assignment. In that case the goods were described as—

All and singular the stock in trade of the said R. D. W. (the assignor) situate on Ontario street in said town of Stratford, and also all his other goods, chattels, furniture, household effects, horses, cattle and also all bonds, bills, notes, debts, choses in action, &c., &c.

Now the enactment in question was not based upon the assumption that persons dealing with a trader and becoming his creditors might be ignorant of the nature of the trade in which he was engaged, or the place where such trade was carried on, and that to protect them from any prejudice arising from such ignorance it was necessary that any mortgage made by a debtor of goods and chattels under the designation of "all the "stock in trade" of the mortgagor should be void as against creditors unless the nature of the debtor's trade should be stated in the mortgage and the place where such stock in trade was situate should be stated with greater preciseness than naming the street and town where it was.

It is, in my opinion, quite a mistake to hold that the statute is to be construed as meaning that by reading the instrument itself or a schedule annexed thereto such a description should be obtained as would convey to every reader and to the court, whenever a question

1887

HOVEY v. WHITING.

Gwynne J.

should arise, without the aid of any oral evidence of surrounding circumstances or otherwise, what were the particular articles which constituted "all the stock in "trade" of the mortgagor, or that in a mortgage of goods and chattels under such designation it is indispensable that an inventory should be made or stock taken and that the nature, quantity, quality and value of the several items constituting the stock in trade should be set out in the mortgage or in a schedule annexed thereto.

Such an inventory, perfect though it should be, would be of no use whatever in many cases; if, for example, the debtor, after executing a mortgage of all his stock in trade in his shop at a named place designating every item of such stock in an inventory annexed by its quantity, quality and value, and after selling one-third of such stock in the course of his trade should replenish his shop with other goods of the like description, quality and value but in much greater quantities so that the goods remaining of the stock in trade mortgaged should, when a question should arise, constitute but a part of the mortgagor's stock in trade in his shop of the like articles as those mortaged consisted of, in such a case it would be impossible by reading the mortgage alone without any oral evidence to distinguish the mortgaged goods from those of the like description which had been subsequently purchased, but with oral evidence the goods mortaged could be readily and easily known and distinguished from the others.

So again, if the mortgage should be of a part only of the mortgagor's stock in trade in his shop and there should be an inventory annexed specifying the goods intended to be conveyed by their quantity, quality and value as for example :—

5 pieces of black silk for ladies dresses of the value of $2 per yard, ten pieces of black satin for ladies dresses at $2.25 per yard, twenty pieces of grey cotton goods at twenty cents per yard, ten bales of

1887

HOVEY v. WHITIN G.

Gwynne J.

Brussels carpet, containing each 100 yards, of the value of $2 per yard, twenty bales of tapestry carpet, containing each 100 yards, of the value of $1 per yard, and five bales of Kidderminster carpet of 100 yards, each of the value of $1.25 per yard, all of which goods were described as being in the mortgagor's shop, the precise site of which is stated — such a description would be utterly insufficient to enable a person who knew no more than the inventory annexed to the mortgage stated to distinguish the goods intended to be mortgaged from others of the like description, quantities, quality and value in the mortgagor's shop at the time of the execution of the mortgage. This is what I understand the judgment of this court in *McCall* v. *Wolff* (1), in substance to decide. I was not a party to that judgment, but the majority of the court appear to have been of opinion that the goods as described in the mortgage constituted part only of the goods in the mortgagor's shop at the time of the execution of the mortgage, and it is plain I think, from the language of His Lordship the Chief Justice who delivered the judgment of the majority, that if the goods had been stated in the mortgage to have been all the goods in the mortgagor's shop, or even if oral evidence had established that the goods were, in point of fact, all the goods that were in the mortgagor's shop when the mortgage was executed, it would have been sufficient.

The naming a locality where the goods intended to be covered by the mortgage or bill of sale are at the time of its execution seems to me to be the least efficient mode possible of describing the goods intended to be assigned and in many cases utterly useless, for when the question arises whether the goods intended to be covered by the assignment can be readily and easily known so as to be distinguished from other goods of the assignor the locality in which the goods were at the time of the mortgage may be

(1) 13 Can. S. C. R. 130.

1887

HOVEY v. WHITING.

Gwynne J.

wholly changed. Thus if the mortgagor described the property intended to be mortgaged as

> One black gelding, one bay mare, one Alderney cow, one Jersey heifer, one Durham bull, and five South Down ewes, the property of the mortgagor, all of which cattle are now in the care of A. B. and grazing upon his farm, situate upon lot No. 1, in the 2nd Concession of the Township of Nepean,

of what use would the statement of locality be if A. B. should himself have property of his own or of some other person of like description on the farm named when the question as to the sufficiency of the description should arise? And yet, independently of the locality stated, the interested parties, namely, the mortgagor's creditors, might have no difficulty whatever in distinguishing which were the property of the mortgagor, and so which were covered by the mortgage. When the execution creditors who assailed the mortgage in *Wilson* v. *Kerr*, in order to obtain satisfaction of their execution seized a portion of the stock in trade of the mortgagor they had no difficulty in finding the goods seized where they were on Ontario Street, in the town of Stratford, so that they could not have been prejudiced by any supposed insufficiency of the statement in the mortgage of a building on Ontario Street in which the mortgagor's stock in trade was. Whether or not a description is sufficient to enable the goods mortgaged to be distinguished within the meaning of the statute, is always a question of fact and not of law. In the above case the question was limited to the sufficiency of the statement of the locality where the mortgaged stock in trade was and was whether the description given conveyed such information to the parties interested, namely, the creditors of the mortgagor, as to have enabled them to find the goods; and the tribunal to determine such fact could not reasonably exclude from consideration any evidence of knowledge bearing upon such fact which the creditors possessed through their dealings with their debtors,

1887

HOVEY v. WHITING.

Gwynne J.

Again, if a mortgage should describe the property mortgaged as

> One Alderney cow, one Jersey cow, one bay mare, one Durham bull, one plough, one threshing machine, two harrows, all of which cattle, goods and chattels are now upon the farm of the mortgagor, being the S. ½ of lot No. 2, in the 2nd Concession of the Township of Gloucester,

of what use would this statement of locality of the cattle, goods and chattels mortgaged be if, when the question should arise, the mortgagor had already removed to another farm in another township to which the cattle and chattels mortgaged had been removed? And yet oral testimony of the most undoubted veracity might without difficulty shew—and perhaps out of the lips of the creditors assailing the mortgage—that at the time of the execution of the mortgage the mortgagor owned and had in his possession no cattle, goods or chattels of the description stated in the mortgage other than the precise number there stated, and that they were, at the time of the question arising, on the farm to which he had removed. Innumerable instances might be given of the insufficiency of a statement of the locality of the goods intended to be covered by a mortgage as a mode of distinguishing the goods intended to be covered by the mortgage from other goods of the mortgagor. But when all a man's stock in trade is assigned no occasion for distinguishing assigned from non-assigned goods can arise unless it be to distinguish what a man had at the time of the execution of the mortgage from articles of a like description, if any there be, in his possession which he had subsequently acquired, and that is a thing which no description in the mortgage might be able to effect but which could readily and easily be done by parol evidence.

So where a man assigns all his bonds, bills, notes and securities for money, there can be no doubt that such a description was intended to cover every bond,

bill, note and security for money of which the mortgagor was, at the time of the execution of the mortgage, the owner and entitled to receive the proceeds, whatever might be the names of the obligors of the bonds or of the makers of the notes or of the acceptors of the bills, and whether the mortgagee was obligee or assignee of the bonds or payee or endorser of the notes, and whatever might be the amount secured by each respectively, and whether they were in the possession of the mortgagor's bankers for safe keeping, or in a strong box or safe in his own custody, which places of safe keeping might, if stated in the mortgage, be changed after its execution and before the occasion for distinguishing what was intended to pass should arise; and as that occasion never could arise except at the suit of some creditor assailing the mortgage, and in respect of some particular bond, bill, note, or security for money claimed to be the property of the mortgagor, and as such applicable to payment of the debt due to the creditor or creditors assailing the mortgage, and as the mortgage plainly shows that all the bonds, bills, notes and securities for money which the mortgagor possessed at the time of the execution of the mortgage were covered by it, the only question would be, whether the particular security or securities which the assailing creditor or creditors claimed to be applicable to satisfaction of their debts was or were the property of the mortgagor at the time of the execution of the mortgage or had been acquired by him since; and for this purpose I cannot see upon what principle oral evidence should be excluded. The statute never intended, in my opinion, to exclude oral evidence of circumstances surrounding the execution of the mortgage and throwing light upon the question of fact to be determined or to cancel the maxim *certum est quod certum reddi potest.*

The object and intent of the statute, in my opinion,

1887

HOVEY v. WHITING.

Gwynne J.

was to prevent creditors being defrauded by means of secret mortgages or bills of sale being executed by the debtor of property still remaining in his possession and to all appearance his own property, and to afford facilities for unsecured creditors to distinguish betweeen the goods of their debtor which are encumbered from those which are as yet unencumbered, and to protect persons dealing with him and giving him credit upon the faith of the property of which he was in open possession being, as it appeared to be, his own property. The clause in the statute which requires such a description of the goods intended to be covered by the instrument that the same may be thereby readily and easily known and distinguished was not, in my opinion, enacted either for the purpose of enabling the mortgagee or assignee to know and distinguish the goods upon which he had agreed to accept the security taken, nor to enable a stranger to the transaction or the court upon a question arising by merely looking at the description in the mortgage to distinguish what goods were covered by the mortgage from other goods of the mortgagors, but to enable unsecured creditors of a debtor and persons having dealings with him or contemplating becoming his creditors to ascertain what part if any of the goods and chattels being in his possession and apparently his own is to any, and if to any to what, extent encumbered by assignment to a stranger or to a preferred creditor so as to be removed wholly or in part from liability to unsecured creditors; in short, to distinguish the encumbered from the unencumbered goods so as to enable them to determine how they shall govern themselves in their dealings with him, namely, whether to continue dealing with him, and trusting him, and giving him credit, or to call in question the assignment, if any, as not being executed in good faith. When all the goods and chattels of a debtor are

1887

HOVEY v. WHITING.

Gwynne J.

assigned the occasion for distinguishing that which is assigned from that which is not assigned does not arise, and when such assignment is put on registry in the manner and with the affidavits required by the statute the object and intent of the statute is attained, and the only question open to the unsecured creditors, as it appears to me, is as to the *bona fides* of the instrument.

In the case before us, assuming the deed to be within the operation of the statute and to be open to attack at the suit of the particular creditors assailing it to the prejudice of all other creditors, who equally with the assailing creditors are all alike *cestui que trustent* of the trust assignment, and as the only objection taken to the sufficiency of the description is as to its sufficiency to protect from seizure the goods taken in execution, none of which are suggested not to have been on the premises where the debtors' business was carried on at the time of the execution of the trust assignment, all that is necessary to determine is that as to all such goods the description given in the trust assignment is abundantly sufficient upon a true construction of the statute, and I am of opinion that it is. And assuming locality of the assigned goods to be necessary to have been stated in the trust assignment, that locality does sufficiently appear by the deed to have been in the particular lots of land conveyed by the deed, where the debtor's business was carried on and where the goods were when seized and taken out of the possession of the trustees of the deed, and, therefore, upon the authority of the great weight of the decisions in the Ontario courts, and of what was said in this court when holding the description in *McCall* v *Wolff* (1) to have been insufficient, the statute has been sufficiently complied with in the present case, and the plaintiffs in the interpleader issue were upon this point also entitled to judgment, as well as upon the

(1) 13 Can. S. C. R. 130.

1887
HOVEY
v.
WHITING.
Gwynne J.

ground that the statute does not apply to such a trust deed for the benefit of all creditors of the as signor alike ratably to the amount due to each without preference or priority.

The appeal must for the above reasons, in my judgment, be dismissed with costs.

Appeal dismissed with costs.

Solicitor for appellants: *William M. Hall.*

Solicitor for respondents: *Hugh McKenzie Wilson.*

1886
*Nov. 25, 26,
1887
*Mar. 14.

THE MERCHANTS' DESPATCH TRANSPORTATION COMPANY (DEFENDANTS)..... APPELLANTS;

AND

WALTER C. HATELY AND OTHERS (PLAINTIFFS)..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Carriers—Contract by one for several—Bills of lading—Terms of contract—Custody of goods—Delivery—Negligence.

The M. D. T. Co. through one B. contracted with H. to carry a quantity of butter from London, Ontario, to England, and bills of lading were signed by B., describing himself as agent severally but not jointly, for the G. W. Ry. Co., the M. D. T. Co. and the G. W. S. S. Co. named as carriers therein.

The G. W. Ry. Co. were to carry the goods from London to the Suspension Bridge, the M. D. T. Co. from the Suspension Bridge to New York, and it was then to be delivered to the S. S. Co. for carriage to England. It was provided by one clause in the bill of lading that if damage was caused to the goods during transit the sole liability was to be on the company having the custody thereof at the time of such damage occurring.

The butter was carried to New York where it was taken from the car and placed in lighters owned by the M. D. T. Co to be conveyed to the steamer "Dorset" belonging to the S. S. Co. On arriving at the pier where the steamer lay the lighter could not get near enough to unload and the stevedore in charge of the steamer had it towed across the river with instructions for it to remain until sent for. The "Dorset" sailed without the butter

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

1886

MERCHANTS' DESPATCH TRANSPORTATION CO. v. HATELY.

which was sent by another steamer of the S. S. Co. some five days later. The butter was damaged by the heat while in the lighter.

Held, affirming the judgment of the court below, that the M. D. T. Co. having made a through contract for the carriage of the goods they were liable to H. for the damage, and even under the bill of lading were not relieved from liability as the butter was never delivered to, and received by, the S. S. Co. but was in the custody of the M. D. T. Co. when the damage occurred.

APPEAL from a decision of the Court of Appeal for Ontario (1) affirming the judgment of the Divisional Court (2) in favor of the plaintiff.

The facts of the case as far as they affect the appeal to the Supreme Court may be stated as follows.

The plaintiff, Hately, was an extensive shipper of butter and cheese from London, Ont. to England, and in August, 1881, he applied by telegram to the agent of the Merchants' Despatch Co. for the carriage of three hundred packages of butter to England. The following telegrams passed between Hately and the agent:—

"TORONTO, August 22, 1881.

"To JOHN BARR:

"Will give you car butter, London—300 packages for London—one for Bristol—one for Cardiff. Will ship Tuesday for Saturday's steamer at 63 cents. Say quick if you accept, and if you can get it through.

"W. C. HATELY."

"August 22, 1881.

"To W. C. HATELY:

"Sixty-four best can do—steamers 27th—if they will take it. Answer, and will wire New York to place.

"JOHN BARR."

"August 22, 1881.

"To JOHN BARR:

"Your list says steamers Bristol and Cardiff Saturday. Will ship butter to-morrow for them at rate you name.

"W. C. HATELY.

(1) 12 Ont. App. R. 201. (2) 4 O. R. 723.

1886

MERCHANTS' DESPATCH TRANSPORTATION CO. v. HATELY.

"August 22, 1881.

"To W. C. HATELY:

"Ship your London butter *via* Great Western; You can get refrigerators there. I have advised Western.

"JOHN BARR."

The Despatch Company had traffic arrangements with the Great Western Railway Co. and the Great Western S. S. Co., and Barr was their general agent at Toronto.

The agent notified the Great Western Railway Co. of the arrangement with Hately and the butter was shipped by the Great Western on August 23. Bills of lading were signed as follows:—

"FOREIGN BILL OF LADING.

"GREAT WESTERN RAILWAY,

"Merchants' Despatch Transportation Company, and the Great Western Line of Steamships from New York. From London, Ont., to Bristol, England.

"Shipped in apparent good order, by W. C. Hately, the packages, property or articles marked, numbered, and specified as below. Contents, gauge, value, and condition of contents unknown. Weights subject to correction.

"To be delivered in like good order and condition unto order, or to his assigns, he or they paying freight, in cash, immediately on landing the goods, without any allowance of credit or discount, at the rate of gross weight delivered, with average accustomed (at $4·80 to the pound sterling), under the following terms and conditions, viz.:— * * *

"Through rate 64c. gold per 100 lbs. Gross weight 9639 lbs.

"☞ The property covered by this bill of lading is subject to all the conditions expressed in the customary forms of bills of lading in use by said steamships or steamship company at time of shipment.

MARKS AND NUMBERS.	MERCHANDISE.
One hundred and fifty (150). P. 2 Top. P. Side. Car 2872, M. D. T.	Packages of butter. Iceing to be charged forward.

"3. It is further agreed, that the said Great Western Railway, and its connections, shall not be held accountable for any damage or deficiency in packages after the same have been receipted for in good order by consignees, or their agents, at or by the next carrier beyond the point to which this bill of lading contracts. Consignees are to pay freight and charges upon the goods or merchandise in lots or parts as they may be delivered to them.

"4. It is further stipulated and agreed, that in case of any loss, detriment, or damage done to or sustained by any of the property herein receipted for during such transportation, whereby any legal liability or responsibility shall or may be incurred, that company alone shall be held answerable therefor in whose actual custody the same may be at the time of the happening of such loss, detriment, or damage, and the carrier so liable shall have the full benefit of any insurance that may have been effected upon or on account of said goods.

"6. It is further agreed, that the said Great Western Railway, and its connections, have liberty to forward the goods or property to port of destination by any other steamer or steamship company than that named herein; and this contract is executed and accomplished, and the liability of the Great Western Railway, and its connections, as common carriers thereunder, terminates on the delivery of the goods or property to the steamer or steamship company's pier at New York, when the

1886

MERCHANTS' DESPATCH TRANSPORTATION CO. v. HATELY.

responsibility of the steamship company commences, and not before."

The bills of lading were signed by "William Brown, agent severally but not jointly," and endorsed by Hately and the consignees.

The Great Western Railway Company were to forward the butter to the Suspension Bridge and the Dispatch Company thence to New York, where it was to be delivered on board a steamer of the S. S. Co., who were to carry it to England. This arrangement was carried out, but when the butter was taken from the cars as New York and placed in lighters to be put on board the steamer Dorset then in dock, a delay occurred. The lighter could not get near enough to place the butter either on the steamer or the pier at which she lay, and the stevedore in charge of the steamer caused the lighter to be towed across the river to Brooklyn, directing the lighterman to remain there until he sent a tug to bring it back. The Dorset sailed on September 3rd without the butter, and it was finally sent by the "Bristol" another steamer of the S. S. Co. on September 7th. On arrival in England the butter was found to be injured by the heat.

Hately brought an action against all three companies and on the first trial he was non-suited on the ground that the action should have been brought by the consignee who had paid him for the butter. The Divisional Court set aside the non-suit, and allowed the consignee to be joined as plaintiff in the action. That decision is reported in 2 O. R. 385. The action was tried again and Hately obtained a verdict against all the defendants. The Despatch Company appealed from the judgment at the trial directly to the Court of Appeal, and the other defendants to the Divisional Court. The latter court sustained the verdict against the S. S. Co., who then appealed to the Court of Appeal which reversed the decision of the Divisional

1886

MERCHANTS' DESPATCH TRANSPORTATION CO. v. HATELY.

Court and affirmed that of the judge at the trial, as to the Despatch Company, leaving the plaintiff with his verdict against that company. The latter company then appealed to the Supreme Court of Canada.

Robinson Q. C. and *Millar* for the appellants, cited the following cases:—

Collins v. *Bristol and Exeter Railway Co.*, (1); *Wilby* v. *West Cornwall Ry. Co.* (2); *Strong* v. *Natally* (3); *Pratt* v. *Ry. Co.* (4); *London & North Western Ry. Co.* v. *Bartlett* (5); Hutchinson on Carriers (6).

Moss Q.C. for the respondent referred to *Muschamp* v. *Lancaster & Preston Junction Ry. Co.* (7); *Nashua Lock Co.* v. *Worcester and Nashua Railway Co.* (8); *Kent* v. *Midland Ry. Co.* (9); *Hyde* v. *Navigation Co.* (10); Angell on Carriers (11); Lawson on Carriers (12).

Sir W. J. RITCHIE C.J.—It appears to me that the only question in this case is: Was the butter delivered in good condition to the steamer or steamship company's piers at New York, as the defendants undertook to do, and if it was not was the butter damaged while in charge of the Transportation Company in accordance with the terms of the condition contained in the bill of lading? It is abundantly clear that under the bill of lading placing the butter on board the barge at New York was not a delivery to the steamship company. It seems to me that the fact of sending the goods away from the pier was a refusal to receive them and I cannot see that the transportation company, as against the plaintiff, while the goods were on board the barge had any right to leave the pier with them and remain away for so long a time as to destroy the butter. They should, in my opinion,

(1) 11 Ex. 790; 1 H. & N. 517.
(2) 2 H. & N. 703.
(3) 1 B. & P. (N. R.) 16.
(4) 95 U. S. R. 43.
(5) 7 H. & N. 400.
(6) ss. 240-243 p. 192.
(7) 8 M. & W. 421.
(8) 48 N. H. 339.
(9) L. R. 10 Q. B. 1.
(10) 5 T. R. 389.
(11) P. 274 ss. 287-288.
(12) P. 345.

1887

MERCHANTS' DESPATCH TRANSPORTATION CO. v. HATELY.

Ritchie C.J.

have insisted on the acceptance of the goods at the pier; if the steamship wrongfully neglected or refused to accept the goods I cannot see that this is any answer to the plaintiff's claim, though it may, between the transportation and the steamship company, be a matter for controversy. The transportation company assumed the responsibility of seeing that the goods were delivered on the pier in such manner that they could be shipped by the first steamer, which it is quite clear they might have been on board the "Dorset," which sailed on the 3rd of September. It is said that the barge or lighter could not get to the pier; in my opinion whether it could or not get to the pier should have been first ascertained, and a perishable article such as butter should not have been sent away under such a heated atmosphere until it was ascertained that it would reach the pier without unreasonable delay, which was obviously not possible in this case by reason of other lighters engaged in unloading the "Dorset," and the lighter with the butter was sent away because it was blocking the way showing very clearly that the butter was sent too soon and should not have been removed from the ice car until a proper delivery in the terms of the bill of lading could have been effected.

In this case I can see no reason why, if the barge could not reach the pier, instead of sending the barge away, as was done, the butter was not immediately returned to the ice car from which it had been taken, and kept there until the delivery at the pier could be effected. If the butter was improperly moved at the instigation of the steamship company before it could be received at the pier that might possibly form a very good subject for a claim by the transportation company against the steamship company, but I entirely fail to see how it is an answer to the unfortunate owner of the butter who had a right to look to the

transportation company to see that his property was delivered at the pier in a position to be then and there shipped from the pier.

Therefore I think there was no delivery to the steamship company or the steamship company's pier until after the damage to the butter occurred, which took place while in the possession of the transportation company and for which they are responsible, in my opinion, to the plaintiffs.

STRONG J.—For the reasons assigned by the Court of Appeal I am of opinion that the judgment appealed against ought to be affirmed.

FOURNIER J.—Concurred.

HENRY J.—I am of opinion that the appellant company were the original contractors to carry the butter from the place where it was delivered to them to England, and that the bill of lading only settles the liability between the different carriers. There was no privity of contract between the shipper and the steamer.

The transportation company were guilty of gross negligence in taking the butter out of the ice car in the hot weather of New York and exposing it to the sun in a lighter. They should not have moved it in the heat of the sun until it was in a position to be placed on board the steamer, and when the steamer authorities declined to take immediate delivery of the butter it was the duty of the transportation company, who owned the lighters, to place it in a position where it would be preserved until it could be received by the steamer. The company were guilty of express negligence, and for these reasons I think the judgment of the Court of Appeal was right and that this appeal should be dismissed with costs.

TASCHEREAU J.—I concur in the judgment delivered by the Chief Justice, and for the reasons given

1887

MERCHANTS' DESPATCH TRANSPORTATION CO. v. HATELY.

Gwynne J.

by him I think this appeal should be dismissed with costs.

GWYNNE J.—The Merchants' Despatch Transportation Company are, in my opinion, clearly liable for the loss of the butter in question as the parties who contracted with the plaintiff Hately to convey the butter to England, whatever may be their rights over against the Great Western Railway Company or the New York Central and Hudson River Railway Company or the Steamship Company with whom they contracted for the actual carriage of the butter. The plaintiff Hately in delivering the butter to the Great Western Railway Company at London, was acting merely in pursuance of the instructions given to him by the Despatch Transportation Company and for the purpose of enabling that company to fulfil their contract with him, and they cannot now be heard to claim exemption from liability under their contract by appealing to the bill of lading which, in pursuance of the arrangements existing between the Despatch Company and the railway companies through whom the former company carry on their business, the Great Western Railway Company issued to Hately. The difficulty which this case presented in the courts below appears to have arisen wholly from the mode in which the Merchants' Despatch Transportation Company transact their business—a mode designed apparently for the purpose of mystifying the persons with whom they enter into contracts and of throwing difficulties in the the way of their recovering compensation for undoubted injuries, by attempts to shift their own responsibility to some or one of the carriers with whom, to enable them to carry on their business as a Despatch Transportation Company, they find it to be their interest to enter into special arrangements. There is no such difficulty in the case before us as the Despatch Transportation Company are the only defendants who are par-

ties to this appeal, and as to their liability there can, I think, be no doubt.

Appeal dismissed with costs.

Solicitors for appellants: *Morphy & Millar.*

Solicitors for respondents: *Fitch & Brewster.*

1887

MERCHANTS' DESPATCH TRANSPORTATION CO. v. HATELY.

JAMES SHERREN, JR., (DEFENDANT).....APPELLANT;

AND

EASTER PEARSON (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF PRINCE EDWARD ISLAND.

1886

*Oct. 26, 27.

1887

*Mar. 14.

Trespass on wild lands—Isolated acts of—Title—Statute of limitations—Misdirection.

Isolated acts of trespass, committed on wild lands from year to year, will not give the trespasser a title under the statute of limitations, and there was no misdirection in the judge at the trial of an action for trespass on such land refusing to leave to the jury for their consideration such isolated acts of trespass as evidencing possession under the statute.

To acquire such a title there must be open, visible and continuous possession known or which might have been known to the owner, not a possession equivocal, occasional, or for a special or temporary purpose. *Doe d. DesBarres* v. *White* (1) approved.

The judgment of the court below affirmed, Gwynne J. dissenting on the ground that the finding of the jury on the question submitted to them was against evidence, and further that the acts done by the defendant were not mere isolated acts of trespass, but acts done in assertion of ownership during a period exceeding 35 years, and the evidence of such acts should have been submitted to the jury and the jury told that if they believed this evidence they should find for the defendant.

APPEAL from a judgment of the Supreme Court of Prince Edward Island refusing to set aside a verdict for the plaintiff and order a new trial.

The action was brought in the court below by the respondent against the appellant for an alleged tres-

---

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

(1) 1 Kerr N.B. 595.

1886

SHERREN v. PEARSON.

pass, and the declaration contained a count for trespass to land and a count in trover for trees cut upon the *locus*, which is a piece of unfenced land lying between two roads and in the declaration is described as bounded "on the north by Palmer's road." The appellant, as to the trespass, pleaded not guilty, and that the land upon which it was committed was not the respondent's land.

At the trial before Mr. Justice Hensley it appeared that in the year 1820 a road was run through a portion of the township on which the *locus* is situated, and in its course passed between the farms at present in possession of appellant and respondent; that since the year 1851 two roads exist, and that between these two roads is a piece of land upon which the respondent charges that the trespass was committed, she alleging that the road to the north of the *locus* is the Palmer road, and that inasmuch as this road is her northern boundary the *locus* is included in her farm.

The appellant admitted having cut the wood on the *locus*, (the alleged trespass) but claimed that the Palmer road ran south of the *locus*, which, if so, would include it in his farm or exclude it from respondent's.

Evidence was given on the trial of wood and timber being cut on the *locus* by the appellant and those through whom he claims for a number of years previous to the action, and the defendant attempted to set up a title by possession to the *locus*, even if it was embraced within plaintiff's leases, and asked the judge to charge the jury that such evidence was sufficient, if they believed it, to constitute a title in him by possession.

The judge refused so to charge, holding that if the plaintiff's contention as to the situation of the Palmer road was correct, and that was for the jury to say, the evidence of cutting given by defendant amounted merely to isolated acts of trespass and were

not of such an actual, continuous and visible nature as the law required to confer a title by possession.

The jury found that the north road claimed by respondent was the Palmer road, and gave her a verdict accordingly.

The defendant moved for a new trial on the ground of misdirection by the learned judge in refusing to charge the jury as requested on the trial. The rule *nisi* for a new trial was discharged and the defendant then appealed to the Supreme Court of Canada.

Hodgson Q.C. for the appellant. The judge was not justified in withdrawing from the jury evidence of defendant's possession. See *Ewing's Lessee* v. *Burnet* (1); *Prudential Assurance Company* v. *Edmonds* (2).

The defendant used the land in the only way it could be used and such user will give him a title under the statute of limitations. *Davis* v. *Henderson* (3); *Mulholland* v. *Conklin* (4); *Norton* v. *London & North Western Ry. Co.* (5).

Davies Q.C. for the respondent. The judge has to exercise a discretion in determining what evidence shall be left to the jury. *Metropolitan Ry Co.* v. *Jackson* (6). And the discretion was rightly exercised by refusing to leave to the jury this evidence of possession when the location of the Palmer Road would settle the rights of the parties. *Jones* v. *Chapman* (7).

It was necessary for the defendant to show an open, visible, continuous possession of the *locus* in order to establish a title under the statute of limitations and the evidence was entirely insufficient for that purpose. *Proprietors of Kennebeck* v. *Call* (8); *Proprietors of Kennebeck* v. *Springer* (9).

SIR W. J. RITCHIE C.J.—The great controversy at the

(1) 11 Peters (U.S.) 41.
(2) 2 App. Cas. 487.
(3) 29 U. C. Q. B. 344.
(4) 22 U. C. C. P. 372.
(5) 13 Ch. D. 268.
(6) 3 App. Cas. 193.
(7) 2 Ex. 803.
(8) 1 Mass. 483.
(9) 4 Mass. 416.

1887

SHERREN v. PEARSON.

Ritchie C.J.

trial of this case appears to have been as to which of the two roads, the one to the north and the other to the south of the disputed locus and adjoining each other at the eastern and western ends of the locus, or near the eastern and western ends, was the old Palmer road run in 1820, the plaintiff contending that that road was to the north of the locus, and the defendant that the south is the old Palmer road. There can be no doubt that the old Palmer road was the division line between the Sherren and Pearson farms; in fact, I understood such to be the contestation of both parties, and that the question at the trial was: Where was the Palmer road? This question the learned judge left squarely to the jury, instructing them that if they found that the north road was on the line of the road run in 1820 by Palmer to find for the plaintiff, otherwise to find for the defendant. The jury found for the plaintiff, and thereby established that the north road was the old Palmer road, which finding it cannot be said, I think, that there was no evidence to justify, and therefore the finding of the jury, and its confirmation by the court, ought not to be disturbed. But, independently of this, the defendant does not complain of, and has not appealed against, this finding of the jury, but has limited the question to be raised on this appeal to the alleged misdirection of the learned judge in withdrawing from the consideration of the jury certain acts which he claims were acts of possession sufficient to give him a title under the statute of limitations. The case submitted to this court, states that the question intended to be raised on this appeal is: Was the learned judge right in directing the jury that the sole question for their consideration was, where was the old Palmer road originally established? Or should he not, instead of withdrawing it from the consideration of the jury, also have left to them, as requested by the defendant's counsel, the question of possession and

the evidence of the defendant's claim to the possession, and whether the plaintiff's title was barred by the statute of limitations? and with this the factums of both the appellant and the respondent agree. And the learned counsel for the appellant frankly admitted on the argument that on this appeal it was not open to him to attack the finding of the jury on the question submitted as to the Palmer Road, and complains only, as his factum does, of the ruling of the learned judge in reference to the question of possession, that is to say, in not leaving to the jury to say whether or not the defendant had such a possession of the *locus* for twenty years as barred the plaintiff's title under the statute of limitations.

Assuming then this finding to be correct, the defendant contended at the trial, and before the court below and in this court, that the evidence showed the plaintiff was out of possession of the *locus* and the defendant in possession, and assuming the north road to be the Palmer Road the plaintiff's title was barred by the statute of limitations, or at any rate, there was evidence which the judge should have submitted to the jury and he was not warranted in telling them that there was no evidence from which they could find that plaintiff was out of possession or her title barred.

To enable the defendant to recover he must show an actual possession, an occupation exclusive, continuous, open or visible and notorious for twenty years. It must not be equivocal, occasional or for a special or temporary purpose.

I cannot discover anything in this case to indicate that the defendant or those under whom he claims at any time made an entry on the land with a view of taking possession of it under a claim of right or color of title, or with a view of dispossessing the actual owner, such as running the lines around it, spotting

1887

SHERREN v. PEARSON.

Ritchie C.J.

the trees, or acts of this character, assuming such would have been sufficient against the true owner, or by any other open, visible, continuous acts, and there is no evidence whatever to show that the acts relied on were done with the knowledge of the owner. The acts relied on were nothing more, as against the true owner, than isolated acts of trespass having no connection one with the other. The mere acts of going on wilderness land from time to time in the absence of the owner, and cutting logs or poles, are not such acts, in themselves, as would deprive the owner of his possession. Such acts are merely trespasses on the land against the true owner, whoever he may be, which any other intruder might commit. There was no occupation of the lot by the defendant; there was nothing sufficiently notorious and open to give the true owner notice of the hostile possession begun. An entry and cutting a load of poles or a lot of wood, being itself a mere act of trespass, cannot be extended beyond the limit of the act done, and a naked possession cannot be extended by construction beyond the limits of the actual occupation, that is to say, a wrongdoer can claim nothing in relation to his possession by construction.

Assuming then that the old Palmer road, as found by the jury, was unquestionably the true dividing line between the Pearson and Sherren lots, the possession would follow the title unless displaced by evidence of an exclusive, continuous and uninterrupted possession of twenty years by the defendant. As was said in *Doe d. DesBarres* v. *White* (1), the presumption is that the owner remains in possession of that which is not actually in possession of others until proof be given of acts of possession by the defendant. It is sufficient for the plaintiff, as owner of the fee, to show the land continued in its natural state, and uninclosed, within

(1) 1 Kerr N. B. 595.

twenty years before action. In the case just referred to, *Doe d. DesBarres* v. *White*, which was decided as far back as 1842, Parker J., afterwards Chief Justice, says (1):—

It has already been repeatedly decided, that a twenty years' adverse possession to a part of a lot of land, by a person coming in without color of title, will not enure as a possession of the remainder; but this is the first time that I am aware of, that the question has been distinctly been brought up in this court as to what will constitute adverse possession of wilderness land. In the absence of any English case to direct our judgment, which of course could not be looked for in any of the English courts at Westminister, it is satisfactory to find that the question has frequently been discussed in the courts of the United States, and that in various independent tribunals in different States, some of which hold to the statute of James 1st. as the existing law, and others have local statutes framed after the model of the English statute, there has been a great unanimity on the subject, and a general opinion of the impropriety and inexpediency of giving any constructive effect to acts which do not of themselves clearly demonstrate the intention of the party to dispossess the owner. I shall proceed to cite several of those cases, not as binding authority, but, as was said by Justice Patteson, 6 A. & E. 837, intrinsically entitled to the highest respect; they are important to us, inasmuch as the same principles of law are applied to a state of things similar to our own, by judges of high character, learning and experience; some, indeed, of very deserved celebrity. I cite from the notes to Tillinghast's Ejectment.

[The learned judge then proceeds to cite at length a great number of American authorities, and concludes thus:—]

It is impossible not to perceive the different manner in which the rights of owner of wilderness land are affected by a person entering, enclosing and actually cultivating, who stands there in fact openly and notoriously excluding the owner from the possession, and against whom, as it was ably argued, he may immediately proceed to a legal adjudication of his title; and by another who enters, cuts down the trees here and there, taking them off the land for the purpose of using them, and often without the knowledge at the time of the owner, who may indeed remain in ignorance of the person by whom these acts are committed, and who cannot well be prepared to meet evidence of such acts, when they are brought forward as proofs of an adverse possession. If every intendment is to be made in favor of the lawful owner, in order to protect right and suppress wrong,

(1) At p. 627.

1887

SHERREN v. PEARSON.

Ritchie C.J.

why should the act of cutting down a tree, and taking it away, be intended as an act of possession of the land? The intent to occupy the land is not indicated by that act; in general, no such intent accompanies it. It is the commission of a wrong, not the exercise of a right; and on what principle would you extend benefit to the wrong-doer, beyond the necessary consequence of the act? He may continue such acts for years, and yet never think of possessing himself of the land; and who can say when the intent was first formed? The act indeed may be concealed until the right to maintain an action of trespass is barred by the statute of limitations, when it may be set up with impunity as a proof of possession. If however the repeated acts of cutting and taking away trees openly, notoriously and exclusively committed by one person, with the knowledge of the owner, or under such circumstances as that he cannot be presumed to be ignorant of them and without interruption on his part, will ripen into actual possession of the soil, one of two things would seem further required, namely, that the land over which the claim extends shall be defined, either by marks and bounds upon the land itself, or by some deed or instrument under color of which the party has entered; and that to make out a possession of twenty years' duration, there must have been sufficient acts of this sort committed before the commencement of that period, and not merely while it was running on. It is also material to show distinctly that all the acts of cutting relied on have been done by the party himself or by others under his direction, or that there be at least the same degree of certainty on this point as would be required to make him answerable in an action of trespass.

And Carter J. afterwards Chief Justice says:— (1).

We then have to consider what are the acts of the defendant, by which he says he has proved that he has been in the possession of this land for more than twenty years. It appeared that the land in dispute is a tract of wilderness in the rear of a piece of cultivated land, of which the defendant has been in the occupation for more than thirty years; that on several occasions, and probably whenever he had need of such things, he went to the back of his cleared land to cut firewood and poles. It is obvious and natural that in so doing he would at first merely go on the part nearest to his cleared land, and gradually extend his acts of trespass (for such undoubtedly they were at first) further and further back. Now in the absence of any other evidence, what inference is to be drawn from the mere fact of a person going on the land of another, and cutting down a few trees, and carrying them away for firewood? Surely not that he intends to take possession of the land on which the trees grew, but that he intends merely to get the wood for his own purposes.

(1) At p. 640.

Suppose he does this repeatedly, and that he ultimately cuts down all the trees, when is it that he can be said to manifest an intention to take possession of the land itself? Granting however that repeated acts of trespass of such a nature on land may constitute a possession of the land, still it is obvious that such possession cannot be said to commence until after the last act of trespass has been committed, which will make up the amount necessary to constitute such possession. In the case of land under cultivation, suppose a person who has no title takes possession by fencing; that he begins by erecting a small part of the fence, and does not completely fence the whole in until some years have passed; his possession of the whole could hardly be said to commence until the whole of his fence was completed. Assuming that these acts of the defendant could give him a possession of the land, there is nothing in the evidence to show that such acts had extended over the whole of this tract more than twenty years before this action was commenced, or to what particular portion of the land they had extended at that time and therefore the defendant failed in proving a possession of twenty years to the whole or any part of the land in question.

Chief Justice Chipman and Mr. Justice Botsford took no part in this judgment on account of having been engaged in the suit while at the bar, but both expressed their full concurrence with their brethren upon the general principles of adverse possession.

I have cited this case at greater length than I otherwise should have done, because it has ever since been regarded and acted on as enunciating the correct principles in reference to the possession of wilderness lands. To interfere in any way with this case, or to cast any doubt on it, after having been accepted and acted on as good law for forty-two years, would be to unsettle the jurisprudence of New Brunswick and, as I understand, of the other Maritime Provinces, on this subject and lead to litigation and confusion.

The evidence as to the acts of possession is the very opposite of showing an adverse possession for twenty years of this lot, as the following extracts from the evidence of the defendant's witnesses will show.

Jos. McDonald says:—

I chopped wood on the disputed piece for Mr. Coughlan south of the Northern road. I chopped that wood 42 years ago.

1887

SHERREN v. PEARSON.

Ritchie C.J.

Richard Boyle:—

I know the disputed piece of land. I cut off the disputed piece of land 16 or 17 years ago. I got leave from Mrs. Sherren the grandmother of the defendant.

George Oakes:—

Live at Crapaud; aged 46; lived within 16 chains of the place; I never remember a stick being cut off on the disputed land when I first went to school.

James Hall:—

I saw young James Sherren and John McDonald and old Mr. Jas. Sherren cut down off the disputed land. I saw Sherren cut when Mr. Pearson was alive. Can't name the year. I saw George Trowsdale cutting. Might be 10 or 15 years ago.

John McDonald:—

I know the piece of land in dispute. I cut poles off it. 200 or 300 poles in 1870. In 1871 cut about 500 to 600 too. I did it for Mrs. Sherren the defendant's grandmother.

The evidence of John Sherren, uncle of defendant is much relied on. He says:—

My father cut wood on the disputed land in 1851. I went in 1852 and cut down a good bit of stuff off it, about 20, 30 or 50 trees. I suppose there never was a year in the 35 years but what I, or some of the Sherrens, cut some wood off it, except last year.

John Malone:—

Lived three and a half miles from disputed land. I never saw any cutting or trees cut on the disputed land.

James Trowsdale Sherren:—

Father of defendant James and owner of the land. Brother (that is John Sherren whose evidence is referred to above) has nothing to do with it. Went into possession in 1850 or 1851. I cut on this disputed piece of land. Commenced cutting on it 13 or 14 years ago. Before that I saw mother's servants and several men and my brother cutting poles. McDonald cut in 1870 and 1871. I saw my brother George who is dead cut on it 13 or 14 years ago. Nothing more than taking a tree now and again on it or my boy by my orders sometimes. I would take a sill, sometimes a beam off it and some hundred longers. I and my son and brother cut off it during the last 15 years.

On cross-examination he says:—

I think I cut some saw logs on this land some five years ago. I was in last fall to see this place. I think I was cutting 10 or 11 years myself more or less during that time. I saw some sticks lying there last fall.

1887

SHERREN v. PEARSON.

Ritchie C.J.

Then this witness who went into possession in 1850 or 1851, says:—

Five different winters I cut on that place or three winters I will say to two different winters. I did'nt cut any poles last winter that I mind of. Some poles were cut three winters ago north of the south road off the disputed piece.

James Sherren:—

I cut the wood; am 31 next May; I remember 20 years back (1866); know this piece of land; cut on it 13 or 14 years since father got it; wanted it for fence poles and saw logs; first about 14 years ago made use of it for boards and scantling; cut mostly every year; six or seven years ago I cut 600 longers off this very piece.

In this case, then, there is nothing to indicate that the party at any time made an entry on the land with a view of taking possession of it under a claim of title or any open visible acts. There is no evidence of anything but isolated acts of trespass having no connection one with the other, no evidence of any open, visible, continuous possession for twenty years, known, or which might have been known, to the owner, but simply cutting without any open and exclusive possession.

STRONG J.—The appellant himself tells us that the only question intended to be raised here is, whether the judge who presided at the trial should not have left the occasional acts of ownership exercised by the defendant to the jury as evidence of possession under the statute of limitations. As I am clearly of opinion, for the reasons already stated by the Chief Justice and which I need not therefore repeat, that these trespasses were no evidence of possession there is, in my opinion, no alternative but to dismiss the appeal.

FOURNIER J.—I concur in the reasons given by His Lordship the Chief Justice for dismissing this appeal.

HENRY J.—I also am of the opinion that the appeal in this case should be dismissed with costs. At the argument it was clearly intimated to us that the only

1887

SHERREN v. PEARSON.

Henry J.

question for our decision was as to the propriety of the proceeding of the learned judge at the trial who withdrew from the jury the question of the defendant's possession of the *locus*. I have come to the conclusion that the learned judge was perfectly right in adopting that course, and he was not only right, but it was his duty to do what he did. In all the provinces the law is well settled that acts of trespass cannot amount to what the law requires to give title under the statute of limitations, that is, the ouster of the true owner. An act of trespass in going on the property amounts to a disseisin for a time, but it is not an ouster; what the law requires is an ouster of the owner for twenty years. Numerous acts of trespass only amount to so many acts of disseisin; when a man trespasses on the land the true owner ceases to have full possession for the time being; but the moment the trespass is at an end the trespasser's disseisin is at an end and the complete possession is again in the actual owner. It is therefore required that the party should not only take possession, not only disseise the owner, but that he should continue that dissiesin so as to amount to an ouster, and that ouster maintained for the statutory period. That can only be done by some act of possession not merely by a temporary disseisin, and it must be over every inch of the land of which the party claims possession.

In this case the defendant got on the land. By the decision of the jury the title is in the plaintiff. That is not to be attacked; the finding of the jury is to be taken as correct. In that view of it I have come to the conclusion that there has been no ouster of the plaintiff.

I approve generally of the decision of the late Chief Justice of New Brunswick in *Doe d. Des Barres* v. *White* (1). He argues the case very fully and, to my mind,

(1) 1 Kerr (N. B.) 595.

very satisfactorily. But when he talks about the intention of the party who goes upon the land of another and commits a trespass, I should remark that the intention of the party has nothing to do with it. If he does not do what the law says will amount to an ouster it is immaterial what his intention is. The thing necessary for him to prove is a possession for twenty years.

This is not a case of adverse possesion. That does not arise here. It is only a question as to whether or not the owner was out of possession for twenty years.

In this case the statute, so far as the evidence goes, has never, in my opinion, commenced to run. The plaintiff was never out of possession and, therefore, I think the judgment of the court below was right, and the judge was right in withdrawing from the jury a question which could only be decided in the one way. This was the only question to be determined by the jury, and it would be useless, in my opinion, for the court to send the case back for the decision of another jury on a question which, in law, could not operate to give the defendant a title to the land in dispute.

TASCHEREAU J.—I am of opinion that this appeal should be dismissed. Where was this Palmer Road was the main question at the trial. The jury found that the north road as claimed by the respondent was the Palmer road, and returned a verdict in his favor, which verdict was subsequently sustained by the full court. Now against this verdict the appellant has nothing to say. He limits his appeal as follows:

Was the learned judge justified in directing the jury that the sole question for their consideration was,—Where was the old Palmer Road originally established? or should he not instead of withdrawing it from the consideration of the jury also have left to the jury the

1887

SHERREN v. PEARSON.

Taschereau J.

question of possession, and the evidence of the defendant's claim to the possession, and whether the plaintiff's title was barred by the statute of limitations, as requested by the defendant's counsel? I am of opinion that, as held by the judge at the trial, the location of this Palmer road determined the ownership of the *locus* in contestation. This part was all wilderness. The appellant had cleared south to the Palmer road as fixed by the jury, and had fenced his land along that road from his west boundary line eastwardly some chains past where the south road, claimed by him as Palmer's, branched off from the now established Palmer road. By this open, notorious, continuous and visible act he had declared to the world the extent of his claim. Occasional acts of cutting beyond this fence and across the road, committed too without respondent's knowledge, were mere repeated acts of trespass.

It is clear law that if a man owns a farm by a good legal title the front part of which he occupies and cultivates and the rear of which he reserves in a wilderness state for firewood or other purposes, a series of independent acts of trespass committed on the rear of the land, by a wrongdoer or person laying illegal claims thereto each of them unconnected with preceding or subsequent acts, would not operate to oust the title of the legal owner. By virtue of his title he was as much in possession, in the eye of the law, of the woodland in the rear as of the cultivated land in front. To deprive him of that possession the wrongdoer entering must show dispossession of the true owner by actual, constant, visible possession for twenty years in himself.

The fact that the wrongdoer or trespasser supposes he has a claim or title to the land does not alter the character of his acts. His unfounded belief cannot diminish or destroy the legal claims of the true owners or

1887

SHERREN v. PEARSON.

Taschereau J.

deprive them of their right to treat him as a wrong-doer in entering on their land. The effect to be given to repeated entries upon the land, or acts of user or possession, depend largely upon the nature of the property. What might be sufficient evidence in the case of cultivated lands to go to a jury would not constitute any evidence in those of wilderness lands. If the property is of a nature that cannot easily be protected against intrusions, mere acts of user by trespassers will not establish a right.

Owners of wilderness or wooded lands lying alongside or in the rear of other cultivated fields are not bound to fence them or to hire men to protect them from spoliation. The spoiler, however, does not, by managing without discovery even for successive years to carry away valuable timber, necessarily acquire, in addition, title to the land. The law does not so reward spoliation.

As to Mr. Justice Hensley's charge to the jury, I do not see that the appellant's contentions can be maintained. The judge told the jury that if they found the north road to be the Palmer road the plaintiff, respondent, had constructive possession of the *locus* in litigation, and that the acts of cutting given in evidence by the defendant (now appellant) admitting them all as well and duly found, could not operate as a disseizin of the respondent, and a bar to his title. I do not see anything illegal in that charge. On the contrary, if the judge had charged the jury as the appellant contends he ought to have done, that is to say, if he had left the question of possession to them, and they had found, on that point, in favor of the present appellant, with this evidence on record that verdict, in my opinion, could not have been sustained.

GWYNNE J.—I am of opinion that this appeal should be allowed with costs, and that the rule *nisi* issued in

1887

SHERREN v. PEARSON.

Gwynne J.

the court below for a new trial should be ordered to be made absolute. The action is one of trespass *quare clausum fregit*. The plaintiff in her declaration alleges that the defendant broke and entered certain land of the plaintiff described as follows:—"On the south by "land in possession of John Stordy, on the west by "the Westmoreland river, on the north by Palmer's "road, and on the east by a stream situate on town-"ship number 29 in Queen's County," in the Province of Prince Edward Island and cut down and carried away a large number of trees growing thereon, &c.

In pursuance of an order of the Supreme Court of Prince Edward Island the following particulars were given of the years and months and days as near as could be upon which the trespasses complained of were committed, namely: In the months of February, March, April and May, 1884, and between the 1st of February, 1885 and 1st of April, 1885, and also between the months of August and December, 1883.

To this declaration the defendant pleaded not guilty, and that the land was not the plaintiff's as alleged.

At the trial the plaintiff produced and put in evidence an indenture of lease, dated the 1st of June, A.D., 1818, and made between the Right Honorable John Earl of Westmoreland and the Right Honorable Robert Lord Viscount Melville of the one part and John Pearson of the other part, whereby the piece of land next therein after described was demised to John Pearson, that is to say, all that tract, piece or parcel of land situate lying and being in the Parish of Hillsborough in Prince Edward Island, which is bounded as follows:—

Commencing at a square stake fixed in the north-east bank of the north-west branch of Westmoreland or Crapaud River, the same being the north-western boundary of William Hodson's farm, and from thence running by a line north sixty degrees east until it strikes the north-east branch of said Westmoreland river and following the

1887

SHERREN v. PEARSON.

Gwynne J.

course thereof northward to a certain road lately opened, leading from the lower or new road to the upper or old road from Charlottetown to Tryon, and from thence following the course of the said first mentioned road, until it meets the said new road from Charlottetown to Tryon aforesaid, and from the centre thereof running by a line south 60 degrees west into Westmoreland river aforesaid and following the courses thereof to the place of beginning, making a front of ten chains by a base line upon the said river and containing 90 acres of land a little more or less agreeable to a plan thereof hereunto annexed, and is part and parcel of lot or township number 29 in the said Island. *Habendum*, for 999 years.

The plan above referred to was not annexed to the lease nor was it produced, nor was any attempt made to shew that the *locus in quo* was within the metes and bounds stated in the lease, for in 1859 this lease became surrendered by a new lease which the tenant then took for a term of 900 years from the 1st November, 1859, from Lady Cecily Jane Georgina Fane, who is admitted to have then been the heir to the Earl of Westmoreland, the lessor in the lease of 1818 mentioned, and to have been then seised in fee of the lands described in the lease executed by her on the 1st of November, 1859. In that lease the land thereby demised is described as follows:—

All that tract, piece or parcel of land situate in the western moiety of township number twenty-nine, and bounded as follows that is to say:—Commencing at a stake fixed on the east side of the Westmoreland river at the south-east corner of land leased to Henry Newson, thence along Henry Newson's line to Palmer road, thence along Palmer road to the stream, thence southerly along the stream until it obtains a breadth of nine chains and twenty-four links, thence south fifty-five degrees thirty minutes west to the river, thence along the river to the place of commencement, containing by estimation ninety acres of land be the same a little more or less.

The plaintiff claimed title through the will of her husband, who died in the year 1867, and who was the lessee named in the above leases. The first question involved in the case was the site of the Palmer road as the *locus in quo*—that road being the north boundary of the land described in the lease of the 1st

1887
SHERREN
v.
PEARSON.
Gwynne J.

November, 1859, under which the plaintiff claimed title; and secondly a question arose whether (whatever might be the site of the Palmer road) the defendant and those through whom he claimed were not in possession of the *locus in quo* for more than twenty years before the commencement of the action. This Palmer road was not in existence when the lease of 1818 was executed; it was run first in 1820 by a person of the name of Palmer, but under the authority it would seem of the owners in fee of the land on which it was run and of their tenants; for a witness named Turnbull, aged 83, who was employed in running it under the Mr. Palmer from whom the road derives its name, says: "That the road commenced at a road called Stordy's road and ran north-east by east on the line between Newson and Pearson. It went" he says "a little more in on Pearson that on Newson. Starting from Stordy's line it ran at first straight, but when approaching a gulch it was canted in to the east on to Pearson's land. Newson's land" he says "did not run out to the old Town road; somewhere near Newson's corner (that is his eastern corner or boundary), the road" he says "took a sheer to the right to clear the gulch. This sheer to the right would" he said "be no distance at all from Newson's corner. The road then came to a brook and from thence out to the old Town road. The object of the divergence was to clear the gulch." This running of the road on to Pearson's land was no doubt with his knowledge and consent and would seem to account for the new lease given to and accepted by Pearson in November, 1859, for the Palmer road which by that indenture is made the northern boundary of the land leased to Pearson was in August, 1841, made the southern boundary of land then demised by the Earl of Westmoreland to one Coughlan through which demise the present defendant claims title. On the 27th

August, 1841, by an indenture of that date the Earl of Westmoreland demised to John Coughlan his executors, administrators and assigns, habendum for 999 years, a portion of the said township, number 29, described as follows: —

Commencing at a stake fixed on the west side of a road called Palmer or the old town road at the east boundary of Samuel Newson's farm, and running back on said line 23 chains and 50 links or until it meets the eastern boundary line of James Collbeck's farm, and thence running along said line north, 31 degrees, 30 minutes east, 16 chains, 25 links, thence in a direction south 58 degrees 30 minutes east 34 chains 50 links, or until it meets the road aforesaid, thence along the west side of said road in a direction southwest to the said state or place of commencement, containing 60 acres more or less.

Now the first question as I have said is as to the site of the Palmer road at the *locus in quo*. The *locus in quo* is a piece of land which lies on the north side of and abutting on a road which diverges to the right from a point near Newson's Corner and which after crossing a brook approaches Stordy's mill stream. Such a road, it may be here observed, accurately corresponds with the description given by Turnbull of the course which the Palmer road, as run in 1820, took, when he says that the "road somewhere near Newson's Corner," and he says again "this would be no distance at all from Newson's Corner," took a sheer to the right to clear a gulch.

Now at the time of the execution of the indenture of lease of August, 1841, which appears to have been the first which made the Palmer road a boundary of land demised, it is not pretended that there were two roads on the ground at the *locus in quo*—there were not two roads diverging to the right from the straight line which starting at Stordy's road was run as the Palmer road—there was but one such point of divergence and but one road then known as the Palmer road at the *locus in quo*, which diverging to the right from

1887

SHERREN v. PEARSON.

Gwynne J.

a straight line led to Stordy's mill stream. The material question therefore between the parties is—Where was that diverging road situate at the time of the execution of the indenture of demise of August, 1841, under which the defendant claims? for the land to the north of that road as it was then opened and travelled on was demised to Coughlan by that indenture, and that same road must be taken to be the boundary of the land demised to Pearson by the indenture of lease of November, 1859. Whatever was known and used and travelled upon the ground as the Palmer road in 1841, when the lease to Coughlan was executed, must be the road up to which the land demised to him reached, and must be held to be thenceforth the road coming under the designation of the Palmer road at the *locus in quo*, and to be the road referred to as the Palmer road in the description of the land demised to Pearson by the indenture of November 1859.

The evidence is overwhelming that the road as claimed by the defendant is the only road which was in existence and known as the Palmer road at the *locus in quo* in 1841, when the lease to Coughlan under which the defendant claimed was executed.

(His lordship then reviewed the evidence at length and proceeded as follows:)

This being the evidence, the learned judge who tried the case directed the jury that if they should find that the north road as on the ground was on the line of road run in 1820 they should find for the plaintiff—if otherwise to find for defendant. Counsel for the defendant objected to the charge and asked the learned judge to charge the jury that even if they should find that the north road was laid out in 1820 they should still consider the evidence as to possession and find whether the defendant's father and those

through whom he claimed were not in possession of the piece of land in dispute, and the plaintiff and those through whom she claimed out of possession of it for more than twenty years before the commencement of the action. This the learned judge refused to do and he charged the jury that there was no evidence from which they could find that the plaintiff was out of possession, or that her title was barred, or that the defendant or those through whom he claimed had possession of or had any title to the *locus in quo* and that the sole question for their consideration was: Where was the line of the Palmer road run in 1820? The jury upon this charge by a majority of five to two rendered a verdict for the plaintiff. A rule was obtained in the supreme court of the Island calling upon the plaintiff to show cause why this verdict should not be set aside and a new trial granted upon the following grounds: That the verdict was against the weight of and contrary to evidence—and that the judge who tried the case charged the jury that there was no evidence from which they might find that the defendant or those through whom he claimed had obtained a title to the land in dispute.

This rule was discharged by the court and it is from the rule which discharged the rule *nisi* that this appeal is taken.

It is, I think, impossible to understand how the jury could have rendered the verdict they did if they had understood the judge's charge in the sense in which, no doubt, he intended it to be understood by them, namely, that if they should find the north road to have been the road laid out and opened in 1820 and since travelled upon as the Palmer road, from thence up to and in 1841 when the lease to Coughlan was executed, to find for the plaintiff, for this was the material question in issue. The word "run" in 1820 as

1887

SHERREN v. PEARSON.

Gwynne J.

used by the learned judge was not the most appropriate term to have used; there was no evidence, or suggestion that there was a road "run" in 1820 different from the road which was opened and travelled as the Palmer road. All the evidence was to the effect that what was run in 1820 was the road which was then opened and thenceforth travelled upon and known as the Palmer road. So that perhaps the jury did understand the learned judge's charge as they should have understood it and that the majority intended to find by their verdict that the north road was the road which was opened in 1820 and was thenceforth travelled upon and known as the Palmer road until and in 1841, when the lease to Coughlan was executed. Such a verdict, if that be what the jury meant, was utterly unsupportable upon the evidence, for it was proved beyond question that no road was ever opened on that line until 1851, and moreover the great mass of the evidence leads irresistibly to the conclusion that the south road is the true old Palmer road and which has always been known and travelled upon as such. But it is said that although the rule *nisi* for a new trial in the court below asked that the verdict might be set aside as against the evidence, no question now arises before us upon this point because the learned counsel for the appellant, resting, as I understood him, upon his objection to the judge's charge on the question of possession as sufficient for his purpose abstained from pressing his objection to the verdict upon the single point which was submitted to the jury on the ground of its being wholly against the evidence. But the fact that the learned counsel for the appellant having two points, both of which he deemed equally good and which he took and made the grounds upon which his rule *nisi* was granted, rested in his argument before us upon one of them as

1887

SHERREN v. PEARSON.

Gwynne J.

being in his judgment abundantly sufficient to entitle the appellant to a new trial, cannot deprive him of the right to insist upon all the evidence bearing upon that point, although it bears equally upon the point not pressed. The whole of the evidence in point of fact bears upon the question of possession, and therefore must be referred to in the question now before us just as if it had been the only one in contestation throughout. The objection under consideration is simply one of misdirection, namely, whether or not it was misdirection in the learned judge to have told the jury that there was no evidence before them upon which they could find that the plaintiff had been out of possession—or that the defendant and those through whom he claimed ever had possession of the *locus in quo*—and that the sole question for their consideration was where was the line of the Palmer road run in 1820, and that if they should find that the north road as on the ground, that is to say the road which the evidence showed was never opened or made until 1851, was on the line run in 1820, they should find for the plaintiff. Can any doubt be entertained for a moment that the charge opens before us the whole of the evidence as bearing upon the question whether Coughlan and his assignees had or not possession up to the south road now on the ground as the boundary between the lands in the possession of Coughlan and his assignees on the one side and the land in the possession of the plaintiff's husband in his lifetime and of the plaintiff since his death on the other? Reading this evidence I must say, with the greatest deference for those with whom it is my misfortune to differ in this case, that the learned judge's charge cannot in my opinion be supported, and that it is clearly open to the defect of misdirection and if, when given, it was misdirection it is obvious that the subsequent finding of the jury

1887

SHERREN v. PEARSON.

Gwynne J.

upon the single point so erroneously submitted to them, whether such finding be right or wrong upon that point, cannot remove the defect of misdirection and the error committed in withholding from them the other question which should have been submitted to them, and in not drawing their attention to the evidence bearing upon that question.

So far as the question of actual possession was concerned it was obviously a matter of no importance whether or not a line had been run in 1820 in the place where the road made in 1851 was made if during all the period from Coughlan's entry under his lease in 1841 until his assignment of it in 1851 he was in possession up to what is now called the southern road on the ground as his southern boundary at the *locus in quo*. Whether Coughlan did or did not enter upon the *locus in quo* in 1841, claiming it under his lease, and whether there was then on the ground any road separating the *locus in quo* and the land leased to Coughlan from that in the possession of Pearson other than the road now called the southern road on the ground, and whether Coughlan did or not thenceforth continually until he assigned to Sherren in 1851 exercise acts of ownership over the *locus in quo*, claiming it as his own property to the exclusion of all others, and without any claim to it by Pearson or any other person, were facts for the jury and the jury alone to decide and which could not be affected in their determination by any opinion which in 1885 a jury might entertain upon the question whether a line had or had not been run in 1820 at any place different from that claimed by Coughlan to be a boundary between his possession and that of Pearson from 1841 to 1851 and enjoyed by him as such. Again, whether Sherren, the assignee of Coughlan. did or not in 1851 enter upon and retain possession of the *locus in quo* in the same manner,

1887

SHERREN v. PEARSON.

Gwynne J.

claiming it as his own, and whether he and those claiming under him did or not exercise acts of ownership over it, claiming it as their own property continuously from the time of the assignment by Coughlan of his lease, were likewise questions for the jury to decide, and which in their determination could not be affected by any opinion the jury might entertain upon the question whether the road claimed as the boundary between the lands in the possession of the plaintiff and defendant respectively was or not on a line run in 1820. All these were essentially questions for the jury alone to pass upon, and to say that there was no evidence to leave to them upon the question of title by possession with defendant was to ignore almost the whole of the evidence. The authorities upon this point are numerous and uniform.

Where persons are in possession of adjoining lands whose visible dividing line is a fence or a road or a river (it matters not which), and exercise acts of ownership up to such dividing line, each is deemed to be in possession of the land on his side of and up to such dividing line, although upon a survey it might be found that a piece of land of which he was seized in fee by his paper title extended across and into the land on the other side of the fence or road or river from that on which the residue of his land lies and possession up to and according to the visible dividing line will perfect a title under the statute of limitations. *Dennison* v. *Chew* (1); *Doe Dunlop* v. *Serbos* (2); *Doe Quinsey* v. *Caniffe* (3); *Doe Taylor* v. *Sexton* (4).

In the present case the jury should have been told that if they believed the evidence as to the acts of ownership and possession exercised by the Sherren's on the *locus in quo* (and as to which there was no

(1) 5 U. C. O. S. 161.
(2) 5 U. C. R. 284.
(3) 5 U. C. R. 602.
(4) 8 U. C. R. 264.

1887

SHERREN v. PEARSON.

Gwynne J.

contradictory evidence) they should find for the defendant. *Doe Shepherd* v. *Bayley* (1) is an authority to this effect.

In *Dundas* v. *Johnston* (2) Draper C.J. says:

I have always thought that as against the real owner squatters acquire title by twenty years occupation of no more land than they actually have occupied or, at least, over which they have exercised continuous and open notorious acts of ownership, and not mere desultory acts of trespass in respect of which the true owner could not maintain ejectment.

And he adds:—

We agree with the learned judge who tried this case that it must depend upon the circumstances of each case whether the jury may not, as against the person having legal title, properly infer the possession of the whole land covered by such title in favor of an actual occupant, although his occupation by open acts of ownership, such as clearing, fencing and cultivating has been limited to a portion less than the whole.

In *Hunter* v. *Farr* (3) the same learned judge says:

If without title one enters on a lot which is in a state of nature, clearing and fencing a few acres only, leaving the rest open and unimproved, the actual possession of the part will not alone in my opinion draw to it the possession of the other part. I do not say what may be the effect of continuous acts of ownership over the residue though unenclosed and uncleared, but here there is no such evidence to rest upon.

In *Heyland* v. *Scott* (4) Hagarty C.J. says:

We are not prepared to hold that unenclosed woodland in this country can never be the subject of twenty years possession; if fencing and cultivation can alone constitute a possession then title to open woodland can never be acquired against the true owner. To put an extreme case—if a man posted caretakers or sentries every day to patrol the bounds of an unfenced lot, rigidly driving off all trespassers and thus preserving the whole for the exclusive use of their employer, could it still be said that twenty years of such proceedings would not bar the true owner. If this can confer a possessory title then the question becomes one only of degree.

In *Davis* v. *Henderson* (5) citing Erle J. in *Stevenson* v. *Newnham* (6) Wilson J. delivering the judgment of the court says:

(1) 10 U. C. R. 319.
(2) 24 U. C. R. 550.
(3) 23 U. C. R. 327.
(4) 19 U. C. C. P. 172.
(5) 29 U. C. R. 353.
(6) 17 Jur. 600.

The term "possession" has no definite meaning.

And he proceeds to discuss the question—

What is there to be done to constitute possession of wild land? If the rightful owner enter upon any part of it he enters in law upon the whole of it. If after such entry another forcibly turns him off and keeps him off for twenty years and during all that time the wrong-doer lives on the land and cultivates as much of it as he requires, but leaves the half of it in a state of nature, is not this extrinsic evidence without more of a disseisin of the whole lot? So if another believing he is rightful owner enters on a lot, claiming to be the owner of it all—lives there for 20 years and clears a part of the land, leaving the rest of it as wild land, is not this without more evidence of possession of the whole lot the wild as well as the cleared land? So if a squatter who is generally understood to be a person without right or color of right, enters on land claiming the whole lot, and occupies it for 20 years cultivating part and leaving uncultivated the rest of the lot, taking his fire-wood and farm timber from it as he requires it, and using it in all respects just as the owner himself would if he were there, and just as all owners usually do use their wild land, is not this evidence of possession of the whole lot wild land and all? The instances above mentioned of the various kinds of possession show that all that is required in order to constitute possession of land is that such a seisin, enjoyment, occupation or benefit be had of the property, which the property is capable of according to its nature or character. Now how is wild land to be possessed? It is settled that it need not be enclosed—what better test can there be of its possession than the person whose possession is questioned should have used it just the same as any other owner uses his wild land—by asserting title to it, by giving licenses to cut timber from it or to pass over it—by excluding others from cutting on it or travelling over it at his pleasure—by preserving the timber upon it though he has never cut a stick himself, or by any other acts or evidence from which it may fairly be presumed he has taken the possession of the woodland as well as of the cleared. To require more or greater possession than this will be to defect the beneficial object of the statute of limitations, which was to secure peace and to put an end to litigation by extinguishing these dilatory claims.

He concludes by expressing his opinion upon the question in such cases to be submitted to a jury:—

In my opinion when any person enters on a lot or half lot or any defined piece of land, wild, or partly cleared and partly wild under color of right or otherwise, and holds possession for the statutable period the question for the jury should always be as to the wild land whether the person whose possession is in question has claimed

1887

SHERREN v. PEARSON.

Gwynne J.

or held the wild land as owner, and has used it in like manner as the owners of land who have uncleared and unenclosed portions on the lots they occupy usually use their wild lands by such acts of ownership as owners are accustomed to exercise, or whether the acts of the person in question have been the acts of a mere trespasser not done and not intended to have been done in the assertion of right, title or ownership.

In *Mulholland* v. *Conklin* (1) the Court of Common Pleas for Ontario entirely adopted the views as expressed in the above judgment.

Now in the case before us the evidence is that in the month of August, 1841, by the indenture of lease of the 27th of that month, Coughlan became possessed for a term of 999 years of a portion of Township 29 in Queen's County, in Prince Edward Island, the southern boundary of which portion was a road opened, travelled on and known as the Palmer road. There is a mass of evidence that the only road known as the Palmer in 1841 was that which is the southern road on the ground at the *locus in quo* and that Coughlan entered upon and held the land demised to him up to that southern road as his boundary, and that he continued to exercise acts of ownership upon the small piece now in dispute equally as upon the residue of the land by cutting timber thereon and using it as an owner of woodland would do until 1851 when he assigned the residue of his term and the land possessed by him in virtue thereof to one Sherren who entered upon and possessed and held the land as Coughlan had up to this same south road, claiming it to be the southern boundary of the land demised by the lease to Coughlan, and that Sherren and his assigns thenceforth during every year for thirty-five years exercised acts of ownership upon the small piece now in dispute equally as on the residue of the land by cutting timber thereon, and using and claiming right to use it as part of the land of which they were possessed

(1) 22 U. C. C. 373.

1887

SHERREN v. PEARSON.

Gwynne J.

under the demise to Coughlan and that during all that time neither the plaintiff's husband, under whom the plaintiff claims, nor the plaintiff herself, nor any person interfered with the exercise of such acts of ownership by Coughlan or his assignees the Sherrens or claimed to have any interest in the *locus in quo* adverse to them. The evidence also shows that in 1851, before the assignment to Sherren, a new road was made on the land in possession of a tenant of Coughlan, but such new road which is now the north road on the ground could not alter the character of the possession of Coughlan up to the time of its being made, nor of his assignees after it was made up to the south road as and being the boundary as claimed by them of the land in their possession. It is impossible to say that this was not evidence to be submitted to the jury or that it was not sufficient if believed by the jury to have entitled the defendant to a verdict in his favor upon the question of possession conferring title under the statute of limitations. Indeed, Mrs. Hall who was the only witness to the acts which are relied upon as acts of trespass admits that those acts were done by the Sherrens in assertion of ownership, that is to say, *animo domini*. But for a judge to pronounce acts done every year during a period exceeding 35 years in assertion of ownership to be mere isolated, desultory acts of trespass and not to be matter to be submitted to a jury as evidencing possession of the land upon which the acts in assertion of ownership were so done, is such a usurpation of the province of the jury as entitles the defendant *ex debito justitiæ* to a new trial. *Prudential Assurance Co.* v. *Edmonds* (1).

The case of *McConaghy* v. *Denmark* (2), was cited on behalf of the plaintiff, but that case has no application

(1) 2 App. Cas. 508.

(2) 4 Can. S. C. R. 609.

1887

SHERREN v. PEARSON.

Gwynne J.

whatever to the present. The action was brought in 1878 and the defendants pleaded *liberum tenementum* in themselves. They had no paper title and could therefore only prove their plea by shewing possession for twenty years, to the exclusion of the rightful owner under the statute of limitations, which statute in the province of Ontario where the land lay enacted that in case lands granted by the crown of which the grantee, his heirs or assigns had not taken actual possession by residing upon or cultivating some portion thereof, should when in a state of nature be taken possession of by some person not claiming under the grantee of the crown, the statute should not begin to run against the grantee of the crown his heirs or assigns, unless it should be shown that such grantee, &c., while entitled to the lands had knowledge of the same being in the actual possession of such other person, but should only begin to run from the time that such knowledge was obtained. The defendant, Francis McConaghy, having been examined as a witness admitted that he had never lived upon the land (he lived in fact in an adjoining township), and that he had never entered on the land until within the last few years, since 1835, except occasionally to cut some timber suitable for use in his trade as a cooper; and it appeared that even for this purpose he had not entered on the land since 1840. There was evidence to show that other persons with whom the defendants did not claim privity had been in possession of part of the land but none of these appeared to have ever seen or to have been aware of McConaghy's entrance upon the land for the purpose of cutting and of his cutting the timber upon the occasions spoken of by him—the possession which the parties who had been in possession of the land prior to 1845 lacked the essential condition to the statute of limitations beginning to run against the

grantee of the crown, for it did not appear that such grantee or any person claiming under him had entered upon the land by residing thereon or cultivating any portion thereof or had any knowledge of any other person having taken possession thereof. In 1845 an entry was made upon the land by one acting for the grantee of the crown, and from that time down to the commencement of the action the possession was that of persons claiming under the persons through whom also the plaintiff claimed. The learned judge who tried the case alone as a jury rendered a verdict for the plaintiff, holding that upon the above evidence the defendants had not acquired title to the land under the statute of limitations, and this court was of opinion that he could not with propriety have rendered any other verdict. It is obvious that a judgment rendered upon such a state of facts as appeared in that case can have no application in the present case. The entries of Francis McConaghy upon the land in that case to cut the timber which he said he did cut had more the appearance of acts done *animo furandi* than *animo domini*.

Appeal dismissed with costs.

Solicitor for appellant: *Edward J. Hodgson.*

Solicitor for respondent: *Francis L. Haszard.*

1887
*Feb. 15.

THE SOVEREIGN FIRE INSURANCE CO. (DEFENDANTS)..... } APPELLANTS;

AND

WILLIAM C. MOIR, JAMES W. MOIR AND JAMES R. GRAHAM (PLAINTIFFS)..... } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Fire Insurance—Condition in policy—Not to carry on hazardous or extra hazardous business—Violation of condition—No increase of risk.

A policy on a building described in the application for insurance as a spool factory contained the following conditions:—

"That in case the above described premises shall at any time dur-
"ing the continuance of this insurance, be appropriated or
"applied to or used for the purpose of carrying on or exercising
"therein any trade, business or vocation denominated hazard-
"ous or extra hazardous or for the purpose of storing, using or
"vending therein any of the goods, articles or merchandise
"denominated hazardous or extra hazardous unless otherwise
"specially provided for, or hereafter agreed to by the defendant
"company in writing or added to or endorsed on this policy,
"then this policy shall become void.

"Any change material to the risk, and within the control or know-
"ledge of the assured, shall void the policy as to that part
"affected thereby, unless the change is promptly notified in
"writing to the company or its local agent."

Held, reversing the judgment of the court below, that the introduction, without notice to the company, of the manufacture of excelsior into the insured premises, in addition to the manufacture of spools, avoided the policy under these conditions, the evidence establishing clearly and there being no evidence to the contrary, that such manufacture in itself was a hazardous, if not an extra hazardous business, notwithstanding that on the trial of the action on the policy the jury found, in answer to questions submitted to them, that such additional manufacture was less hazardous than that of spools and did not increase the risk on the premises insured.

---

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

1887

SOVEREIGN FIRE INSURANCE CO. v. MOIR

APPEAL from a judgment of the Supreme Court of Nova Scotia (1) refusing to set aside a verdict in favor of the plaintiffs (respondents).

This is an action on a policy of insurance bearing date 19th November, 1880, issued by defendant company to William C. Moir and James W. Moir, insuring "the machinery in spool factory, situate at Bedford Basin," in the sum of $3,000. The policy was renewed for one year from the 27th of October, 1881.

In the application for insurance, which, by its terms, is made a part of the policy, the building containing the machinery insured is thus described:

"*g*. For what purpose is building used? As a spool factory.

"*h*. What kind of goods are made and of what material? Spools made of hardwood.

"3. *a*. How occupied—Give full description under heading referring to class of property sought to be covered? Spool factory."

The policy contained the following, among other, conditions:

"And it is agreed and declared to be the true intent and meaning of the parties hereto, that in case the above described premises shall at any time during the continuance of this insurance be appropriated, or applied to, or used, for the purpose of carrying on or exercising therein any trade, business or vocation denominated hazardous or extra-hazardous; or for the purpose of storing, using or vending therein any of the goods, articles or merchandize denominated hazardous or extra-hazardous, unless otherwise specially provided for, or hereafter agreed to by this company in writing, or added to or endorsed on this policy, then this policy shall become void.

"2. Any change material to the risk, and within the

(1) 6 *Russ.* v. *Geld.* 502.

1887

SOVEREIGN FIRE INSURANCE CO. v. MOIR.

control or knowledge of the assured, shall avoid the policy as to that part affected thereby, unless the change is promptly notified in writing to the company or its local agent; and the company when so notified may return the premium for the unexpired period and cancel the policy or may demand in writing an additional premium, which the insured shall, if he desire the continuance of the policy, forthwith pay to the company, and if he neglect to make such payment forthwith after receiving such demand, the policy shall be no longer in force."

After the issue of the policy the insured, in addition to the manufacture of spools, manufactured on the said premises excelsior, made from wood cut by machinery into shreds and used for upholstering, and also stored such excelsior, after it had been pressed into bales, on the premises.

The machinery insured having been destroyed by fire the company refused payment of the policy on the ground that the manufacture of excelsior in the said building was a breach of the above conditions and rendered the policy void. On the trial of an action for the insurance in which the defence relied wholly on the ground just stated, evidence was offered as to the manufacture of excelsior as an insurance risk, and the relative risk between its manufacture and that of spools. Certain questions were submitted to the jury, and among them were the following:—

"Q. Which is the more hazardous risk, if any, the manufacture of spools or the manufacture of excelsior? A. The manufacture of spools.

"Q. Is the risk increased by adding the manufacture of excelsior to that of spools in the same building? A. No."

A verdict was found for the plaintiffs for the amount insured by the policy and interest, which verdict was

1887

SOVEREIGN FIRE INSURANCE CO. v. MOIR.

sustained by the Supreme Court of Nova Scotia. The company then appealed to the Supreme Court of Canada.

Henry Q.C. for the appellants.

If there is a breach of the condition in the policy it is void even if the risk is not thereby increased.

Excelsior is a particularly hazardous article, and its manufacture is a clear breach of the condition. *Lee* v. *Howard Insurance Co.* (1).

Borden for the respondent.

There is no evidence that excelsior is hazardous and the verdict could only be interfered with on that ground by sending the case to another jury.

But there is no necessity for a new trial as the jury have found that the risk was not increased by the change and the company, therefore, are not prejudiced.

Refers to Wood on Insurance, sec. 233 *Stokes* v. *Cox* (2).

Sir W. J. RITCHIE C.J.—Where there is a condition like this annexed to a policy I think that, independent of the representations, it forms a stipulation in the policy itself, and it seems to me that the question to be determined is: What was the condition?

The respondent agreed that he would not allow the insured premises to be used for carrying on any business denominated hazardous or extra-hazardous, or for storing any goods or articles so denominated. Then the question is: Did he allow the premises to be so used?

He placed in the building in question, in addition to the spool factory which, by the express terms of the application for insurance and the policy, was what was insured, facilities for the manufacture of excelsior, and the evidence seems to me clear that that was a hazard

(1) 3 Gray (Mass.) 583. (2) 1 H. & N. 320, 533.

1887

SOVEREIGN FIRE INSURANCE CO. v. MOIR.

Ritchie C.J.

ous business, and being such there was a breach of the conditions of the warranty. It seems to me clear that the evidence shows this beyond all reasonable doubt, and there is no evidence to the contrary. And there is further evidence of the hazardous character of the business in the rate of premium which is charged for insuring premises in which it is carried on. The condition of warranty was not complied with, and therefore, by well known principles of insurance, the defendants were relieved.

The plaintiff offered no evidence, either in his own case or in reply, to show that the evidence given by defendants as to the character of this business was in any way incorrect, and that it was not a hazardous, or extra-hazardous business.

For these reasons I think it is our duty to give the judgment which should have been given by the court below and allow the appeal.

STRONG J.—Concurred.

FOURNIER J.—I think this is a very clear case of a breach of the warranty in the policy, and the appeal should be allowed.

HENRY J.—The contract that these parties entered into was clearly to insure a building used for the manufacture of spools, and the policy contained a warranty that no material change from that manufacture, calculated to increase the risk, should be made, otherwise the policy was to be void.

The only question to be put to the jury was, whether the manufacture of excelsior was hazardous or not. I would almost go further, and say that it was the duty of the judge, after that question was answered, to have found, not a verdict for the plaintiff, but a verdict for the defendants.

1887

SOVEREIGN FIRE INSURANCE CO. v. MOIR.

Henry J.

The contract, as appears from the application, was that the company should insure a building used for the manufacture of spools.

I think the evidence was quite strong enough to enable the jury to arrive at the conclusion that the risk was increased. The question simply was: Was the new business hazardous? Not: Was it more hazardous than the other? If that question had been submitted to the jury, and the evidence admitted of a doubt, the jury could have exercised the judgment upon it.

I think this court must give the judgment that should have been given in the court below, and I therefore concur in allowing the appeal.

GWYNNE J.—The 14th plea expressly raises a question which determines the case. If manufacturing excelsior or keeping it on the premises is a risk denominated hazardous or extra-hazardous the policy is by its express terms avoided unless the company be notified, and an increased premium be paid, and the evidence does establish the manufacture to be extra-hazardous. I concur therefore in allowing the appeal.

Appeal allowed with costs.

Solicitors for appellants: *Henry, Ritchie & Weston.*

Solicitors for respondents: *Graham, Tupper, Borden & Parker.*

THE PICTOU BANK AND DOUGALD LOGAN (DEFENDANTS)..... } APPELLANTS;

AND

CHARLES H. HARVEY (PLAINTIFF).....RESPONDENT.

1887

* Feb. 16, 17.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Sale of goods—Delivery—Non-acceptance by vendee—Return of goods to vendor—Rescission of contract—Re-sale.

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

1887

PICTOU BANK v. HARVEY.

H. doing business at Halifax, N.S., was accustomed to sell hides to J. L. of Pictou. Their usual course of business was for H. to ship a lot of goods consigned to J. L., and send a note for the price according to his own estimate of weight, &c., which was subject to a future rebate if there was found to be any deficiency.

On July 14, 1884, a shipment was made by H. in the usual course and a note was given by J. L., which H. caused to be discounted. The goods came to Pictou Landing and remained there until August 5th, when J. L. sent his lighterman for some other goods and he finding the goods shipped by H. brought them up in his lighter. The next day J. L. was informed of their arrival and he caused them to be stored in the warehouse of D. L. where he had other goods, with instructions to keep them for the parties who had sent them. The same day he sent a telegram to H. as follows: "In trouble. Have stored hides. Appoint some one to take care of them." H. immediately came to Pictou and having learned what was done, expressed himself satisfied. He asked if he would take the goods away, but was assured by J. L. that they were all right and left them in the warehouse.

On August 6th a levy was made, under an execution of the Pictou Bank against J. L., on all his property that the sheriff could find but the goods in question were not included in the levy. On August 12th J. L. gave to the bank a bill of sale of all his hides in the warehouse of D. L., and the bank indemnified D. L. and took possession under such bill of sale of the hides so shipped by H. and stored in said warehouse. In a suit by H. against the bank and D. L. for the wrongful detention of said goods:

Held,—Affirming the judgment of the court below, that the contract of sale between J. L. and H. was rescinded by the action of J. L. in refusing to take possession of the goods when they arrived at his place of business and handing them over to D. L. with direction to hold them for the consignor, and in notifying the consignor who acquiesced and adopted the act of J. L., whereby the property in and possession of the goods became re-vested in H.; and there was, consequently, no title to the goods in J. L. on August 12th when the bill of sale was made to the bank.

APPEAL from a decision of the Supreme Court of Nova Scotia, sustaining a verdict for the plaintiff.

This was an action commenced in the Supreme Court of Nova Scotia, at Pictou, for the conversion of 162 hides and for damages for the detention of the same. The defendants appeared and denied the con-

version and detention. They also denied the title of the plaintiff to the property and alleged title in the Pictou Bank, one of the defendants.

The plaintiff prior to the transaction out of which this action arose did business in Halifax, and was in the habit of shipping hides to one John Logan, a tanner, near the town of Pictou. The course of business seems to have been for the plaintiff to ship whatever hides he had for sale to Logan, and as soon as the shipment was made to forward an invoice and note for the amount named in it; on receipt of the invoice and note, Logan signed the latter and returned it to the plaintiff by mail. It also appears that by arrangement between Logan and the plaintiff, the hides should be accepted, and whatever was wanting in weight and quality should be the subject of a rebate to be made to Logan by Harvey.

On the 14th July, 1884, the plaintiff forwarded from Halifax, addressed to "John Logan, Pictou," 162 hides, the bill of lading, given by the agent of the Intercolonial railway, providing that they were to be carried to Pictou station. The hides were put off at the land terminus of the railway at Pictou Landing, on the south side of the harbour from Pictou station, and remained there until the 5th of August, 1884. On that day Logan's lighterman, John Cameron, was sent by Logan with the lighter to Pictou landing for a carload of vitriol. He was not told to bring anything else but finding the hides there he took them in his lighter. Logan did not see them until the next day, the 6th, when the tannery stopped work: and in the morning he sent for the lighterman and told him he "was in "trouble and that he had better put the hides in separ- "ate lots just as he got them from the railway and put "them in Dougald Logan's store" which was done. The same day, August 6th, he sent the following

1887

PICTOU BANK v. HARVEY.

telegram to Harvey: "In trouble, have stored hides, "appoint some one to take charge of them." Harvey came to Pictou, the hides were stored for him, and he expressed himself as satisfied. He asked if he had not better take them away but was told that they were all right, and he returned to Halifax, and left them there.

The hides were landed from the lighter and stored between seven and nine o'clock, a.m., on Aug. 6th On the same day the deputy sheriff with an execution on a judgment by confession in the suit of *Pictou Bank* v. *John Logan*, levied on all the property of John Logan, but did not levy on the hides. He applied to Dougald Logan for permission to enter the warehouse and get the hides but was refused. On the 7th an agreement was entered into between the bank and Logan by which he was to give a deed of assignment of all his property which he had under his possession or control and embracing all his personal property now held bound by the said execution, and agreed to deliver into possession of the Pictou bank or its agents all the personal estate, property and effects to be transferred by such deed. Logan became the bank's agent or servant under the terms of the agreement and superintended the business thenceforth for the bank. On the 12th of August Logan executed and gave to the Pictou bank an assignment of his property to pay the bank the amount due. It contained a schedule and there is a general clause ending as follows :—" Also all the hides and sole leather owned by the said John Logan, or stored by him in any buildings, warehouse or store-room of Dougald Logan, or in his keeping."

" All the personal property assigned by the foregoing deed poll or bill of sale and schedule, has been this day delivered into the actual possession of William B. O. Meynell, as agent for the Pictou bank, and it is now in his possession in the tannery and on lands and premises

owned by the bank."

The particular hides in question had not been that day delivered into the actual possession of Meynell or the bank and were not delivered at all until over a month afterwards viz., the 25th of September when Dougald Logan gave them up to the Pictou bank upon receiving a bond of indemnity. They were manufactured by the Pictou bank.

Harvey brought an action and recovered a verdict, which was sustained by the Supreme Court of Nova Scotia.

The defendants then appealed to the Supreme Court of Canada.

Sedgewick Q.C. for the appellants.

The property had vested in Logan and there must be a formal re-sale to Harvey to give him a title. Being Logan's property they passed to the bank under the bill of sale. The following authorities were cited: *Bushel* v. *Wheeler* (1); *Bentall* v. *Burn* (2); Benjamin on Sales (3).

Borden for the respondent cited *Sturtevant* v. *Orser* (4); *Grout* v. *Hill* (5); Benjamin on Sales (6).

Sir W. J. RITCHIE C.J.—I think there was a clear re-sale in this case; in fact, I think as strong a case of re-sale as could be made. These goods were shipped from Halifax and came to Pictou Landing, but were not taken from thence, or received by the consignee or taken away by his orders. The consignee sent over to obtain delivery of other property, and the goods in question were brought with the property so sent for. They arrived at their place of destination in Pictou on the evening of the 5th of August. The consignee was not aware that they had arrived until the next morn-

(1) 15 Q. B. 443.
(2) 3 B. & C. 423.
(3) P. 134.
(4) 24 N. Y. 538.
(5) 4 Gray (Mass.) 361.
(6) P. 392.

1887

PICTOU BANK v. HARVEY.

Ritchie C.J.

ing. When informed he immediately, then and there repudiated the receipt of the goods and gave directions that they should, with other goods belonging to other parties under similar circumstances, be deposited in the warehouse of his brother, with whom he does not appear to have had any business connection, with instruction to be kept there for the benefit of the parties who had shipped them from Halifax. His brother put a lock on the door of the warehouse and the consignee Logan says those goods were never in his possession, and that on the 12th of August, when the bill of sale was executed, they were not, and never had been, in his possession. He immediately communicated with Harvey in Halifax informing him that he had stored the goods and asking him to appoint some person to take charge of them, whereupon Harvey came to Pictou and was informed by Logan that the hides had come up in the lighter on the day previous, and that he (Logan) had stored them in Dougald's store for him (Harvey). Logan says:—

The hides reached my place on the 5th August, 1884, between five and six in the evening. I did not see them that evening nor next day. On the morning of the 6th, early, I sent for John Cameron, who brought them there. I told him I was in trouble, and that he had better get the boys and put the hids in separate lots just as he got them from the railway, and put them in Dougald Logan's store. I said they belonged to different parties and I wanted them returned to them. I never saw these hides sent by Harvey, or took any possession of them. I told my brother Dougald to keep them for the parties who had sent them. I told him who the parties were. He agreed to take possession of them for the parties and did so, and he locked the building. He got a lock and put it on the door. Never had after that the hides in my possession, or under my control. I wired the different parties next morning.

Harvey asked if he should take the goods away and Logan assured him that they were all right. He clearly assented to what Logan had done, and it is equally clear that the goods were held by Dougald Logan for Harvey whereby the contract was, to all intents and

purposes, rescinded.

Under these circumstances, inasmuch as the defendants in this case claim under a bill of sale executed on the 12th of August, I think that at that time there was no property in these goods in John Logan which he could transfer under the bill of sale.

The plaintiff has made out his title to the goods and I think the appeal should be dismissed.

1887

PICTOU BANK v. HARVEY.

Ritchie C.J.

STRONG, FOURNIER and HENRY JJ. concurred.

GWYNNE J.—It appears to be undisputed that the moment the consignee had notice of the arrival of the goods, which it is to be observed he had not ordered, he intending that the goods should get back to the plaintiff repudiated their receipt and placed them in a warehouse for the plaintiff and as his property and notified him thereof by telegram, and the warehouseman received them as the property of and for the plaintiff, and the same day the plaintiff and the consignee came together when the plaintiff assented to and adopted the act of the consignee. Under these circumstances I am of opinion that the possession of the warehouseman was the possession of the plaintiff who became repossessed of the goods as his own property prior to the 12th of August, and as the defendants only claim goods which were the property of Logan the consignee of the goods in question, at the time of the execution by him to the bank of the deed of the 12th of August under which alone the defendants claim, the plaintiff is entitled to prevail.

Appeal dismissed with costs.

Solicitors for appellants: *Sedgewick, Ross & Sedgewick.*

Solicitors for respondent: *Graham, Tupper, Borden & Parker.*

1886
*Nov. 23.
1887
*March 14.

WILLIAM SHOOLBRED.....APPELLANT;

AND

THE UNION FIRE INSURANCE CO. *et al*.....RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Company—Winding up order - Notice to creditors, &c.—45 *V. c.* 23 *s.* 24.

It is a substantial objection to a winding up order appointing a liquidator to the estate of an insolvent company under 45 Vic. ch. 23, that such order has been made without notice to the creditors, contributories, shareholders or members of the company as required by sec. 24 of said act (1), and an order so made was set aside, and the petition therefor referred back to the judge to be dealt with anew.

Per Gwynne J. dissenting, that such an objection is purely technical and unsubstantial, and should not be allowed to form the subject of an appeal to this court.

APPEAL from a decision of the Court of Appeal for Ontario (2) affirming the judgment of the Chancery Division (3), whereby the petition of William Shoolbred was dismissed.

In 1881 proceedings were instituted for the purpose of winding-up under the provisions of 45 Vic. ch. 23 as amended by 47 Vic., ch. 39 (the winding-up acts) the Union Fire Insurance Company which was already insolvent, and in the hands of a receiver under ch. 160 R. S. O., and in January, 1885, a winding-up order was granted by Mr. Justice Proudfoot which contained the following among other provisions:—

"1. This court doth declare that the said the Union

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

(1) Sec. 24 is as follows: The court in making the winding-up order must appoint a liquidator * * * but no such liquidator shall be appointed unless previous notice be given to the creditors, contributories, shareholders and members in the manner and form prescribed by the Court.

(2) 13 Ont. App. R. 268.

(3) 10 O. R. 489.

1886

SHOOLBRED v. UNION FIRE INS. CO.

Fire Insurance Company is an insurance company within the meaning of the said act and is insolvent under the provisions thereof, and doth order and adjudge that the business of the said company shall be wound up by this court under the provisions of the said act and the amendments thereto.

"2. And this court further order and adjudge that William Badenach, of the City of Toronto, Esquire, accountant, the receiver heretofore appointed in the said case of *Clarke* v. *The Union Fire Insurance Company*, be and he is hereby appointed interim liquidator of the estate and effects of the said company.

"3. And this court doth further order that it be referred to the master in ordinary of the Supreme Court of Judicature to appoint a liquidator of the estate and effects of the said company, and to fix and allow the security to be given by the said liquidator and the remuneration payable to him and the said interim liquidator.

"4. And this court doth further order that it be referred to the said master to settle the list of contributories, take all necessary accounts and make all necessary enquiries and reports for the winding up of the affairs of the said company under the provisions of the said act and amending acts."

Shoolbred, a shareholder and creditor of the said company, filed a petition in the Chancery Division, praying to have the said winding up order set aside, principally on the grounds that the court must appoint the liquidator and cannot delegate the authority of appointment to the master, and that a notice of the petition for such order was not given to the creditors, contributories and shareholders of the company as required by 45 Vic. ch. 23, sec. 24.

The petition was heard before Mr. Justice Proudfoot who ordered it to be dismissed, and on appeal to the

1887

SHOOLBRED v. UNION FIRE INS. CO.

Ritchie C.J.

Court of Appeal the judgment of Proudfoot J. was affirmed, the court being equally divided. The petitioner then appealed to the Supreme Court of Canada, having applied to Mr. Justice Strong in chambers for leave to appeal, which was granted.

W. Cassels Q C. and *Walker* for the appellant, cited Thring on Joint Stock Companies (1); *In re Agriculturist Cattle Ins. Co.* (2).

Bain Q C. for the respondents referred to *In re General Financial Bank* (3); Buckley on Joint Stock Companies (4).

SIR W. J. RITCHIE C. J.—I cannot see my way clear to ignore what appears to me to be the plain meaning of section 24 of this statute which declares that:

The court in making the winding up order must appoint a liquidator, or more than one liquidator, of the estate and effects of the company, but no such liquidator shall be appointed unless previous notice be given to the creditors, contributories, shareholders and members in the manner and form prescribed by the court.

I agree with Mr. Justice Osler that we should attribute to these words their natural and ordinary meaning, and that which can be given to them without doing violence to any other section of the act.

In agreeing generally with what Mr. Justice Osler says on this point, I must except his observations as to the purely technical and unmeritorious character of the objection. It appears to me that the want of notice contemplated by sec 24 is a very substantial matter.

I think the winding up order must be set aside and the petition referred back to the learned judge to be dealt with as he may think right.

STRONG J.—I agree with the judgments delivered by Burton and Osler JJ. in the Court of Appeal,

(1) 4 Ed. p. 227, sec. 92 and pp. 273, 384.
(2) 3 DeG. F. & J. 194.
(3) 20 Ch. D. 276.
(4) P. 520.

though I am unable to agree that the objection is of a mere technical character; on the contrary I think it a very substantial one.

FOURNIER J.—I concur in the judgment of the learned Chief Justice.

HENRY J.—I have arrived at the same conclusion. I entirely agree with the learned Chief Justice and my brother Strong that the judgment of Burton and Osler JJ. ought to be the judgment of this court with the exception of that part which refers to the objection as being one of an unsubstantial and technical character. I consider that the statute has some meaning and was intended to have some effect and, without going into the reasons why the parties were to be benefitted by it, I think it is enough for us to find that the statute was to confer a benefit and, I think, we are bound to presume that it was so intended.

Under the circumstances I think the judgment of Mr. Justice Osler, with the exception I have mentioned, should be adopted by this court.

TASCHEREAU J.—I would allow this appeal. The objections assigned by the appellant against the order of the 27th of January, 1885, are far from being technical and unmeritorious. If the respondent's contentions were maintained proceedings of the most important nature might be taken without notice to the shareholders or creditors of a company, who would thus be deprived of the most important safeguards that the legislature has enacted for their protection.

The order complained of cannot be supported either under the act of 1882 or that of 1884. It could not be made without appointing a liquidator, and as no liquidator could be appointed without notice to the creditors, contributories, shareholders, and members of

1887

SHOOLBRED v. UNION FIRE INS. CO.

Taschereau J.

the company, the order itself could not be made without such notice.

I am of opinion that the prayer of the petition of Shoolbred should be granted and that the order in question should be vacated and discharged. The appeal should be allowed with costs in all the courts against the respondents, including those in the court of appeal.

GWYNNE J.—The main ground of appeal taken by the appellant is one relating to procedure only, and is so purely technical that I doubt the propriety of an appeal in respect of it being entertained at all. The point is one which raises merely the question—What is the proper time for serving notice upon the creditors, contributories and shareholders of an insolvent trading company of an application for the appointment of a liquidator of the company in liquidation under the Dom. Stat. 45 Vic. ch. 23, as amended by 47 Vic. ch. 39? And what is the proper manner of making the appointment? Must the notice for the appointment of a liquidator be given before the company is put into liquidation and must the appointment be made in the order for winding up the company? or may the notice be given upon the order which puts the company into liquidation being made, and may the liquidator be appointed by a separate order according to the ordinary procedure of the Chancery Division of the High Court of Justice in Ontario in a similar case as in the appointment of a receiver, &c.? The appeal if it should be allowed will decide nothing but a point of practice and the costs of the appeal, for immediately upon the appeal being allowed notice may be given and the appointment may be made in the manner this court should direct, and the same end will be attained as that which has already been attained, in

1887

SHOOLBRED v. UNION FIRE INS. CO.

Gwynne J.

the manner adopted by the Chancery Division of the High Court of Justice, in Ontario. The entertaining an appeal in a question of this nature seems to me to tend rather to the obstruction, than to the advancement, of justice; and there is, in my opinion, no foundation for the contention that the point appealed comes within the provisions of the 78th section of the act of 1882, which prescribes the only cases in which an appeal is by the statute allowed. However if the point were appealable and had to be entertained I concur in the construction put upon the 24th section of 45 Vic. ch. 23, as amended by 47 Vic. ch. 39, by Mr. Justice Proudfoot in the Divisional Court, and by Mr. Justice Patterson in the Court of Appeal. But apart wholly from that section the winding up order is, in my opinion, a perfectly good order within the 2nd and 3rd sections of 47 Vic. ch. 39, which sections and not the 13th, 14th and 24th sections of the act of 1882, as amended by the act of 1884 are the only sections applicable to the present case. The 13th, 14th and 24th sections apply to the case of an insolvent company about to be put into liquidation originally, under the act of 1882, while the 2nd and 3rd sections of the act of 1884 apply to the case of a company already in liquidation or in process of being wound up at the time of the passing of the act of 1882, which the company here was, being brought within and under the provisions of that act.

Now upon this point the act of 1884 enacts that when, at the date of the passing of the said act of 1882, a company was in liquidation or in process of being wound up any shareholder, creditor, assignee, receiver or liquidator of such company might apply by petition to the court, asking that the company be brought within and under the provisions of the said act, and the court may make such order, and that in making

1887

SHOOLBRED v. UNION FIRE INS. CO.

GWYNNE J.

such order the court may direct that the assignee, receiver or liquidator of such company, if one has been appointed, shall become the liquidator of the company under the said act, or may appoint some other person to be liquidator of the company. This was the proceeding taken in the present case. Two creditors of the company presented a petition to the court, setting forth an action brought, and pending in the Chancery Division of the High Court of Justice at the suit of one Clarke a creditor on behalf of himself and all other creditors of the Union Fire Insurance Company plaintiffs, against the Union Fire Insurance Company defendants, and that a judgment was rendered in the said suit on the 7th January, 1882, ordering the winding up of the affairs of the said company, and that one William Badenach had been appointed receiver of the estate and affairs of the said company under the said judgment. Upon that petition the order now under consideration was made whereby among other things the court did:—

Order and adjudge that William Badenach of the city of Toronto, Esquire, accountant, the receiver heretofore appointed in the said case of *Clarke* v. *The Union Fire Insurance Company* be and he is hereby appointed interim liquidator of the estate and effects of the said company.

And the court did further:

Order that it be referred to the Master in Ordinary of the Supreme Court of Judicature to appoint a liquidator of the estate and effects of the said company, and to fix and allow the security to be given by the said liquidator and the remuneration payable to him and to the said interim liquidator.

And the court did further:

Order that the accounts and enquiries heretofore made under the judgments and references to the said Master in the said suit of *Clarke* v. *The Union Fire Insurance Company* including the proceedings to ascertain who are the shareholders in the said company, and the evidence taken in connection with the said proceedings do stand and be incorporated with and used in the said winding up proceedings under this order in so far as the same can properly be made appliable by the said Master in the proceedings before him in the mat-

1887

SHOOLBRED v. UNION FIRE INS. CO.

Gwynne J.

ters of the winding up of the affairs of said company, and that the parties who have contested their liability to be settled on the list of stockholders by the said Master shall be at liberty to apply to the court after the settlement of the list of contributories in this matter for payment of such costs in the said suit of *Clarke* v. *Union Fire Insurance Company* as they may deem themselves entitled to.

Now this order not having been made under the 13th and 14th sections of the act of 1882 but under the 2nd and 3rd sections of the act of 1884 all question, in so far as the order is concerned, as to the proper time for giving the notice referred to in the 24th section of the act of 1882, as amended by the act of 1884, is removed from the case and the objection to the order assumes a new shape. It is admitted that the order as made would be good under the 2nd and 3rd sections of the act of 1884 if the word "interim" had not been inserted in it, and it is contended that the insertion of this word in the order avoids it, that is to say, that if the order had made Badenach "liquidator" instead of "interim liquidator" it would have been free from objection. This objection appears to me to be even more purely technical than the other, and to be utterly insufficient to warrant us to pronounce the order void. An interim liquidator is a liquidator and he must continue as such until removed or another should be appointed in his place in due course of law. The clause of the order, therefore, which appoints the person already filling the office of receiver in *Clarke* v. *Union Fire Insurance Company* to be "interim" liquidator under the order is equivalent to making him liquidator until he should be removed or until another should be appointed in his place in due course of law.

The appellant's contention, moreover, is that the reference to the master to appoint a liquidator is a proceeding not authorized by the statute and is therefore void; well if it be, nothing effectual can be done under it and therefore Badenach cannot be removed

1887

SHOOLBRED v. UNION FIRE INS. CO.

Gwynne J.

from his office as liquidator by anything to be done under it, and if the reference to the master to appoint a liquidator be authorized by the statute, Badenach may be the person so appointed, or if not the person so appointed will still be legally appointed, so that in the interim Badenach is to all intents liquidator, clothed with all the powers attached to such office until he shall be removed in due course of law; and as he can be removed only by a proceeding taken in due course of law there is no one who can have cause of complaint and his appointment as made in the order is warranted by the statute. Anything more technical and more devoid of merit than this objection to the order is, it would, in my opinion, be difficult to conceive. The appeal should, in my opinion, be dismissed with costs.

Appeal allowed with costs.

Solicitors for appellant: *Walker & McLean.*

Solicitors for respondents Scott & Walmsley: *Bain, Laidlaw & Co.*

Solicitors for respondents the creditors: *Foster, Clarke & Bowes.*

Solicitor for company: *G. F. Shepley.*

1886

*NOV. 23.

1887

*JUNE 4.

SAMUEL SEA (PLAINTIFF).....APPELLANT;

AND

ALEXANDER McLEAN AND JAMES STEWART, EXECUTORS, &C., (DEFENDANTS).....RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Sale of land—Unknown quantity—Sold by the acre—Words "more or less"—Executors—Breach of trust.

The executors of an estate were authorized by the will to sell such portion of the real estate as they in their discretion should think

---

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

1886

SEA
v.
MCLEAN.

necessary to pay off a mortgage and such debts as the personal estate would not discharge. They offered for sale at auction a lot described as sixty acres (more or less) section 78, Loch End Farm, Victoria District, and giving the boundaries on three sides. The lot was unsurveyed and was offered for sale by the acre, an upset price of $35 being fixed. By the conditions of sale a survey was to be made after the sale at the joint expense of vendors and purchaser.

S. purchased the lot for $36 per acre and on being surveyed it was found to contain 117 acres. The executors refused to convey that quantity alleging that only some $2,000—was required to pay the debts of the estate, and refused to execute a deed of the 117 acres tendered by S. In a suit by S. for specific performance of the contract for sale of the whole lot:—

Held, reversing the judgment of the court below and restoring that of the judge on the hearing, Gwynne J. dissenting, that S. was entitled to a conveyance of the 117 acres, and that the executors would not be guilty of a breach of trust in conveying that quantity.

APPEAL from a decision of the Supreme Court of British Columbia reversing the judgment of the Chief Justice at the hearing (1) in favor of the plaintiff and decreeing the specific performance of a contract for sale of land.

The defendants were executors of the will of one Robert Anderson, of Victoria District, Vancouver Island, and by the terms of the will were to hold the real and personal estate of the testator in trust for the use of his wife during her life and after her death to sell the same and out of the proceeds pay the debts of the estate and certain specified legacies and divide the residue among the testator's children. The following codicil was annexed to the will:—

"I hereby authorize and empower Alexander McLean and James Stewart the trustees and executors of my said will, to sell and dispose of by public auction or private sale and convey such portion of my real estate as they in their discretion shall think necessary for the purpose of raising money to pay off the existing

(1) 2 B. C. L. R. 67.

1886

SEA v. MCLEAN.

mortgage upon my said real estate and such of my just debts as my personal estate may be insufficient to discharge. In all other respects I confirm my said will."

Under the authority given to them by this codicil the executors proceeded to sell a portion of the testator's real estate and caused the same to be advertised for sale, as follows:—

"ADVERTISEMENT OF SALE.

"AUCTION SALE—REAL ESTATE.

"I have received instructions from Alexander McLean and James Stewart, Esquires, the executors of the late Mr. Robert Anderson, to sell at the salesroom, Yates street, on Friday, the 30th inst., at 12 o'clock, noon, some sixty acres, (more or less), Section 78, Loch End Farm, Victoria District.

"☞ The property to be sold adjoins Mr. Matthias Rowland's land, and has a frontage on the Burnside Road and also on the road commonly known as 'Carey's Road.'

"Deeds at purchaser's expense.

"Terms, cash.

"W. R. CLARKE,

"Auctioneer.

The sale was made subject to certain conditions, among which were the following:—

"6. The property is believed and shall be taken to be correctly described as to quantity and otherwise, and is sold subject to any easements which may be subsisting thereon, and if any error be discovered the same shall not annul the same, *nor shall any compensation be allowed by the vendors or purchaser in respect thereof.*

"8. The vendors will bear half the expense of surveying the property sold."

A plan was produced at the sale showing the land intended to be sold colored pink, and giving the

boundaries as described in the advertisement.

The land was offered for sale by the acre, an upset price of $35 per acre being fixed, and the plaintiff Sea being the highest bidder it was knocked down to him at $36 per acre. A survey was subsequently made according to the plan and the lot was found to contain 117 acres. The plaintiff caused a conveyance to be prepared of that quantity and tendered it, together with the purchase money, to the executors who refused to execute the conveyance, alleging that they only required some $2,000 to carry out the directions in the codicil to the will, and that they only intended to sell about sixty acres to realize that amount. Sea then brought a suit for specific performance of the contract, and on the hearing before the Chief Justice specific performance was decreed. The Supreme Court of British Columbia reversed the judgment of the Chief Justice on the ground that it would be a breach of trust in the executors to sell more than they required to carry out the instructions of the testator as contained in the codicil to his will. The plaintiff then appealed to the Supreme Court of Canada.

Robinson Q.C. and *Eberts* for the appellant cited the following cases:—*Whitfield* v. *Langdale* (1); *Newman* v. *Johnson* (2); *Barker* v. *Barker* (3); *Thomas* v. *Townsend* (4).

No counsel appeared for the respondents.

SIR W. J. RITCHIE C.J.—On the appeal the contract of sale seems to have been admitted to have been for the whole lot, and the only ground on which the full court reversed the decision of the Chief Justice was that the sale of the whole lot was a breach of trust on the part of the trustees and that such

(1) 1 Ch. D. 61.
(2) 1 Vern. 45.
(3) 2 Sim. 249.
(4) 16 Jur. 736.

1887

SEA v. MCLEAN.

Ritchie C.J.

being the case the court would not decree specific performance.

No doubt, generally speaking, a Court of Equity will not enforce, on behalf of a purchaser, a contract by trustees which amounts to a breach of trust, and of which the beneficiaries have a right to complain as a breach of trust. But in this case no question as to a breach of trust was raised by the pleadings or at the trial and, had any such question been raised, I can discover no evidence whatever to sustain any such contention.

By his will the testator appointed McLean and Stewart as follows :—

I appoint Alexander McLean, of the City of Victoria, British Columbia merchant, and James Stewart, of the same place, merchant's clerk, hereinafter called my trustees to be the executors and trustees of this my will.

I give devise and bequeath unto my trustees all my real and personal estate upon the following trusts, namely, after my decease to permit and allow my wife Jessie Anderson, to hold, manage and enjoy the same during the term of her natural life, and at her death to sell and dispose of the same and convert into money and out of the proceeds of such sale and conversion of my said real and personal estate, pay my debts, and the following legacies that is to say :

And by a codicil he authorized McLean and Stewart as follows—

I, Robert Anderson, of Lake District, Vancouver Island, farmer, declare this to be a first codicil to my last will dated the 24th day of April, A. D., 1883.

I hereby authorize and empower Alexander McLean and James Stewart the trustees and executors of my said will, to sell and dispose of by public auction or private sale and convey such portion of my real estate as they in their discretion shall think necessary for the purpose of raising money to pay off the existing mortgage upon my said real estate and such of my just debts as my personal estate may be insufficient to discharge. In all other respects I confirm my said will.

In witness whereof I have to this my first codicil to my said will set my hand this 5th day of June, A. D., 1883.

In *Lord Rendlesham* v. *Meux* (1) in which the words

(1) 14 Sim. 249.

of the will were

> And in case it should be considered necessary by the trustees or trustee for the time being of this my will to sell any part of my estate for the purpose of raising money to discharge any of the incumbrances thereon,—

And it was contended that the trustees had sold the whole of the estate and that the purchase money greatly exceeded the amount of the incumbrances, the Vice-Chancellor said:

> The general language of the testator has made it plain that the power of sale depends upon the opinion of the trustees that a sale is necessary.

In this case, then, I think the sale was, as found by the Chief Justice and the jury, of the whole lot between the two roads; that in making such sale there was no breach of trust; that the power given by the codicil was well exercised by the sale of the lot in question; that the agreement as found is sufficiently free from uncertainty and ambiguity to be enforced; and I think that all reasonable diligence was used to obtain the best price and prevent the property being sacrificed by fixing what would seem to have been a fair upset price, and I do not think the price obtained can reasonably be considered inadequate. In fact the Chief Justice says the contract was entered into at the fair, and even the best, price of the day.

If this sale took place under circumstances which amounted to a breach of trust I am free to admit that the court should not decree a specific performance of the contract. If the block of land had been sold for a lump sum then it might fairly be said they should have ascertained the quantity to have enabled them to form an adequate idea of its value; but as they sold by the acre, and as they fixed the upset price per acre as the fair value to be obtained, the necessity for an actual ascertainment of the quantity would appear to become the less necessary, and it may be that they

1887

SEA v. MCLEAN.

Ritchie C.J.

may have thought it more expedient, and more in the interest of the estate, to sell the whole block rather than the exact quantity that would produce $2,000, supposing that was the amount required which, however, is by no means clearly established, for the Chief Justice says in his judgment on appeal to the full court:

> But is it a breach of trust to complete this contract? The defendants now propose to read the will as if it said the trustees were to have no power to sell more than so much of the land as should be necessary to pay debts. But these are not the words of the will. The trustees, here, were certainly acting within the words of their power, viz., to sell "such portion of the testator's land as they may think necessary" to raise money to pay off debts. They found the testator's land divided into two portions. One portion would apparently not produce enough money for their purpose. They therefore thought it necessary to sell the other portion, and contracted to sell it accordingly. They now suggest that the purchase money has provided more cash than was necessary, (viz.) nearly $4,000 dollars net; and that they only calculated a little more than $2,000 to be necessary; that if they had known the land offered would have produced so much they would have auctioned only half the quantity, or some 60 acres. But there is no proof of all this. The debts may, for all that appears, be $4,000 or upwards. But suppose they had offered only 60 acres and the bidding had risen to $60 or $70 per acre, so that the money raised would again have been twice as much as the demands on the estate, so far as then known, rendered necessary, would the trustees in such a case be deemed to have exceeded their powers, so as that this court would not permit them to carry out the sale?

In view of all which I think the judgment of the Chief Justice should not have been disturbed and should now be restored.

STRONG and FOURNIER JJ. concurred.

HENRY J.—I also am in favor of allowing the appeal and concur in the views expressed by His Lordship the Chief Justice. I can see no grounds for the allegation that the trustees could not sell all the land, or that they were guilty of a breach of trust in doing so.

1887

SEA v. MCLEAN.

Taschereau J.

TASCHEREAU J.—I am of opinion that this appeal should be allowed and the judgment of the 10th July, 1884, restored for the reasons given by Sir. M. W. Begbie at *nisi prius* and in full court.

That the defendants offered for sale, and that the plaintiff bought, without either of them knowing its acreage, the whole of the Loch End farm lying between Carey's road and Burnside road, at $36 per acre, seems to be clearly established, and, in fact, if I do not misunderstand them, Mr. Justice Crease and Mr. Justice Walkem do not materially differ from the Chief Justice on that part of the case. But their conclusions were adverse to the plaintiff on the ground that the defendants, in selling more than was necessary to pay the testator's debts, were guilty of a breach of trust which the courts are bound to restrain. I cannot view the case in that light. The defendants were empowered to sell all of the real estate which they, in their discretion, should think necessary. They exercised their discretion and sold this farm. There is no fraud proved nor even alleged. There is no evidence that their discretion was improperly exercised, and no breach of trust has been shown. Having exercised their discretion, their power to sell was complete and unconditional as regards *bonâ fide* purchasers, whatever liabilities they might have incurred towards their *cestuis que trustent* if they had wrongfully acted towards them.

The courts cannot say that a trustee has not the discretion which the testator has given him, nor refuse to recognize contracts openly entered into at the fair and, according to the evidence in this case, the extreme price that could be had. Such are the conclusions of the Chief Justice and in them I concur.

GWYNNE J.—The plaintiff in his statement of claim

1887

SEA
v.
MCLEAN.

Gwynne J.

in the court below alleges that the defendants caused to be put up for sale by public auction "a messuage "and land situate in Victoria, District of British Col- "umbia, being all that portion of section 78 in said "district lying between the Burnside road on the south "and the Carey road on the north;" that at such auction sale the plaintiff was the highest bidder for the same and purchased the said premises from the defendants and the defendants sold the same to the plaintiff for $36 per acre; that it was agreed by and between plaintiff and defendants that one Peter Leech, land surveyor, should proceed to ascertain the acreage of said part of said section and that on the completion of the said survey the plaintiff was to pay the balance of purchase money on the acreage as ascertained by said Peter Leech, and that the vendors should then execute a conveyance of said premises to the purchaser at the purchaser's expense; that the plaintiff paid the defendants a deposit of $540 as part payment of the purchase money immediately after said sale and was always ready, willing, and still is, to pay the remainder; that Peter Leech proceeded to survey the said tract so put up for sale and ascertained that the acerage of the same was $117\frac{35}{100}$ acres; that plaintiff tendered to the defendants for execution a deed for the conveyance by the defendants as trustees of the will of Robert Anderson, deceased, to the plaintiff in fee in consideration of the sum of $4224.60, all and singular that certain parcel or tract of land situate, lying and being in Victoria district aforesaid, which may be more particularly described as all that portion of section seventy-eight, lying between the Burnside road on the south, and the Carey road on the north, containing in the whole one hundred and seventeen acres and thirty-five hundreths of an acre, and that the defendants refused to execute such conveyance and the plaintiffs

1887

SEA
v.
MCLEAN.

Gwynne J.

claimed that the defendants as such trustees as aforesaid might be decreed specifically to perform said agreement and for other relief.

The defendants in their answer, in so far as it is material to set it out, deny that they caused to be put up for sale by public auction the portion of the section 78 specified in the first paragraph of the plaintiff's statement of claim, but they say that they did as trustees under the will and codicil of Robert Anderson deceased, cause to be put up for sale by auction a portion of the said section containing 60 acres more or less, adjoining the land of Matthias Rowland, and lying between the Burnside road and Carey's road; that the land put up for sale had not been surveyed, and was not marked out on any plan, but that a sketch plan of the whole of the said section lying to the north of the Burnside road was exhibited at the sale; that the conditions of sale did not stipulate that the highest bidder per acre should be the purchaser, but the auctioneer stated that the bidding would be per acre, and did not stipulate that the expense of the title deeds should be borne by the purchaser; that it was never agreed between plaintiff and defendants that on completion of any survey of the land purchased the plaintiff was to pay the balance of the purchase money on the acreage as ascertained by Peter Leech or any one else; that it was verbally agreed between the plaintiff and the defendant McLean that Peter Leech should survey the property purchased by the plaintiff which the defendants contended was 60 acres more or less of the said piece of said section seventy-eight.

The plaintiff in support of the case as made by him in his statement of claim produced in evidence:

1. The advertisement of the sale which is as follows:—

AUCTION SALE—REAL ESTATE.

I have received instructions from Alexander McLean and James

1887

SEA
v.
MCLEAN.

Gwynne J.

Stewart, Esquires, the Executors of the late Mr. Robert Anderson, to sell, at the sales-room, Yates Street, on Friday the 30th instant, at Twelve o'clock, noon, some Sixty acres, (more or less) Section 78, Loch End Farm, Victoria District.

☞The property to be sold adjoins Mr. Matthias Rowland's land and has a frontage on the Burnside Road and also on the road commonly known as Carey's Road.

Deeds at purchaser's expense.

Terms—Cash.

WM. R. CLARKE,
Auctioneer, &c.

2. The conditions of sale which contained among others the following:

"*a.* No person shall, at any bidding advance a less sum than shall be named by the auctioneer, and no bidding shall be retracted. The highest bidder shall be the purchaser and if any dispute arise respecting a bidding the lot shall be put up again and re-sold.

"*b.* Every purchaser shall immediately after the sale of a lot sign the underwritten agreement, and pay into the hands of the auctioneers a deposit of 25 per cent of his purchase money, and shall at the expiration of fourteen days pay to Mr. Hett, the vendor's solicitor, the balance of his purchase money.

"*c.* The property is believed and shall be taken to be correctly described as to quantity and otherwise, and is sold subject to any easements which may be subsisting thereon, and if any error be discovered the same shall not annul the sale nor shall any compensation be allowed by the vendors or purchaser in respect thereof.

"*d.* The vendors will bear half the expense of surveying the property sold."

At the foot of the conditions of sale is the contract of sale, of which the plaintiff is claiming specific performance, as follows:—

I, Samuel Sea, hereby acknowledge that on the sale by auction, this 30th day of November, 1883, of Sixty acres, (more or less,) part of Section 78, Victoria District, I was the highest bidder and was

1887

SEA
v.
MCLEAN.

Gwynne J.

declared the purchaser thereof, subject to the conditions, at the price of thirty six dollars per acre, and that I have paid the sum of five hundred and forty dollars by way of deposit and in part payment of the said purchase money, to the auctioneers, and hereby agree to pay the remainder of the said purchase money and complete the said purchase according to the said conditions.

(Signed) SAMUEL SEA.

As agent for the vendors I ratify this sale and acknowledge the receipt of the said deposit.

(Signed) W. R. CLARKE,
Auctioneer.

The vendors as trustees under the will of Robert Anderson had power to sell only for the purpose of paying debts if the personalty should be insufficient for that purpose, and their object in selling was merely to raise the sum of $2000, the total sum which would be required for the above purpose. The notice of the intended sale contained in the advertisement that the auctioneer had received instructions from the trustees to offer for sale "some 60 acres (more or less,") section "78 Loch End Farm, Victoria District," may be fairly construed as conveying an intention of offering for sale about 60 acres, it might be more or it might be less, according as the trustees should find to be necessary to raise the required sum; the words "more or less" as there used are quite appropriate having regard to the position in which the trustees stood, for by the time the sale should take place they might find that the price the land would be likely to fetch per acre would enable them to realise the required sum of $2000 by the sale of only forty or it might be of thirty acres, in which case, quite in accordance with the statement in the advertisement, they might offer for sale and sell forty or thirty acres as the case may be; but having resolved upon not taking less than $35 per acre the sale of sixty acres would be sufficient for their purpose; and their duty

1887

SEA v. McLEAN.

Gwynne J.

to their *cestuis qui trustent* under the will required that they should sell no more than was necessary for that purpose. The notice in the advertisement of what would be offered for sale did not say that the whole of that part of section 78 lying between Burnside road and Carey's road would be offered for sale, but that some sixty acres, it might be more or might be less of section 78, adjoining Rowlands, and having a frontage on Burnside's road and Carey's road would be offered for sale.

Now as to what took place at the auction. The auctioneer says he sold according to advertisement. He thought, but very mistakenly as now appears, that there might be about sixty or sixty-five acres in the whole piece lying between the two roads, but being asked whether what he offered for sale was not the whole of that piece he answered: "Sixty acres of it;" that the intention was to sell the rough, uncultivated part. The defendant McLean's evidence is that he intended to sell sixty acres going from Rowland's fence west and abutting on each road. Rowland who was present at the auction says that what he understood to have been offered for sale was sixty acres next to his fence. The plaintiff having bid $36 per acre for what he was buying signed the above contract of sale at the foot of the conditions and paid $540 as the 25 per cent. on his purchase required by the conditions to be paid at the time of sale. Now, the plaintiff's contention is, that this contract, so signed by him and the auctioneer, is a contract for the sale to, and purchase by, the plaintiff of the whole of that part of section 78 which lies between the two above named roads whatever its contents in acres might be and that there being found to be $117\frac{35}{100}$ acres in the piece he is entitled in virtue of the above contract so signed to demand and have a conveyance of the said $117\frac{35}{100}$ acres executed to him

1887

SEA
v.
MCLEAN.

Gwynne J.

he paying $36 per acre for every acre in excess of 60 acres. If the plaintiff is right in this contention then not only would he be entitled to compel the defendants to execute to him a conveyance of 500 acres or any greater quantity if such should be found to be the quantity of section 78, between the two roads, but he could also, at the suit of the defendants, be compelled to accept a conveyance of such 500 acres or any greater quantity, and to pay therefor at the rate of $36 per acre, although he should deny that he had ever bid for, or intended to purchase any greater quantity than sixty acres, and in support of such contention should refer to this contract and the mention of sixty acres therein and should insist upon his having, in accordance with the conditions of sale, paid $540 as and for the sum of 25 per cent upon his whole purchase money of $2160 for such 60 acres That the defendants could not under the terms of the contract as signed by the plaintiff compel him to take the whole $117\frac{35}{100}$ acres is to my mind too clear to admit of a doubt.

Now as to the intention of the trustees we can not I think attribute to them, contrary to the sworn evidence of the only one of them who was examined, and contrary to their duty, an intention of selling the whole of the section between the two roads whatever the contents might prove to be, when the sale of sixty acres would be sufficient to supply the purpose for which alone they had power to sell. If they had intended to sell the whole of the piece they surely would have had, as they should have had, the piece surveyed before being offered for sale for, according to the conditions of sale, the deposit of 25 per cent of the whole purchase money to be paid at the time of the sale would vary in proportion to the quantity of land sold, and they could not have in their contract of sale acknowledged, as they had done, the receipt of $540

1887

SEA
v.
MCLEAN.

Gwynne J.

as such deposit and part payment of the said purchase money, that is to say, the purchase money for sixty acres at $36 per acre. That, in truth, the trustees did not intend to sell the whole of the section lying between the two roads I am, for my part, satisfied and that, under the circumstances of the sale of sixty acres producing sufficient for the purpose for which alone they had a power of sale they should not have sold the whole cannot admit of a doubt; this therefore is not, in my opinion, a case in which we should compel specific performance although the contract should in express terms be for the sale of the whole of such piece, as it would be unjust to enforce against trustees to the great prejudice it may be of the interests of their *cestuis que trustent* a contract different from what the trustees intended to enter into, and which was therefore improvidently entered into by them. But it is, to my mind quite clear that the contract which the plaintiff has produced and relies upon is not a contract to sell the whole of that part of section 78, lying between the two roads, whatever the quantity might upon survey prove to be, namely, whether 500 acres or 117 acres, or any other quantity, as the plaintiff now contends, but that if it be not avoided for uncertainty by the senseless and inappropriate introduction of the words ("more or less") after the stated quantity of 60 acres, it is in its terms simply a contract to sell sixty acres of part of section 78, lying between the two roads at $36 per acre, upon which contract in accordance with the terms of the conditions of sale the purchaser has paid and the vendors have received the sum of $540 as and for the 25 per cent upon the whole purchase money made payable by the conditions at the time of the sale. There is not a word in the contract about a survey being necessary in order to determine what was the

quantity of land sold and what should be the amount of the purchase money the plaintiff should have to pay, and there is no principle upon which any such variation in quantity of land and in the amount of purchase money can be imported into the contract. The plaintiff has not in the contract as signed by him undertaken to pay to the defendant one cent more than the amount of purchase money calculated upon sixty acres at $35 per acre, and of which sum the amount of $540 paid at the time of sale constitutes 25 per cent or one fourth part; in other words the total amount he has contracted to pay, and which the trustees could ever compel him to pay under this contract, is the unpaid balance of the sum of $2,160.

It must be admitted that there has been great carelessness in the preparation of this contract, for in the conditions of sale, at the foot of which is the contract, and which conditions are referred to in and made part of the contract, is one which declares that the property offered for sale is believed to be and shall be taken to be correctly described as to quantity, and that if any error should be discovered the same should not annul the sale nor should any compensation be allowed either by vendor or purchaser in respect thereof, that is to say whether the contents should prove to be greater or less than the quantity stated. Now there is no description of the property offered for sale other than "Sixty acres (more or less) part of Section 78, Victoria District." So that if the plaintiff's contention be correct that what was offered for sale was "the whole of that portion of section 78, lying "between Burnside Road and Carey's road" if the above condition is to apply, we must, to complete the description as to quantity, add here the words "containing 60 acres (more or less)." So that the result would be that under this condition the plaintiff

1887

SEA
v.
MCLEAN.

Gwynne J.

would be entitled to a conveyance of the $117\frac{85}{100}$ acres for $2,160, or the sum ascertained to be the price of sixty acres at $36 per acre, a contention which the plaintiff has not been bold enough to make; the whole difficulty in the case arises from what I call the senseless introduction of the words "more or less" in the contract after the words "60 acres."

The plaintiff in the signed contract acknowledges that on a sale by auction of 60 acres, more or less, part of section 78, he was the highest bidder, and was declared the purchaser thereof subject to the conditions, which are part of the contract, at the price of $36 per acre. Now in this sentence to what does the word "thereof" apply—of what does the plaintiff acknowledge himself to be the purchaser? Is it of the sixty acres which is expressed or is it of some greater or less quantity? and if greater of what quantity? The contract certainly does not say that the plaintiff had purchased the whole of that portion of section 78, lying between the two roads, whatever might be the quantity at $36 per acre, and that he had paid $540 on account, and would pay the remainder as soon as the amount should be ascertained upon measurement of the contents of the piece of land sold; and how we are to say that this was the plaintiff's contract, as he now contends, from what is said in the formal signed instrument I fail to see. There he says that the $540 paid was paid by way of deposit and according to the conditions of sale forming part of the contract, which shews that this sum was paid and accepted as 25 per cent on the whole of the purchase money called for by the contract, or the precise price of 60 acres at $36 per acre, and he undertook to pay the balance of his said purchase money, that is an ascertained sum, not a sum yet to be ascertained, and as yet quite undeterminate, at the expiration of 14 days. It might perhaps

1887

SEA
v.
MCLEAN.

Gwynne J.

be contended that these words "more or less" so introduced into the contract make it so vague and uncertain that it cannot be enforced at all, although when the conditions of sale are referred to, which are part of the contract and require the purchaser at the time of sale to pay a deposit of 25 per cent. of his whole purchase money, I cannot say that I think they are. In my opinion the plaintiff under this contract has no claim whatever for any greater quantity than sixty acres measured west from Rowland's fence, and extending from Burnside Road to Carey's Road. If he is unwilling to accept a deed for that quantity the most favorable judgment that he could have would be for the return of his deposit with interest but without costs, and in my opinion the case should be remitted to the court below to enable the plaintiff to elect whether he will accept a conveyance of sixty acres as above named or that the contract be annulled and his deposit restored to him. In the former event the decree should be for a conveyance to him of such sixty acres upon payment of the balance of the purchase money with interest, but in that case the plaintiff should pay the costs of the court below, for the litigation has been caused by his demand for more than he was entitled to under his contract, and in case he elect to annul the contract and to have his deposit returned by reason of uncertainty in the contract as to the land actually sold, neither party should have costs in the court below. But the plaintiff's appeal to this court should be dismissed with costs.

Appeal allowed with costs.

Solicitor for appellant: *D. M. Eberts.*

Solicitor for respondents: *J. Roland Hett.*

1887

*Feb. 15.

*June 20.

JOHN. P. MOTT AND OTHERS SHAREHOLDERS OF THE BANK OF LIVERPOOL..... } APPELLANTS ;

AND

THE BANK OF NOVA SCOTIA.....RESPONDENT.

IN *RE* THE BANK OF LIVERPOOL. *EX PARTE* THE BANK OF NOVA SCOTIA.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Winding up act—45 *V. c.* 23—47 *V. c.* 39—*Winding up of insolvent bank—Proceedings in case of.*

Sections 2 and 3 of the winding-up act 47 Vic. ch. 39, providing for the winding-up of insolvent companies (1) do not apply to banks, but an insolvent bank whether in process of liquidation or not at the time it is sought to bring it under the winding up act, must be wound up with the preliminary proceedings provided for by secs. 99 to 102 of 45 V. c. 23, as amended by 47 V. c. 39 (2). Strong and Gwynne JJ. dissenting.

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

(1.) Sections 2 and 3 of 47 Vic. ch. 39, amending 45 Vic. ch. 23, read as follows:

2. When at the date of the passing of the said act, a company was in liquidation or in process of being wound up, any shareholder, creditor, assignee, receiver or liquidator of such company may apply by petition to the court, asking that the company be brought within and under the provisions of the said act, and the court may make such order; and the winding up of such company shall thereafter be carried on under the said act, and the expression "winding up order," in the said act shall include the order in this section mentioned.

3. The court, in making such an order, may direct that the assignee, receiver or liquidator of such company if one has been appointed, shall become the liquidator of the company under the said act, or may appoint some other person to be liquidator of the company.

(2.) 45 Vic. ch. 23, sec. 99 to 102 as amended:

99. In case of a bank the application for a winding up order must be made by a creditor for a sum of not less than one thousand dollars, and the court must, before making the order, direct a meeting of the shareholders of the bank, and a meeting of the

1887

MOTT
v.
THE BANK OF NOVA SCOTIA.

In re THE BANK OF LIVERPOOL.

APPEAL from a decision of the Supreme Court of Nova Scotia (1) sustaining the order of the Chief Justice for winding up the affairs of the Bank of Liverpool and appointing the Bank of Nova Scotia liquidator.

The Bank of Liverpool had been placed in insolvency under the provisions of "The Insolvent Act of 1875 "and amending acts" and the Bank of Nova Scotia was the assignee. In 1884 the Bank of Nova Scotia filed a petition under the winding up act of 1882, praying that the said Bank of Liverpool be wound up thereunder. After hearing arguments for and against the petition the Chief Justice made the following order under sections 2 and 3 of 45 Vic. ch. 23, the winding up act of 1882, as amended by 47 Vic. ch. 39, he having decided that said sections governed the proceedings in this case.

"It is ordered that the prayer of the said petition be granted and that the said Bank of Liverpool and the estate thereof be brought within and under the pro-

creditors of the bank to be summoned, held and conducted as the court directs, for the purpose of ascertaining their respective wishes as to the appointment of liquidators.

100. The court may appoint a person to act as chairman of the meeting of shareholders, and in default of such appointment, the president of the bank, or other person who usually presides at a meeting of the shareholders, shall preside. The court may also appoint a person to act as chairman of the meeting of creditors, and in default of such appointment the creditors shall appoint a chairman.

101. In taking a vote at such a meeting of shareholders, regard is to be had to the number of votes conferred by law or by the regulations of the bank on each shareholder present or represented at such meeting, and in case of the creditors, regard is to be had to the amount of the debt due to each creditor.

102. The chairman of each meeting must report the result thereof to the court, and if a winding up order is made, the court shall appoint three liquidators, to be selected in its discretion, after such hearing of the parties as it may deem expedient from among the persons nominated by the majorities and minorities of the shareholders and creditors at such meetings respectively.

(1) 6 Russ. v. Geld. 531.

1887

MOTT
v.
THE BANK OF NOVA SCOTIA.

In re THE BANK OF LIVERPOOL.

visions of the said act, intituled, 'An act respecting 'insolvent banks, insurance companies, loan com- 'panies, building societies, and trading corporations,' passed by the Parliament of Canada, being forty-fifth Vic. ch. 23, and of the said act, passed by said Parliament of Canada, being 47 Vic. ch. 39, intituled, 'An 'act further to amend the act 45 Vic. ch. 23, entitled 'An act respecting insolvent banks, insurance com- 'panies, loan companies, building societies and 'trading corporations,' and that the liquidation and winding up of the said Bank of Liverpool be carried on and completed under the said last named acts, and that the said Bank of Liverpool and the estate thereon be wound up by this court under the provisions of the said last named acts.

"It is further ordered that the said bank of Nova Scotia be, and it is hereby appointed, the liquidator of the said Bank of Liverpool under the provisions of the said last named acts.

"It is further ordered that the said Bank of Nova Scotia shall give security under the provisions of said act 45 Vic. ch. 23, and amending act, and under sec. 28 thereof by bond in a penal sum of one hundred thousand dollars to the satisfaction of and to be approved by a judge of this Honourable Court conditioned for the due and faithful performance of the duties of the said Bank of Nova Scotia as such liquidator.

"It is further ordered that the said petitioner's costs of and relating to the said petition and application be allowed and paid out of the assets of the said Bank of Liverpool such costs to be taxed, and that the costs of the contestants abide the order of the appellate court to be made in the premises.

"Dated at Halifax this 16th day of January, A. D., 1885."

1887

MOTT v. THE BANK OF NOVA SCOTIA.

In re THE BANK OF LIVERPOOL.

Application was made to the Supreme Court of Nova Scotia to have the order of the Chief Justice set aside, chiefly on the ground that the proceedings prescribed by sections 99 to 102 inclusive of the act of 1882 as amended by the act of 1884 should have been followed and the bank wound up as if the previous proceedings under the Insolvent Act had not taken place. The court divided equally on the application and the order was sustained. The dissatisfied shareholders then appealed to the Supreme Court of Canada.

Henry Q.C. for the appellants.

Sedgewick Q.C. for the respondent.

Sir W. J. RITCHIE C.J.—This is an appeal from the judgment of the Supreme Court of Nova Scotia affirming the decision of the Chief Justice, ordering the Bank of Liverpool to be brought within the provisions of 45 Vic. cap. 23., "An Act respecting Insolvent Banks, Insurance Companies, Loan Companies, Building Societies and Trading Corporations."

Section 147 of 38 Vic. cap. 16, (the Insolvent Act of 1875), and 39 Vic. cap. 31, contain the provisions for putting insolvent companies into insolvency.

Under these statutes the Bank of Liverpool was placed in insolvency in 1879.

17th October, 1879, the attachment under the Insolvent Act of 1875 was issued against the Bank of Liverpool. The official assignee took possession of the estate. At the first meeting of creditors the Bank of Nova Scotia was appointed assignee.

13th September, 1884, the Bank of Nova Scotia, assignee, filed a petition praying that the Bank of Liverpool and its estate should be brought under the provisions of 45 Vic. c. 23., and 47 Vic. ch. 39., and that liquidation and winding up be carried on under said acts, and that the Bank of Nova Scotia might be

1887

MOTT v. THE BANK OF NOVA SCOTIA.

In re THE BANK OF LIVERPOOL.

Ritchie C.J.

appointed liquidator.

13th September, 1884, the Chief Justice made an order directing a hearing on the 28th October, 1884, and in the meantime that notice should be given to creditors by publication in the Canada Gazette and other papers for thirty days, such publication to be sufficient notice.

Notice was duly published and petition heard when counsel for the shareholders and contributories appeared. The Chief Justice allowed the prayer of the petition and granted an order as follows (1) :—

45 Vic. ch. 23, provides for the winding up of incorporated banks and other companies. The principal sections bearing on the questions involved in the present appeal are as follows :

1. This act applies to incorporated banks (including savings banks), incorporated insurance companies, loan companies having borrowing powers, building societies, having a capital stock which are insolvent or in process of being wound up, either under a general or special act, and which, on petition as in this act set forth, by its shareholders or creditors, assignees or liquidators, ask to be brought within and under the provisions of this act.

(*a*) This act does not apply to railway or telegraph companies or to building societies that have not a capital stock.

2. The provisions of sections thirteen to ninety eight inclusive of this act are, in the case of a bank, (not including a saving's bank) subject to the provisions, changes and modifications contained in sections ninety nine to one hundred and five inclusive.

6. "Company" includes any corporation subject to the provisions of this act.

Ch. 39 of 47 Vic. amends the act 45 Vic. ch. 23, as follows :—

I. The first section of the act passed in the forty-fifth year of Her Majesty's reign, chaptered twenty three, and entitled, "an act respecting insolvent banks, insurance companies, loan companies, building societies and trading corporations is hereby repealed, and the following section is enacted in lieu thereof:

I. This act applies to incorporated banks (including savings banks) incorporated insurance companies, loan companies having borrowing powers, building societies having a capital stock, and incorporated

(1) See pp. 651-2.

trading companies, which are doing business in Canada, no matter where incorporated, and which are insolvent or in process of being wound up and on petition as in this act set forth by their shareholders or creditors, assignees or liquidators ask to be brought within and under the provisions of this act.

(*a*) this act does not apply to railway companies or to building societies that have not a capital stock.

2. When at the date of the passing of the said act, a company was in liquidation or in process of being wound up, any shareholder, creditor, assignee, receiver or liquidator of such company, may apply by petition to the court, asking that the company be brought within and under the provisions of the said act, and the court may make such order, and the winding up of such company shall thereafter be carried on under the said act, and the expression "winding up order," in the said act, shall include the order in this section mentioned.

3. The court in making such an order, may direct that the assignee, receiver or liquidator of such company, if one has been appointed, shall become the liquidator of the company under the said act, or may appoint some other person to be liquidator of the company.

4. The 24th section of the said act is amended by inserting before the words "the winding up order" in the first line, the words, "the court in making."

7. Sections 99, 100, 101 and 102 of the said act are hereby repealed, and the following sections are enacted in lieu thereof:—

99. In the case of a bank the application for a winding up order must be made by a creditor for the sum of not less than $1,000 and the court must before making the order, direct a meeting of the shareholders of the bank, and a meeting of the creditors of the bank to be summoned, held and conducted as the court directs, for the purpose of ascertaining their respective wishes as to the appointment of liquidators.

100. The court may appoint a person to act as chairman of the meeting of shareholders, and in default of such appointment the president of the bank, or other person who usually presides at a meeting of the shareholders, shall preside. The court may also appoint a person to act as chairman of the meeting of creditors, and in default of such appointment the creditors shall appoint a chairman.

101. In taking a vote at such a meeting of shareholders, regard is to be had to the number of votes conferred by law or by the regulations of the bank of each shareholder present or represented at such meeting; and in the case of creditors, regard is to be had to the amount of the debt due to each creditor.

1887

MOTT v. THE BANK OF NOVA SCOTIA.

102. The chairman of each meeting must report the result thereof to the court, and if a winding up order is made the court shall appoint three liquidators, to be selected in its discretion, after such hearing of the parties as it may deem expedient from among the persons nominated by the majorities and minorities of the shareholders and creditors at such meetings respectively.

In re THE BANK OF LIVERPOOL.

Ritchie C.J.

I cannot conceive that sec. 3 of the amending act was intended to apply to banks with reference to which the sections 99, 100, 101 and 102 of the original act and the sections of the amending act in lieu thereof have made very special provisions. I think the amending act must be read as if it formed part of the original act, and such a reasonable construction put on it as will give effect to all its provisions. In other words I am at a loss to conceive how section three can be construed to exclude this case from the provisions of sections 99 to 102 when the legislature by express words have declared in the case of a bank they shall apply; certainly it should not be so read as to give to section three the effect of repealing all those special provisions in reference to banks enacted in the same act. To whatever companies section three may apply, it appears to me beyond all reasonable doubt that it does not apply to banks. So far from there being any indication of an intent on the part of the legislature to dispense with all or any of the preliminaries of the original act the legislature seems to me, emphatically, in unmistakable language, by the sections enacted in lieu of sections 99, 100, 101 and 102, to have re-affirmed the necessity of such preliminaries being observed.

As regards the complaint as to the discretion exercised by the learned Chief Justice: Had such discretion as applicable to this case been conferred on him by the statute 47 Vic. ch. 39 sec. 2, (a judicial discretion it is true over which this court no doubt has complete jurisdiction but a discretion the exercise of which is not lightly to be interfered

with) if no case of miscarriage had been shown, and if the learned Chief Justice had not been shown to have gone wrong in his law, no mistake of fact being shown nor that he ordered anything so utterly unreasonable that the court would be obliged to say that there had not been a reasonable exercise of his discretion, I should not have thought it the duty of this court to interfere.

STRONG J.—I am of opinion that the judgment in this case should be affirmed for the reasons given by the Chief Justice of Nova Scotia in his judgment in the court below.

FOURNIER J.—I am in favor of allowing the appeal. It is very clear that the 103rd section of the act was not complied with. It requires that three liquidators should be appointed and here there was only one.

HENRY J.—The respondent bank became in 1879 the assignee in insolvency of the Bank of Liverpool, and on the 12th of September, 1884, made application by petition to a judge of the Supreme Court of Nova Scotia for an order to bring the insolvent estate within and under the provisions of the acts of Canada of 1882, chap. 23, and of 1884, chap. 39, and asking to be appointed liquidator of the estate.

The matter came before His Lordship the Chief Justice of that court who, after hearing the parties, made an order granting the prayer of the respondent's petition.

The appellants appealed to the whole court. At the hearing the court was composed of four members, one joining the Chief Justice in sustaining his order and the others deciding against the validity of the order. One of the latter, however, subsequently changed his judgment formally so tha an appeal to

1887

MOTT
v.
THE BANK OF NOVA SCOTIA.

In re THE BANK OF LIVERPOOL.

Henry J.

this court might be had.

Previously to the act of 1882, chap. 23, incorporated banks could not be brought into liquidation.

By the first section of that act it was provided, amongst other things, that incorporated banks which were insolvent or in process of being wound up might be brought within its provisions.

By section two the provisions of sections thirteen to ninety eight inclusive of that act were, in the case of a bank, (not including a savings bank)—

Made subject to the provisions, changes and modifications contained in sections ninety nine to one hundred and five inclusive.

Sec. 24 provides that:—

The winding up order must appoint a liquidator or more than one liquidator of the estate and effects of the company; but no such liquidator shall be appointed unless previous notice be given to the creditors, contributories, shareholders or members in the manner prescribed by the court.

That section clearly prohibits the passing of a winding up order unless notice be given in the manner prescribed by the court. In this case the court did not make, nor was it asked to make, any order prescribing how the notice was to be given. The only notice given was one in the newspapers as provided by sec. 105, but the provision in that section does not apply to such a notice, but only is sufficient as to the holders of bank notes in circulation. The reason why that provision was made is that it would be impossible to serve such a notice personally as the holders could not be discovered. No such reason existed in this case and therefore the petitioners were required to obtain the direction of the court. Without such notice being given the court had no power to appoint a liquidator in any case, and for that reason alone the appointment was void for the want of jurisdiction.

By section 7 of the act of 1884, secs. 99, 100, 101 and 102 of the act of 1882, were repealed and other provisions substituted as I shall hereafter show.

The 1st sec. of the act of 1884 applies its provisions to incorporated banks, savings banks, incorporated insurance companies, loan companies having borrowing powers, building societies having a capital stock and incorporated trading companies.

Sec. 2 provides that:

When at the date of the passing of this act (19th April, 1884) a company was in liquidation or in process of being wound up, any shareholder, creditor, assignee, receiver or liquidator of such company may apply by petition to the court, asking that the company be brought within the provisions of the said act, and the court may make such order, &c.

3. The court in making such order may direct that the assignee, receiver or liquidator of such company if one has been appointed, shall become the liquidator of the company under the said act or may appoint some other person to be liquidator of the said company.

It will be seen that neither incorporated banks nor savings banks are mentioned in the section just recited, although mentioned specifically in sec. 1. Are we to conclude that the word "company" in sec. 2 was intended to include and has included incorporated banks and savings banks? Incorporated banks may be called companies; but a distinction between banking and other companies is clearly shown to have been drawn in sec. 1, and if it was intended that incorporated banks should be affected by the provisions of sec. 2 it is not unreasonable to expect to find "incorporat-" "ed banks" or "an incorporated bank" inserted in sec. 2, and when we consider how essentially banks differ from insurance companies I would feel forced to the conclusion that the provisions of sec. 2 were not intended to apply to incorporated banks.

If section two, for the reasons I have given or shall hereafter give, does not apply to banks then the provisions of section three are equally inapplicable, but why is it at all necessary to speculate as to section two, which as I have before said does not mention banks, when we find ample and full provision as to them in

1887

MOTT v. THE BANK OF NOVA SCOTIA.

In re THE BANK OF LIVERPOOL.

Henry J.

section seven taken with some modifications from the act of 1882.

The first one of the imported sections is in section seven of the act of 1884 and is as follows :

In the case of a bank the application for a winding up order must be made by a creditor for a sum not less than a thousand dollars, and the court must before making the order direct a meeting of the shareholders of the bank and a meeting of the creditors of the bank to be summoned, held and conducted as the court directs, for the purpose of ascertaining their respective wishes as to the appointment of liquidators.

The next in order of the imported sections provides that the court may appoint chairmen of the meetings, &c.

The next provides for the mode of taking the votes at the meetings and the last provides that

The chairman of each meeting must report the result thereof to the court, and if a winding up order is made the court shall appoint three liquidators to be selected in its discretion after such hearing of the parties as it may deem expedient from among the persons nominated by the majorities and the minorities of the shareholders and creditors at such meeting respectively.

It will thus be seen how carefully the rights and interests of all parties connected with banks were provided to be guarded. Between section two and the first of the imported sections there is this important difference. Under the former the application for a winding up order may be made by any shareholder, creditor, assignee, receiver or liquidator of a company but under the latter (in the case of banks) the application

Must be made by a creditor for a sum not less than one thousand dollars.

A shareholder, creditor for less than a thousand dollars, receiver or liquidator could not apply for a winding up order under that provision.

Under sec. 2 there is no provision for any preliminary meeting of shareholders or creditors, but under the first of the imported sections the court has no power

to appoint liquidators until meetings are held and the result of them reported to the court. Under secs. 2 and 3 one liquidator may be appointed, but under the provisions of the first and last of the imported sections liquidators must be appointed, and under the latter section the member is fixed at three.

The act plainly says that in the case of a company other than a banking company sec. 2 shall apply, but it as plainly says that as to a bank the four imported sections shall apply. If not, why should there be any such special provisions in the case of a bank? Did the legislature make them to become ineffectual for the objects evidently intended by them, to be over-ridden by the provisions of sections 2 and 3? The first section provides that the petition for a winding up order must be "as in this act set forth." Section two provides for an application for an order to wind up an insolvent company, but when we would ascertain how such an application should be made in the case of a bank "as in this act set forth" we must refer to the first of the imported sections and be guided by it and the three following sections. In the case of a company one mode is provided and in the other an essentially different course is required to be taken. Section 103 of the act of 1882 provides for the appointment in the case of a bank of three liquidators.

If no one has been so nominated (at the preliminary meeting) the three liquidators must be chosen by the court—if less than three have been nominated the requisite additional liquidator or liquidators must be chosen by the court.

That section was in force when the act of 1884 was passed and was left untouched and unrepealed by the latter act. If it was intended to apply the provisions of section two to the case of a bank such a counter provision would have been repealed. Sections 99, 100, 101 and 102 are re-enacted by the act of 1884 and section 103 completes the provisions for the appoint-

1887

MOTT
v.
THE BANK OF NOVA SCOTIA.

In re THE BANK OF LIVERPOOL.

Henry J.

ment of three liquidators; and its having been left untouched by the subsequent act is conclusive evidence of the intention of the legislature to place banks, in regard to a winding up order, in a totally different position from that of companies. The petition in this case was made by the respondent bank as assignee of the insolvent bank, and although it alleges that the petitioners were creditors of the insolvent bank for an amount more than a thousand dollars a question might be raised as to the validity of the application as they did not petition as a creditor; but in the view I hold of the law it is unnecessary to refer to that objection.

No meeting was held by direction of the court as prescribed by the statutes and therefore, in my opinion, the court had no power to appoint liquidators and in any event, the appointment of one only was void.

I am, for the reasons given, of opinion the appeal should be allowed and the appointment of the respondent as liquidator annulled with costs.

GWYNNE J.—In my opinion the 2nd and 3rd sections of 47 Vic. ch. 39 applies to banks as well as to all other companies mentioned in the first section, and the object of the sections, as it appears to me, is to make provision in respect of companies which already at the time of the passing of the act were in process of liquidation in insolvency, different from the provision made in the case of companies which although in a state of insolvency had not yet been brought into liquidation by process of law, or which after the passing of the act should become insolvent. In the case of companies already in process of liquidation, and having an assignee or liquidator already appointed, the proceedings directed by the act to be taken for the ap-

pointment of an assignee or liquidator of a company about to be but not yet brought into liquidation might reasonably be dispensed with, and therefore in the case of a petition under the 2nd sec. of 47 Vic. ch. 39, the court is authorized to appoint the assignee or liquidator already appointed to be the assignee or liquidator to continue the proceedings in a winding up to be thereafter taken under the statute, 45 Vic ch. 23, while section 99 and the subsequent sections apply only to the case of a bank in insolvent circumstances, but not yet brought into liquidation in insolvency. In the latter case a creditor of the bank sought to be brought into liquidation by process of law is the only person authorized to make the application, while in the case of an application under sec. 2 of 47 Vic. ch. 39 to have proceedings already commenced to wind up an insolvent company brought under the operation of 45 Vic. ch. 23, a shareholder, creditor, assignee, receiver, or liquidator may be the applicant, shewing that the legislature was making provision for a case different from the case of a bank which although in insolvent circumstances had not yet been brought under process of liquidation. I am of opinion, therefore, that the appeal should be dismissed with costs and that the order of the Chief Justice of the Supreme Court of Nova Scotia should stand.

Appeal allowed with costs.

Solicitor for appellants: *Otto. S. Weeks.*

Solicitors for respondents: *Graham, Tupper, Borden & Parker.*

1887
*Mar. 3.
*June 20.

THE MAGOG TEXTILE AND PRINT COMPANY (PLAINTIFF) ..... } APPELLANT;

AND

EVANS J. PRICE (DEFENDANT)..... RESPONDENT.

THE MAGOG TEXTILE AND PRINT CO. (PLAINTIFF)..... } APPELLANT;

AND

RICHARD R. DOBELL (DEFENDANT)....RESPONDENT.

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

Joint stock company—31 *Vic. ch.* 25 (*P.Q.*)—*Action for calls*—*Subscriber before incorporation*—*Allotment - Non-liability.*

P. signed a subscription list undertaking to take shares in the capital stock of a company to be incorporated by letters patent under 31 Vic. ch. 25 (P.Q.), but his name did not appear in the notice applying for letters patent, nor as one of the original corporators in the letters patent incorporating the company. The directors never allotted shares to P. and he never subsequently acknowledged any liability to the company. In an action brought by the company against P., for $10,000 alleged to be due by him on 100 shares in the capital stock of the company it was

Held,—Affirming the judgment of the court below, that P. was not liable for calls on stock.

APPEAL from a judgment of the Court of Queen's Bench for Lower Canada (appeal side) (1), affirming the decision of the Superior Court.

The following facts and judgments deal only with the case of Price, the appeals being argued together and one decision given for both.

The incorporation of the plaintiff was under and by virtue of the Joint Stock Companies Incorporation Act (P.Q.) ch. 25 of 31 Vic., as amended by 44-45 Vic. ch. 11.

By the Joint Stock Companies General Clauses Act

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

(1) 12 Q. L. R. 200.

1887

THE MAGOG TEXTILE & PRINT CO. v. PRICE.

THE MAGOG TEXTILE & PRINT CO. v. DOBELL.

of the Province of Quebec, 31 Vic. ch. 24, it is enacted:

16. If the special act makes no other definite provision, the stock of the company shall be allotted, when and as the directors, by by-law or otherwise, may ordain.

23. Sub-sec. 2. The names, alphabetically arranged of all persons who are or have been shareholders (shall be recorded by the proper officer).

And by the Joint Stock Companies Incorporation Act of the Province of Quebec, 31 Vic. ch. 25:—

The Lieutenant Governor in council may, by letters patent under the great seal, grant a charter to any number of persons not less than five, who shall petition therefor, constituting such persons and others who may become shareholders in the company thereby created, a body corporate and politic, for any of the following purposes:—

3. The applicants for such letters patent must give at least one month's previous notice in the *Quebec Official Gazette*, of their intention to apply for the same, stating therein;

6. The names in full and the address and calling of each of the applicants, with special mention of the names of not less than three nor more than nine of their number, who are to be the first directors of the company, and the major part of whom must be resident in Canada and subjects of Her Majesty by birth or naturalization.

Section 4. At any time not more than one month after the last publication of such notice, the applicants may petition the Lieutenant Governor through the Secretary of the Province for the issue of such letters patent;

2. Such petition must recite the facts set forth in the notice and must further state the amount of stock taken by each applicant, (and by all other persons therein named, by 41 Vic. cap. 22) and also the amount paid in upon the stock of each applicant, and the manner in which the same has been paid in, and is held for the company.

7. Notice of the granting of the letters patent, shall be forthwith given by the Secretary of the province, in the *Quebec Official Gazette*, in the form of the schedule A appended to this act; and thereupon, from the date of the letters patent, the persons therein named and their successors, shall be a body corporate and politic by the name mentioned therein.

25. If the letters patent make no other definite provision, the stock of the company, so far as the same is not allotted thereby, shall be allotted when and as the directors, by by-law or otherwise may ordain.

32. Sub-sec. 2. The names, alphabetically arranged, of all persons who are, or have been shareholders.

1887

THE MAGOG TEXTILE & PRINT CO. v. PRICE.

THE MAGOG TEXTILE & PRINT CO. v. DOBELL.

SCHEDULE A.

Public notice is hereby given, that under the Joint Stock Companies Incorporation Act, letters patent have been issued under the great seal of the Province of Quebec, bearing date of the day of incorporating (here state names, address and calling, of each corporator named in the letters patent,) for the purpose of (here state undertaking of the company, as set forth in the letters patent,) by the name of (here state name of the company, as in the letters patent,) with a total capital stock of dollars divided into shares of

Dated at the office of the Secretary of the Province of Quebec, this day of

A. B.
Secretary.

The suit was brought to recover from the defendant a sum of ten thousand dollars, the amount due for one hundred shares of $100 each in the capital stock of the company.

The defence raised several objections.

1. That the defendant had subscribed the shares only upon the fraudulent representations which had been made to him by the promoters of the company;

2. That the defendant had never subscribed to the capital stock of the company (plaintiff), but had merely undertaken to subscribe for shares to the amount of $10,000.00 in a company to be incorporated at a future period and that the company, which was the plaintiff in the suit, was not the company to which he had so undertaken to subscribe;

3. That the name of the defendant did not appear amongst those of the persons who asked for the incorporation, and that no share was ever allotted by the plaintiff to the defendant.

At the trial the following facts were proved:—

In September, 1882, the respondent, at the solicitation of one William Hobbs, signed a subscription list, headed as follows:—

The undersigned hereby respectively agree to take the number of shares of one hundred dollars each in the capital stock of a company to be formed under the name of the Magog Textile and

Print Company, hereinbelow set after our names respectively, and to pay the amount of all calls thereon, at the office of the company in Montreal, at such times as the provisional directors or the directors of the company when incorporated may direct.

In January following, Mr. Hobbs and eight others, of whom the respondent is not one, gave notice in the Quebec Official Gazette that they were about to apply for letters patent, under the seal of the province, constituting them and such other persons as might become associated with them, a corporation under the name of the Magog Textile and Print Company. And on the 13th April, 1883, letters patent issued under the Quebec Act 31 Vic. ch. 25, as amended by 44-45 Vic. ch. 11, "constituting the applicants and such other persons as "may become shareholders, a body corporate" under the proposed name.

No allotment of stock was ever made, but subsequently, calls were made for the full amount due on the company's stock.

The judgment of the Superior Court, while refusing to admit the allegation of fraud which was not proved, maintained the plea on the other points.

The judgment is in the following words :—

Considering that the plaintiffs have not proved the material allegations of their declaration, and more particularly that the defendant is a shareholder in the Magog Textile and Print Company, liable to pay calls ;

Considering that the defendant did not petition for letters patent of incorporation for said Company, such as issued for the same under the provisions of the Act 31 Vic. chap. 25, and hence is not constituted thereby a shareholder, and that he has not, since said incorporation, subscribed for any stock in the said company ;

Considering that the defendant hath proved that, although he offered to take one hundred shares in the stock of said company before the same was incorporated or had applied for incorporation, and that after incorporation the plaintiffs wholly failed to make any allotment of shares to him, the defendant as provided by said act, and that, in the absence of such allotment, the defendant was not and is not a shareholder in said company as frequently held by the courts of this country ;

1887

THE MAGOG TEXTILE & PRINT CO. v. PRICE.

Considering that the said patent of incorporation of the said plaintiffs constitutes the petitioners for said patent by name and all persons that may become shareholders thereafter, a body corporate and politic under the said name of the "Magog Textile and Print Company," and that the defendant is neither a petitioner nor a subscriber to the stock of the same since the issue of said patent.

THE MAGOG TEXTILE & PRINT CO. v. DOBELL.

On the appeal which was taken from this judgment to the Queen's Bench, appeal side, it was confirmed for the reasons given by the Superior Court.

Bossé Q.C. for the appellants. The contract entered into by the subscription for stock was absolutely complete and binding upon the defendants from the moment it was made, but supposing that not to be the case, but that the subscription was only to take shares at a future time from a company to be incorporated, that was also a complete contract.

The shares were allotted and several calls were made. The statute requires 10 per cent. to be paid before incorporation; if the 10 per cent. was improperly called the defendants are still liable for the 90 per cent. called afterwards.

The plea of the defendants alleging fraud has been set aside by both courts below.

Beïque follows. Under the Joint Stock Company's Act no company can be formed without the petition of, at least, five persons, nor until a certain amount of stock has been subscribed. 31 Vic. ch. 25; 41 Vic. ch. 22.

Thring on Joint Stock Companies (1); Buckley (2); Abbott's National Dig. (3), title "Subscription." These acts and authorities show that the contract contained in the memorandum of shares is binding on the signer when the company is formed. See also Angell & Ames on Corporations (4).

I distinguish the cases of *Union Navigation Co.* v.

(1) P. 27.
(2) Pp. 41-2.
(3) Vol. 1 p. 801.
(4) 11 ed. p. 555 par. 523.

1887

THE MAGOG TEXTILE & PRINT CO. v. PRICE.

THE MAGOG TEXTILE & PRINT CO. v. DOBELL.

Couillard (1) and *Rascony* v. *Union Navigation Co.* (2).

The defendants are estopped from claiming want of notice of calls. Bigelow on Estoppel (3).

Irvine Q.C. for the respondents.

Under the Quebec act relating to incorporation of companies, it cannot be said that these defendants are incorporators of this company. The company was to consist of the petitioners and others who should afterwards become shareholders, and the policy of the statute clearly was, that all who wanted to become shareholders were to sign the petition.

Then there is the act 44–45 Vic. ch. 11.

The proposition of Price was never accepted so as to make it binding.

In no way was the offer of the defendants accepted, except by asking them to pay.

No notice of allotment was given.

With regard to the question of fraud. We can still urge that question before this court, and we claim that there has been legal fraud which will relieve subscribers. The promoters purchased the stock of the old company, The Magog Manufacturing Co., and got Shanly to make a valuation of the property which was subsequently bought in. The prospectus was never seen by the respondents, nor was it issued until the subscriptions were made. The owner of the property received from the company his price and made 100 per cent. by it. Respondents were never notified of this position.

Another ground of fraud is that Hobbs subscribed for 100 shares on the understanding that he was not to be liable therefor, but was to be indemified by the other shareholders. This was in order to realize the necessary amount of stock to obtain letters patent.

(1) 7 R. L. 215; 21 L. C. J. 71. (2) 24 L. C. J. 133.
(3) P. 468.

1887

THE MAGOG TEXTILE & PRINT CO. v. PRICE.

THE MAGOG TEXTILE & PRINT CO. v. DOBELL.

Ritchie C.J.

Stuart follows citing *Couillard* v. *Union Navigation Co.* (1); Lewin on Trusts (2); *Pellott's* Case (3).

Sir W. J. RITCHIE C.J.—The plaintiffs in their declaration allege "that said hundred shares were duly allotted, assigned and made over to the defendant and entered as such on the books of the company, and the defendant then and there became and was and still is a shareholder in the said company of said hundred shares of the denomination of one hundred dollars $100 each, amounting in all to the sum of $10,000," when in fact no allotment of stock was ever made, defendant's name was never even entered in any book of the company until November or December, 1883, in fact until that time no stock had ever existed, though three calls had been made, and as to this entry in the books it does not appear to have been the act of the company. The account Money gives of it is this:—

I am a clerk in the office of Grant, the witness just examined in this cause.

I opened under his instructions the stock ledger book exhibited by him a moment ago, to wit, the stock ledger of the company plaintiff. It was opened about the end of eighteen hundred and eighty-three (1883).

Q. Before the expiration of the year eighteen hundred and eighty-three (1883)? A. Yes.

Q. In what month? A. I could not say the month exactly, it was either in November or December.

Q. When were these entries made that have reference to the defendant? A. The entries in reference to the defendant in the said stock ledger were made at the same time as the other entries were made, to wit, sometime about November or December eighteen hundred and eighty-three (1883).

It does not appear that after the organization of the company the subscriptions made previous to the incorporation were adopted by the company or that they were entered as stockholders upon the stock ledger of the company, or that the company in any way recog-

(1) 21 L. C. J. 71. (2) P. 171.
(3) 2 Ch. App. 52.

1887

THE MAGOG TEXTILE & PRINT CO. v. PRICE.

THE MAGOG TEXTILE & PRINT CO. v. DOBELL.

Ritchie C.J.

nized the individual subscriptions as valid subscriptions, nor were they recognized and ratified by these subscribers by payments thereon or in any other manner. If after the corporation was formed it had accepted the subscription and recognized the defendant as a stockholder and he had recognized himself as a stockholder and ratified and confirmed his subscription, the case would have been very different, but the fact is he never took any part in the application or steps for the incorporation of the company or the issuing of the letters patent, or in any way assented to the organization of the company nor to any acts done under it, and it is even curious to notice in view of the present claim what Mr. Hobbs in his examination says :—

I am the originator of the company plaintiff.

I was president of the company for some time and I am now vice-president of the company.

I know the defendant and I witnessed his signature to the stock of the company for ten thousand dollars ($10,000). His signature to the said amount of stock was signed in my presence in the stock subscription book which is now shown to me having been exhibited by the witness already examined, Grant.

Q. Will you say about what date that subscription was made? A. He signed the subscription in September of eighteen hundred and eighty-two (1882) for ten thousand dollars ($10,000).

Q. At the time the defendant subscribed as mentioned above, or at any other time since, was there any company in process of organization or in question by the name of the Magog Textile and Print Company? A. No, there was not.

The general principle of law applicable to contracts must be recognised and adopted and must govern the present case and I can discover nothing whatever that created the relation of stockholder and company as between defendant and the corporation to enable the plaintiff to say that defendant was a shareholder in the company, and that there was a contract by and between him as shareholder and the company to pay the calls as now claimed.

The letters patent do not incorporate those who may

1887

THE MAGOG TEXTILE & PRINT CO. v. PRICE.

THE MAGOG TEXTILE & PRINT CO. v. DOBELL.

Ritchie C.J.

have associated themselves together by subscribing the memo. with a view to the formation of a company but constituted those only specifically named in the letters patent as the corporators and not such as may have subscribed the memo. but only those named and such other persons who may become shareholders in said company (of whom the defendant is not one) a body corporate and politic by the name of "The Magog Textile and Print Company," nor can I discover any obligation on the part of the company to give the defendant the stock should he have required it.

The question is not before us as to how far there was a contract by the individuals who signed the memo. as between themselves, or if there was, how it could be enforced by this corporation. It is very obvious the breach of such an agreement and the damages incident thereto are very different from a claim for calls by the company on defendant as a shareholder, in which capacity alone he can be liable and called on to pay calls. Morawitz on Corporations (1) says

> It is important to distinguish between the contract of membership actually existing between the shareholders or members of a company and a contract to become a shareholder at a future time.
>
> A contract to become a shareholder or to subscribe for shares in a company at a future day does not give the contracting party the status of shareholder until after the contract has been fully executed by taking the shares or actually subscribing upon the books, and upon a failure to perform the contract the corporation would be entitled to recover only the damages suffered, that is, the difference between the amount which the defendant agreed to pay, or contribute on account of the shares and the value of an equal number of shares in the market."

The single question therefore in this case, in my opinion, is; Was defendant at the time the calls were made a shareholder in the Magog Textile Print Company and as such liable to the payment of calls? And as to this the statute in express and unequivocal terms

(1) Sec. 46.

1887

THE MAGOG TEXTILE & PRINT CO. v. PRICE.

THE MAGOG TEXTILE & PRINT CO. v. DOBELL.

Ritchie C.J.

declares who are corporators—they are the petitioners and those who may from time to time after the organization is perfected become holders of the capital stock of the company. It is from such stockholders the directors can require payment of calls. The case would have been very different if the words and authority of the act and the wording of the letters patent issued under it had provided as was done in the act in question in *Kidwelly Canal Co.* v. *Raby* (1) where the words of the act were "those who have subscribed or shall hereafter subscribe" and in describing the persons liable to calls as "every person or persons who hath or have already subscribed," "or shall hereafter subscribe" under which it was held that a party who had subscribed and had done no act to discharge himself from the effects of his subscription by reason of his being within the terms of the act, would have been entitled to a share of the profits of the undertaking as a proprietor and must therefore be considered liable as such to losses.

I entirely agree with the courts below that defendant was not a shareholder in the Magog Textile and Print Company and consequently not liable to pay to the company the calls sued for in this action. This conclusion is in accord with the unanimous decision of the Court of Queen's Bench in Quebec, 1878, in the case of *Joseph Rascony* v. *La Compagnie de Navigation Union*, (2) in which it was adjudged :—

"Que les actionnaires incorporées par lettres patentes sont ceux qui y sonts nommées ainsi que ceux qui souscrivent après l'émission des lettres patentes. Toute personne non mentionée aux lettres patentes qui aurait souscrit des parts ou actions avant telle émission ne peut être considerée comme actionnaire."

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

STRONG J. was of opinion the judgment of the Court of Appeal should be affirmed, adhering to the reasons

(1) 2 Price 93. (2) 24 L. C. J. 133.

1887

THE MAGOG TEXTILE & PRINT CO. v. PRICE.

THE MAGOG TEXTILE & PRINT CO. v. DOBELL.

Fournier J.

there given.

FOURNIER J.—En septembre 1887, l'intimé signa, à la réquisition de William Hobbs, une liste de souscription ainsi conçue :—

The undersigned hereby respectively agree to take the number of shares of one hundred dollars each in the capital stock of a company to be formed under the name of the Magog Textile and Print Company, hereinbelow set after our names respectively, and to pay the amount of all calls thereon, at the office of the company in Montreal, at such times as the provisional directors or the directors of the company when incorporated may direct.

Plus tard Hobbs, conjointement avec huit autres signataires, donna avis dans la *Gazette Officielle* de Québec, d'une demande de lettres patentes sous le grand sceau de la province, les incorporant avec telles autres personnes qui se joindraient à eux sous le nom de "Magog Textile and Print Company." Cet avis n'avait pas été signé par l'intimé et son nom ne fut pas non plus inséré dans les lettres patentes émises, le 13 avril 1883, en vertu des statuts de Québec, comme l'un de ceux qui devaient former la dite corporation.

Il n'y eut pas de répartition du stock souscrit, mais des demandes de versements furent faites pour le total souscrit, et à défaut de paiement la présente action fut portée contre l'intimé sur le principe que la souscription l'avait rendu responsable. Il nia sa qualité d'actionnaire, et la Cour Supérieure par son jugement, confirmé en appel par la cour du Banc de la Reine, renvoya cette action.

L'intimé n'est pas un membre originaire de cette corporation, car il n'est pas un de ceux qui ont donné avis de la demande de lettres patentes, ni un des signataires de la pétition à cet effet. Il n'y a que ces personnes qui d'après l'amendement de 44-45 Vict., ch. 11, qui peuvent avoir cette qualité. La ss. 2, de la sec. 1ère le dit clairement :

The Lieutenant Governor may grant a charter to any member or person who shall petition therefor. Such charter shall constitute

the petitioners, and all others who may become shareholders, in the company thereby created, a body politic and corporate.

En vertu de cet acte et des lettres patentes les pétitionnaires seuls, sont membres originaires de la corporation. Ils peuvent, il est vrai, après la constitution de la corporation, en vertu des mots du statut —

Petitioners and all others who may become shareholders,

s'adjoindre des actionnaires. Mais l'appelante ne prétend nullement que depuis l'émission des lettres patentes, l'intimé ait fait aucune démarche pour devenir actionnaire. S'il a fait preuve par sa signature en septembre 1882, d'une intention de le devenir, la compagnie en donnant avis et en pétitionnant sans son concours pour l'organisation de la corporation a aussi de son côté fait preuve qu'elle n'avait pas accepté cette souscription. Pour le faire considérer comme actionnaire, il faudrait prouver contre l'intimé un engagement depuis l'émission des lettres patentes. Il n'y en a point. Aucune action n'ayant été prise par l'appelante pour donner effet à la signature de septembre 1882, elle ne peut être considerée que comme démontrant une intention de devenir actionnaire qui est demeurée à l'état de projet ou que la compagnie a refusée.

Les autorités suivantes confirment la légalité des prétentions de l'intimé:

The Union Navigation Company v. *Couillard* (1); *Rascony* v. *The Union Navigation Company* (2); *Arless* v. *The Belmont Manufacturing Co.* (3); *Nasmith* v. *Manning* (4).

Etant d'opinion que l'intimé n'est aucunement responsable, je ne crois pas devoir m'occuper des circonstances dans lesquelles la signature de l'intimé a été obtenue. L'appel doit être renvoyé avec dépens.

HENRY J.—I concur in the reasons given for dismissing the appeal. No one, not a member of a company, can be made answerable for calls. The appellant

(1) 21 L. C. J. p. 71.
(2) 24 L. C. J. 133.
(3) M. L. R. 1 Q. B. 346.
(4) 5 Can. S. C. R. 440.

1887

THE MAGOG TEXTILE & PRINT CO. v. PRICE.

THE MAGOG TEXTILE & PRINT CO. v. DOBELL.

Henry J.

in this case, before the company was started, joined in the undertaking, but he afterwards declined to sign the petition for incorporation and never afterwards had any connection with the company. He was, therefore, not a member of it and no board of directors could impose any liability by making calls on him.

TASCHEREAU J.—The respondent's action was limited exclusively to signing the subscription list in September, 1882, and the question in the case is: What legal responsibility if any, does that act involve?

It is plain that the respondent is not an original corporator. He was not one of those who gave notice of applying for letters patent, who petitioned for them or were incorporated by them when obtained. The statute on this point is clear. "The Lieutenant-Gov-"ernor may grant a charter to any number of persons "who shall petition therefor. Such charter shall con-"stitute the petitioners, and all others who may become "shareholders, in the company thereby created, a body "politic and corporate" (44-45 Vic. ch. 11, s. 1) and both under this act and the letters patent the nine petitioners were the sole original corporators. Now while it is not pretended that the respondent became a shareholder subsequent to the charter, it is supposed that the subscription in some way or other created a liability, without allotment of shares as distinctly required by section 25 of 31 Vic. ch. 25, and without acceptance of them after allotment in any form.

But there is no ground for that contention. The respondent did not contract with any one to take these shares, and furthermore, the very words of the subscription list he signed constitute nothing but an undertaking to take shares later, that is when the company would be formed, which he never did, nor was ever asked to do. The cases of *The Union Navigation Company* v. *Couillard* (1); *Rascony* v. *The Union*

(1) 21 L. C. J. 71.

1887

THE MAGOG TEXTILE & PRINT CO. v. PRICE.

Navigation Company (1); *Arless* v. *The Belmont Manufacturing Company* (2); appear to me in point and against the appellant's contentions.

This appeal should, in my opinion, be dismissed.

GWYNNE J. concurred with Mr. Justice Taschereau.

THE MAGOG TEXTILE & PRINT CO. v. DOBELL.

Appeal dismissed with costs.

Solicitor for appellants: *Joseph G. Bossé.*

Solicitors for respondent Price: *Caron, Pentland & Stuart.*

Solicitors for respondent Dobell: *W. & A. H. Cook.*

1887

A. PION, *et al* (PLAINTIFFS).....APPELLANTS;

AND

THE NORTH SHORE RAILWAY COMPANY (DEFENDANTS).....RESPONDENTS.

*Mar. 3.
*June 20.

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

Navigable river—Access to by riparian owner—Right of—Railway Company responsible for obstruction—Damages—Remedy by action at law—When allowed—43-44 *Vic.* (*P.Q.*) *ch.* 43 *sec.* 7 *sub-secs.* 3 *and* 5.

Held, reversing the judgment of the court below, Taschereau J. dissenting, that a riparian owner on a navigable river is entitled to damages against a railway company, although no land is taken from him, for the obstruction and interrupted access between his property and the navigable waters of the river, viz., for the injury and diminution in value thereby occasioned to his property.

2. That the railway company in the present case not having complied with the provisions of 43-44 Vic. (P. Q.) ch. 43, sec. 7, sub. secs. 3 and 5 the appellants' remedy by action at law was admissible.

APPEAL from a judgment of the Court of Queen's Bench for Lower Canada (appeal side) (3) reversing a

---

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

(1) 24 L. C. J. 133. (2) M. L. R. 1 Q. B. 346.
(3) 12 Q. L. R. 205.

1887

PION
v.
THE NORTH SHORE RY. CO.

judgment of the Superior Court by which the appellant's action was maintained.

The appellants sued the respondents jointly with the Quebec Harbor Commissioners in damages for $50,000. In the Superior Court the respondents were condemned to pay them $5.500.

The material allegations of the declaration and the pleadings and evidence are fully stated in the 12 volume of the Quebec Law Reports, p. 205 and in the judgments hereinafter given. The action was dismissed as far as the Harbor Commissioners were concerned, because appellants could not prove that they had permitted the respondents to do the works complained of.

Langelier Q.C. for appellants.

Are the respondent's legally responsible for the damages is the main point in the case, and the only one on which the judgment of the court of appeal has turned. This involves two questions: 1. Has the riparian proprietor of a navigable river a right of access to such river? 2. If he has, had the respondents legal authority to deprive him of the same? The first of those questions is purely a question of law: the second is a question of law and of fact; it is a question of law to know what authority is required to deprive a proprietor of such supposed right, and it is a question of fact to ascertain whether such authority has been obtained by the respondents.

As to the question of law whether the riparian proprietor has a right of access to a navigable river, I submit that he has, 1st. under the common law of the province of Quebec, 2nd, under a special statute of that province concerning water courses.

According to the old French law which is the common law of Quebec on that point, navigable water courses are in the nature of public highways, they are, according to Pascal's celebrated saying: *des chemins qui marchent*

1887

PION v. THE NORTH SHORE RY. CO.

Again a party whose property borders such a highway, cannot be deprived of free access, of ingress to it and egress from it, without a special warrant of law. See *Bell* v. *Corporation of Quebec* (1); *Mayor of Montreal* v. *Drummond* (2); *Brown* v. *Gugy* (3); *Renaud* v. *Corporation of Quebec* (4). Consolidated Statutes of Lower Canada, ch. 50;

If, as we contend, the respondents could not, without special authority, deprive the appellants of their right of access to the river, what is the nature of the authority that was required?

The only authority was a statute, not only expressly giving them the power to do what they have done, but further expressly enacting that they could exercise such power without paying any damages. See *Bell* v. *Corporation of Quebec* cited above.

Now, what is the special law invoked by the respondents as their authority for what they have done? 1st. The statute of Quebec, 44-45 Vict. ch. 20 which, they say, gives them power to pass their line where it has been located. 2d. The statute of Quebec, 43-44 Vict., ch. 43 sect. 11, which authorises any railway company whose line is legally located on any beach to use it without indemnity to the crown.

Neither of these statutes gives the respondents the authority which they required.

The evidence shows that the appellants have been deprived by the respondents of the access which they had to the river St-Charles; that they have suffered thereby heavy damages, and if the law of the province of Quebec is as I have contended for, the judgment appealed from should be reversed and the judgment of the superior court restored.

Irvine Q. C. and *Duhamel* Q. C. for respondents contended:—

1st. That they never invaded, nor encroached upon,

(1) 5 App. Cas. 84.
(2) 1 App. Cas. 384.
(3) 2 Moo. P.C. (N.S.) 341.
(4) 8 Q. L. R. 102.

1887

PION v. THE NORTH SHORE RY. CO.

the appellants' property and therefore, never in any way expropriated them, in the legal sense of the word.

2nd. Any damage sustained by the appellants, in consequence of works lawfully carried out under the authority of a statute can only amount to a *damnum absque injuria.*

3rd. That the Quebec Consolidated Railway Act, 1880, neither contemplates, nor provides for, compensation for damages of this nature.

4th. That at common law (*i. e.* under the Civil Code of Quebec) the appellants have no claim against the respondents, by reason of the facts set forth in their declaration.

5th. That the English decisions relied on by the Superior Court have no bearing on the case inasmuch as they all deal with the interpretation to be given to an Imperial Statute, "The Lands clauses consolidation "Act, 1845," (8-9 Vic. cap. XVIII, sec. 68) which forms no part of our law.

6th. That the only remedy the appellants had was by arbitration, under the statute, and not by action.

7th. That no proof has been made in the cause which would entitle the appellants to indemnity, even under the Imperial Act (8-9 Vic. ch. 18), as construed in the numerous cases determined under it; and they cited and relied on to the following authorities:—

The Quebec Consolidated Railway Act, 1880, sections 5, 7, 9; 22 Vic. ch. 32, secs. 1 and 2; 25 Vict., ch. 46, sec. 1; 36 Vic. ch. 62. secs. 15 and 16; Civil Code, articles 405, 407, 503 and 1589; Code Napoleon, articles 545, 644.

Laurent, *Droit Civil* (1); *The Caledonian Railway Co.* v. *Ogilvy* (2); *Penny* v. *South Eastern R. R. Co.* (3); *Chamberlain* v. *The West end of London & Crystal Palace Railway Co.* (4); *Ricket* v. *The Directors, &c, of*

(1) Vol. 7th p. 310.
(2) 2nd Macq. H. L. Cas. 229.
(3) 7 E. & B. 660.
(4) 2 B. & S. 605.

the Metropolitan Railway Co. (1); *The Queen* v. *Vaughan and the Metropolitan District Railway Co.* (2); *The Queen* v. *the Metropolitan Board of Works* (3); *The Duke of Buccleuch* v. *The Metropolitan Board of Works* (4); *The Directors, &c., of The Hammersmith and City Railway Co.* v. *Brand* (5); *the Duke of Buccleuch* v. *The Metropolitan Board of Works* (6); *McCarthy* v *The Metropolitan Board of Works* (7); *The Metropolitan Board of Works* v. *McCarthy* (8); Demolombe (9); Pardessus (10); Zachariae (11); Sirey *Rec. des lois et arrêts* (12); Dalloz, *Rec pér* (13); Dalloz, *Rec. pér.* (14); Dalloz, *Rec. pér.* (15); *Brown* v. *Gugy* (16); Sourdat (17); *Governor, &c., British Cast Plate Manufacturers* v. *Meredith, et al.* (18); *Dungey* v. *Mayor, &c., of London* (19); *Ferrar* v. *Commissioners of Sewers in the City of London* (20); *Jones* v. *Stanstead Railway Co.* (21); *The Mayor, &c., of Montreal* v. *Drummond* (22).

Sir W. J. RITCHIE C.J. concurred with FOURNIER J.

STRONG J. was of opinion that the appeal should be allowed.

FOURNIER J.—Les appelants avaient en premier lieu établi leur fabrique de mégisserie sur la rue St. Valier, dans la cité de Québec, mais après quelques années, leur industrie ayant pris une extension considérable, ils se virent forcés de chercher un terrain plus étendu et offrant de plus grands avantages pour les opérations

(1) L. R. 2 H. L. 175.
(2) L. R. 4 Q. B. 190.
(3) L. R. 4 Q. B. 358.
(4) L. R. 5 Ex. 221.
(5) L. R. 4 H. L. 171.
(6) L. R. 5 H. L. 418.
(7) L. R. 8 C. P. 191.
(8) L. R. 7 H. L. 243.
(9) Vol. 9 p. 305, No. 540.
(10) Vol. 1 p. 73, nos. 34 & following.
(11) Vol. 2 p. 60, note 14.
(12) 1852-2-478.
(13 1856-3 61.
(14) 1859-3-35.
(15) 1860-3-2.
(16) 2 Moo. P. C. (N. S.) 341.
(17) Responsabilité, Vol. 1, nos. 426 *et seq.*
(18) 4 T. R. 794.
(19) 38 L. J. (C.P.) 298.
(20) L. R 4 Ex. 227.
(21) L. R. 4 P. C. 98.
(22) 1 App. Cas. 384.

1887

PION v. THE NORTH SHORE RY. CO.

Fournier J.

de leur industrie et de leur commerce. Dans ce but ils firent l'acquisition du terrain qu'ils occupent actuellement sur les bords de la rivière St. Charles dans le quartier St. Roch de Québec, et y érigèrent à grands frais une bâtisse considérable pour y exercer leur industrie. Une des principales raisons qui les engagea à faire le choix de cet endroit était, ainsi qu'ils l'allèguent dans leur action, celle d'utiliser la rivière St. Charles pour laver les peaux et les laines ; pour s'approvisionner d'eau à l'intérieur de la manufacture et pour recevoir le bois, le charbon et les approvisionnements, ainsi que les matières premières nécessaires à leur manufacture et pour écouler les produits de leur manufacture.

En 1883, la compagnie intimée en cette cause construisit pour le passage de son chemin de fer dans la dite rivière St. Charles, en face de la propriété des appelants, un quai d'une hauteur d'environ quinze pieds, fermant complètement aux appelants l'accès à la dite rivière et rendant l'exploitation de leur manufacture plus difficile et plus dispendieuse. En conséquence ils ont demandé par leur action la démolition du quai en question et une condamnation à des dommages et intérêts.

L'intimée a plaidé à cette action par défense au fonds en fait seulement.

Les faits de cette cause soulèvent les questions suivantes : 1° Le quai construit par l'intimée pour le passage de son chemin de fer a-t-il privé les appelants de leur accès à la rivière ? 2° En est-il résulté des dommages et à quel montant ? 3° L'intimée était-elle autorisée à faire cette construction sans payer une indemnité aux appelants pour les dommages qu'elle leur causait ?

Sur le premier point, il est incontestable que la construction du quai a eu l'effet de priver les appelants d'un accès direct de leur propriété à la rivière et *vice*

1887

PION v. THE NORTH SHORE RY. CO.

Fournier J.

versâ. La preuve ne laisse aucun doute à ce sujet. Ce fait étant établi, on ne peut mettre en doute, je crois, que l'intimée s'est rendue coupable de violation du droit appartenant à tout propriétaire riverain de communiquer directement par son fonds avec la rivière qui le borde.

Pour établir ce droit du riverain il n'est pas nécessaire, je crois, de référer à d'autres autorités qu'à celle de la décision du Conseil Privé dans lacause de *Bell* v. *Corporation of Quebec*, (1) où ce droit d'accès du riverain sur la même rivière (St. Charles) a fait le sujet d'un examen approfondi.

Après avoir passé en revue la décision dans la cause du *Maire de Montréal* v. *Drummond* (2), où il s'agissait des droits d'accès et de sortie appartenant au propriétaire d'une maison située sur une rue, le jugement déclare :

These principles appear to be applicable to the position of riparian proprietors upon a navigable river. There may be "droit d'accès et de sortie" belonging to riparian land, which, if interfered with, would at once give the proprietor a right of action, but this right appears to be confined to what it is expressed to be '*accès*," or the power of getting from the water way to and upon the land (and the converse) in a free and uninterrupted manner.

Ce droit d'accès, comme on le voit, est admis sans restriction ; mais leurs Seigneuries étant d'avis que le droit de Bell n'avait pas été violé et que la construction du pont dont il se plaignait ne lui avait causé aucun dommage, rejetèrent sa demande, tout en admettant le droit du riverain.

Dans le cas actuel, les appelants ne se plaignent que de l'obstacle mis à leur droit d'accès et non pas d'obstruction à la navigation. Au contraire de Bell, ils ont fait une preuve claire et positive des dommages résultant de la privation de leur droit d'accès.

Quant au montant des dommages, fixé à $5,000, par l'hon. juge qui a décidé cette cause en première instance, il est amplement justifié par la preuve qui a été faite

(1) 5 App. Cas. P. 98. (2) 1 App. Cas. 384.

1887

PION
v.
THE NORTH SHORE RY. CO.

Fournier J.

et doit être confirmé, à moins que l'intimée ne fasse voir que par une exemption spéciale en sa faveur, les principes maintenus par le Conseil Privé ne lui sont pas applicables. C'est sa prétention et pour ainsi dire son seul moyen de défense. Au soutien de cette prétention l'intimé invoque les statuts de Québec, 45 Vic., ch. 20 et 43 et 44 Vic., ch. 43, comme l'autorisant à se servir de la grève de la dite rivière pour le passage de son chemin de fer sans payer d'indemnité.

La 17e section de l'acte 45 Vic., ch. 20, a déclaré l'Acte des chemins de fer de Québec de 1880 applicable à la compagnie intimée. Parmi les pouvoirs donnés par ce dernier acte aux compagnies de chemins de fer, à la sec. 7, ss. 3 et 5, on trouve qu'elles sont autorisées avec le consentement du lieutenant-gouverneur en conseil à se servir de

> Telle partie de la grève publique ou du terrain couvert par les eaux de tous lac, rivière, cours d'eau ou canal, ou de leurs lits respectifs qui sera nécessaire pour faire, compléter et exploiter les dits chemins de fer et travaux, sujet toutefois à l'autorité et au contrôle du parlement du Canada en ce qui concerne la navigation et les bâtiments ou navires.

La ss. 5 donne le pouvoir de construire, entretenir et faire fonctionner le chemin de fer, à travers, le long ou sur toute rivière, cours d'eau, canal, grand chemin ou chemin de fer qu'il croisera ou touchera; mais la rivière, cours d'eau, grand chemin, canal ou chemin de fer ainsi croisé ou touché sera remis par la compagnie en son premier état, ou en un état tel que son utilité n'en soit pas amoindrie, etc.

Les termes de ces deux sous-sections ne s'étendent pas évidemment au delà d'une permission donnée aux compagnies de se servir des grèves publiques sans enfreindre les droits de la couronne à cet égard. Il n'y est fait aucune mention des droits incontestables des particuliers sur ces mêmes grèves, et on ne peut pas prétendre que la permission donnée par le gouvernement en ce qui le concerne spécialement peut être

interprétée comme anéantissant les droits des particuliers sur ces mêmes grèves. Le texte de ce statut ne va pas aussi loin que l'intimée le prétend ; il ne fait nullement allusion aux particuliers dont les droits sont restés intacts. De plus cette permission n'est accordée qu'à la condition que l'utilité de ces rivières, cours d'eau, etc., etc., n'en sera pas amoindrie. Cette dernière condition de ne pas diminuer l'utilité des rivières et cours d'eau n'est-elle pas une restriction suffisante pour la protection des droits des particuliers et ne fait-elle pas voir que c'est l'intention de la loi qu'ils ne puissent être violés sans indemnité. Toutefois, je crois que la loi n'avait pas pour but de les atteindre parce qu'il aurait fallu pour cela une déclaration formelle et positive qui n'existe pas.

En supposant même que cette loi affecte les droits des particuliers, il faut remarquer qu'elle n'a pas accordé d'une manière absolue la faculté dont il s'agit. Au contraire elle a mis à son exercice une condition importante qu'il faut préalablement remplir et sans l'accomplissement de laquelle la loi est sans effet. Ainsi il faut avant de se mettre en possession des grèves en obtenir la permission du lieutenant-gouverneur en conseil en vertu de la loi de Québec.

La législation fédérale à cet égard est identique avec celle de la province de Québec. L'acte consolidé des chemins de fer de 1879, 42 Vic., ch. 9, contient la clause suivante, ss. 3 de la section 1re des pouvoirs :

No railway company shall take possession of, use or occupy any land vested in Her Majesty without the consent of the Governor in council, but with such consent any such company may take and appropriate for the use of their railway and works but not alienate so much of the wild lands of the crown lying on the route of the railway as have not been granted for such railway, as also so much of the public beach or of the land covered with the waters of any lake, river, stream or canal, or of their respective beds as is necessary for making and completing and using their said railway and works, subject, however, to the exemptions contained in the next following sub-section.

1887

PION
v.
THE NORTH SHORE RY. CO.

Fournier J.

Il est évident que la loi exige comme condition préalable de l'exercice de la faculté accordée aux compagnies de chemins de fer, de faire usage des grèves, l'obtention d'une permission spéciale du lieutenant-gouverneur en conseil de la province de Québec et du gouverneur en conseil de la Puissance. Dans la présente cause l'intimée n'ayant ni allégué ni prouvé qu'elle avait obtenu cette permission soit du lieutenant-gouverneur de Québec soit du gouverneur-général en conseil, comment peut-elle se prévaloir du privilège accordé par ces lois sans avoir accompli la condition à laquelle il est accordé? N'est-elle pas dans ce cas clairement coupable d'avoir violé sans justification quelconque les droits des appelants comme propriétaires riverains? La loi étant ainsi, les autorités citées pour établir que l'ouverture de voies nouvelles sur le domaine public ne peut donner aux parties lésées le droit de réclamer des indemnités, n'ont aucune application aux faits de cette cause, puisque les droits du riverain ne peuvent être affectés tant que le gouvernement n'a pas donné de consentement. Dans le cas même où le consentement requis aurait été donné, je ne serais pas prêt à admettre qu'il n'y aurait pas lieu à indemnité parce que la décision du Conseil privé dans la cause de *Bell* v. *La Corporation de Québec* me paraît avoir décidé le contraire. Quoi qu'il en soit, cette question ne peut s'éleverici, car la prétendue autorisation invoquée n'a pas été accordée.

Le fait que les appelants ont pris une action ordinaire au lieu de recourir à l'arbitrage d'après l'acte des chemins de fer, leur est opposé comme une admission qu'ils n'ont aucun recours en vertu des dispositions spéciales de l'acte des chemins de fer. Je crois que l'hon. juge Casault a répondu d'une manière tout à fait concluante à cette objection. Dans ses notes sur cette cause, après avoir passé en revue les principales décisions des cours d'Angleterre au sujet des indemnités

en cas d'expropriation, il termine par les remarques suivantes :

Les juges en Angleterre, et la chambre des lords, comme tribunal en dernier ressort, ont maintenu, dans les trois causes sus-mentionnées et dans plusieurs autres qui y sont citées, que les termes *injuriously affected*, dans les lois sus-citées, comprenaient tous les cas où, sans l'autorisation accordée par le parlement, les ouvrages faits, eussent donné une action. J'ai déjà, en les rapportant, démontré que ces termes des statuts impériaux ont leurs correspondants dans l'acte des chemins de fer de cette province, et que tout dommage causé à la propriété par les compagnies de chemin de fer, dans l'exercice des pouvoirs que leur confère la loi, doivent être payés par elles. Le statut provincial (N° 13 et suivants de la sect. 9) détermine le mode à suivre pour établir les compensations que les compagnies doivent payer ; mais, dans le cas où elles ne l'ont pas adopté ou suivi, il ne prive pas les propriétaires des recours que leur donne le droit commun (N° 37 même section).

La section de l'acte des chemins de fer réservant aux intéressés le recours aux tribunaux ordinaires me paraît tellement importante que je crois devoir la citer en entier (1) :

Si la compagnie a pris possession d'un terrain ou y fait des travaux ou en a enlevé des matériaux sans que le montant de la compensation ait été convenu ou décidé par arbitrage le propriétaire du terrain ou son représentant pourra procéder lui-même à faire faire l'estimation du terrain ou des matériaux pris, et ce, sans préjudice des autres recours en loi, si la prise de possession a eu lieu sans son consentement.

Il est évident que cette section donnait droit aux appelants d'adopter la procédure qu'ils ont suivie et que leur action est bien portée.

En résumé je suis d'avis en me fondant sur la décision dn Conseil privé dans la cause de *Bell* v. *La Corporation de Québec* que les appelants comme propriétaires riverains ont incontestablement droit à une action pour la violation de leur droit d'accès à la rivière St. Charles, bordant leur terrain ; que l'autorisation invoquée par la compagnie n'existe pas, et que sans la preuve de l'autorisation des gouvernements de Québec et de la Puissance, de se servir de la

(1) 43 et 44 Vic. ch. 43 sec. 9 ss. 37.

1887

PION v. THE NORTH SHORE RY. CO.

grève, les lois à ce sujet n'ont pas d'application et ne peuvent justifier la violation des droits de particuliers; qu'enfin que les dommages sont prouvés et que l'appel devrait être alloué avec dépens.

Henry J.

HENRY J. concurred with FOURNIER J.

TASCHEREAU J.—Under 22 Vic. ch. 32 (1858) as amended by 25 Vic. ch. 46 (1862) that part of the river St-Charles where the tide ebbs and flows, and consequently the locality in question in the present case, is within the limits of the Harbor of Quebec.

Consequently under the authority of *Holman* v. *Green* (1), by which, I presume, we are bound in this court, the ownership of the beach opposite the appellants' property is vested in the federal government.

This being so, there is no statute either federal or provincial applicable to this case, under which an Order in Council could issue for the purpose of authorising this company to construct their railway on that beach, for the Quebec Railway Act of 1880, clearly does not and could not authorize a railway company to take possession of the property of the Dominion, and the Dominion Railway Act of 1879 does not and could not apply to a provincial railway, of which character the North Shore Company was when they took possession of the beach in question (39 Vic. ch. 2), and up to the 23rd May, 1883 (46 Vic. ch. 24 D.), neither could the Quebec act of 1882 (45 Vic. ch. 20) authorize the company to take possession of this beach. It is obvious that the Quebec Legislature could not dispose of the property of the Dominion.

The question of an order in council, either federal or provincial does not therefore arise.

It, moreover, was not open to the appellants under the terms of their declaration, and, even if open in the Superior Court, is not open to them on this appeal

(1) 6 Can. S. C. R. 707.

1887

PION
v.
THE NORTH SHORE RY. CO.

Taschereau J.

from the terms of the formal judgment of the Court of Queen's Bench, which declares that the appellants have not in that court contested the company's right to have their railway on the beach in question.

In the view I take of the case, however, this is quite immaterial. The appellants must fail, whether the company is a trespasser on this beach or not, if they do not show a title, or a right to use it—for the purposes of their trade. They have no *locus standi* to complain of an encroachment of the company on their neighbour's property, if the company by their works have not deprived them of any of their rights. So that the only question to be determined is: What are the appellants' rights to that beach for the purposes of their trade, whether the company is lawfully in possession of it or not? This question has, in this case, to be determined upon the civil law of the Province of Quebec.

The appellants base their action on a right of servitude which, as they allege, the law gives them on the beach opposite their property. They claim that they have a special, and necessarily an exclusive, right as riparian owner to use that beach for the purposes of their trade.

The Quebec Court of Appeal has decided that they have no such right, and in that decision I unhesitatingly concur.

It is by sufferance only that the appellants have been using that beach for the purposes of their trade up to the time of the building of this railway. They had no more rights there than the public had. If when they established their factory they had obtained from the crown a grant of that beach lot, they would not have been exposed, without full compensation, to the damage they now suffer. But they now claim without a title the same rights they would have had with

1887

PION v. THE NORTH SHORE RY. CO.

Taschereau J.

a title. According to their contention it would be perfectly unnecessary for a riparian owner to obtain a grant of the beach lot opposite his property. Their position as riparian owners, they claim, gives them on that beach all the rights a patent from the crown would. This contention is, in my opinion, utterly unfounded.

The riparian owners on navigable rivers have no special rights either on the beach or on the rivers. Laurent (1). The wharf that the appellants had built in front of their property, below the high water mark, without a grant or license from the crown, was an encroachment on the public domain, which the crown could have put a stop to at any time.

Les propriétaires riverains des cours d'eau dépendant du domaine public ne peuvent y excercer aucune enterprise.

says Demolombe (2). The riparian owner, in the Province of Quebec, has no exclusive right to the grant by the crown of the beach lots opposite his property. This was determined long ago in *Reg.* v. *Baird* (3), and never has been doubted since, that I am aware of. I draw particular attention to the remarks in that case of Meredith C. J. than whom no higher authority on the law of the Province of Quebec can be quoted.

The crown could therefore have conceded this beach lot opposite the appellants' property to any third party who would have been at liberty to erect on it a wharf, or a dock, or an elevator or any building whatever, and the appellants would have had no claim for compensation for their severance from the river.

In the United States, where from the case of *Stevens* v. *Paterson and Newark RR. Co.* (4), I gather that the law is precisely the same as in the Province of Quebec on the subject, this doctrine was, in that case, directly applied. The facts of that case were exactly as they are here, that is to say, a railway company had built

(1) Vol. 7 No. 254 et. seq.
(2) Vol. XI. No. 124.
(3) 4 L. C. R. 325.
(4) 3 Am. R. 269.

1887

PION
v.
THE NORTH SHORE RY. CO.

Taschereau J.

its road along the bank of a navigable river, below high water mark, thus cutting off the riparian owners from the benefits incident to their property from its contiguity to the water. The question was whether they were entitled to compensation. The court held that they were not; that the titles of owners of lands bordering on tide waters ends at high water mark, that below the ordinary high water mark, the title to the soil is in the state; and that the riparian owner has no rights beyond high water mark, as against the state or its grantees. The Chief Justice, in his remarks, said:

Indeed I think it is safe to say that no English lawyer, speaking either from the bench or from the bar, has ever asserted that the owner of the land along the shore of navigable water has any particular right, by reason of such property, to the use of the water or of the shore.

Such is the law of the Province of Quebec. It is precisely what was also declared to be the law of England by the Court of Appeal in Chancery in *Lyon* v. *Fishmonger's Co.* (1), where the court held that they had been unable to find any authority for holding that a riparian proprietor where the tide flows and re-flows has any rights or natural easements vested in him similar to those which have been held in numerous cases to belong to a riparian proprietor on the banks of a natural stream above the flow of the tide

This holding, it is true, was reversed in the House of Lords (2); but this merely shows the difference between the law of England and the law of the Province of Quebec on this subject, a difference which the Privy Council in *Bell* v. *The Corporation of Quebec* (3); in reviewing that case of *Lyon* v. *Fishmonger's Co.* seemed to recognize.

The Ontario case of *The Queen* v *The Buffalo and Lake Huron Railway Co* (4) is no authority; it is not

(1) 10 Ch. App. 679.
(2) 1 App. Cas. 662.
(3) 5 App. Cas. 84.
(4) 23 U. C. Q. B. 208.

1887

PION v. THE NORTH SHORE RY. CO.

Taschereau J.

law here. A judgment of the highest tribunal of France in 1865, in *re Joanne Rousseray* (1) on a case in point leaves no doubt on the subject.—There the claimant had bought for the special purpose of having the use of the river (a navigable one) a lot bordering on that river. The State constructed on the river immediately opposite the claimant's riparian lot public works, by which the claimant was deprived of all access to the river from his lot. He therefore claimed damages. The court of first instance dismissed his claim, and on appeal to the *conseil d'état*, this judgment was confirmed. "Considering, says the judgment dismissing the appeal, that by the construction of public works on navigable rivers, the State owes an indemnity but to those of whom a right of ownership has been affected by the works: Considering that the works in question have not affected any inherent right of the claimant as riparian owner, &c." The doctrine that a riparian owner on a navigable river has not an inherent right of access to the river could not receive a more decisive sanction. In that case it is true the claimant had still access to the river, not from his lot, but some way down the river. But in the present case also, the plaintiffs have still complete access to the river.

They have not been deprived of their *droit d'accès et de sortie* referred to in *Montreal* v. *Drummond* (2), and in *Bell* v. *Corporation of Quebec* above cited.

They still have access to the river. Besides the tunnel which the company has opened in the embankment of their road for their special use, there is a public highway running alongside their property leading to the river, and through this, they have, with the public, all that the public have, that is to say, all that they can claim as of right. All the damage they suffer from

(1) S. V 65, 2, 246. (2) 1 App. Cas. 384.

the construction of the road, is that the access to the river is rendered thereby for them longer or more difficult. Now, the cases under the French law are clear, that, under these circumstances, the appellants have no *locus standi*.

I refer to the cases of *Re Daube* (1); *Re Darnis* (2); *Re Crispon* (3); *Re Hubie* (4).

In *Re Daube* the court held that works which cause inconveniences to a property do not give a claim for indemnity to the owner.

Re Darnis and *Re Hubie* are in the same sense as the decision of the Privy Council in *Drummond* v. *Montreal*.

In *Re Crispon*, the railway had been built between a quarry where the claimant got his limestone and his lime-kiln. The claimant claimed damages from the fact that by the railway works the road from his quarry to his lime-kiln was lengthened, and because he would have to cross the railway to communicate from one to the other. Damages refused.

I also refer to the case of *Ville de Paris* (5).

And Sourdat (6) says :—

Maintenant, quand y aura-t-il dommage indirect, insusceptible de servir de base à une demande en indemnité ?

C'est, d'abord, dit-il, quand il n'y aura d'atteinte portée qu'à de pures facultés ouvertes à tous d'une manière générale, à la différence des droits proprement dits que la loi établit, reconnait et garantit. Les premières ne sont garanties positivement à personne, tel est l'usage des voies publiques; tant qu'elles subsistent, chacun a le droit d'en jouir, d'en tirer tout l'avantage que cet usage, conforme aux lois et aux règlements, peut procurer. Leur abandon, leur suppression ne peut donner lieu à des réclamations fondées.

The appellants have referred us to that class of cases, as *Brown* v. *Gugy* and *Bell* v. *The Corporation of Quebec* where it has been held that an action lies for a public nuisance at the instance of any private individual who has suffered special damages thereby. Not mere

(1) S. V. 49 2 383.
(2) Dall. 56, 3, 61.
(3) Dall. 59, 3, 35.
(4) Dall. 60, 3, 2.
(5) S. V. 75, 2, 342.
(6) Vol. 1 No. 437

1887

PION v. THE NORTH SHORE RY. CO.

Taschereau J.

damages, but special damages. But these cases have clearly no application here.

We have also been referred to the class of cases in the Province of Quebec, where the rights of riparian proprietors on a navigable, but non-tidal, river have been discussed. These also are obviously quite distinguishable. On such rivers there are no beach lots belonging to the crown.

The cases also on non-navigable rivers, such as *Miner* v. *Gilmour* (1), are also distinguishable. On these rivers, the riparian owner is proprietor of the bed of the river *ad filum aquæ*, subject to the restrictions imposed by the law on the use of these waters. *Boswell* v. *Denis* (2).

I am of opinion that the judgment of the Quebec Court of Appeal by which it was held that the appellants have no right of action should be affirmed.

But, even if the appellants would have had their action at common law they cannot succeed, because under the statute their right to a compensation and of action has been taken away, 1st, because the only damages they claim are damages to their track and business, for which, under the statute, they are not entitled to compensation, and 2nd, because, even if they had a right to compensation, their only recourse under the statute is by arbitration and not by action.

On the first of these propositions, I cite Lord Blackburn in *Caledonian Ry. Co.* v. *Walker's trustees*, (3).

> It is not open for discussion that no action can be maintained for anything which is done under the authority of the legislature, though the act is one which, if unauthorized by the legislature, would be injurious and actionable. The remedy of the party who suffers the loss is confined to recovering such compensation as the legislature has thought fit to give him. * * *
>
> And it must now be considered settled that on the construction of these acts compensation is confined to damage arising from that

(1) 12 Moo. P. C. 131. (2) 10 L. C. R. 294.
(3) 7. App. Cas. 293.

which would, if done without authority from the legislature, have given rise to a cause of action. * * *

And it must, I think, also be now considered as settled that the construction of these statutes is confined to giving compensation for an injury to land or an interest in land; that it is not enough to show that an action would have lain for what was done if unauthorized, but it must also be shown that it would have lain in respect of an injury to the land or an interest in land.

Now, that by their action the damages claimed by the appellants here are merely those to their trade and business is clear. Their declaration, after alleging their title to their property, and that they purchased it because of its advantageous situation for the purposes of their trade, the price paid being one thousand dollars as appears by the deed of sale fyled with their declaration, goes on to say that they have built thereon at a cost of $30,000 a large factory for the purposes of their trade, and that the railway company have since illegally built their road between their property and the river, so as to render their access to the river impossible. They then allege that in consequence of the said railway works:—

Les demandeurs ont été mis dans l'impossibilité d'avoir accès de leur dite propriété à la dite rivière; que la navigation sur celle-ci, vis-à-vis de la dite propriété a été obstruée et rendue impossible; que l'exploitation de la manufacture des demandeurs a été rendue beaucoup plus difficile et beaucoup plus dispendieuse, et que tant pour les causes susdites que pour d'autres causes connexes et en résultant les demandeurs ont souffert et continueront de souffrir des dommages et que les dommages déjà soufferts sont au montant de cinquante mille piastres, laquelle somme les défendeurs refusent de payer aux demandeurs bien que dûment requis de ce faire, les défendeurs refusant aussi de faire disparaitre le dit quai et la dite obstruction dans la dite rivière St-Charles.

And they pray for $50,000 damages.

Not a word that their property has been injuriously affected, that it has decreased in value, in consequence of the works. Nothing but personal damage, damages for personal inconvenience and to their business, which as they allege, up to the date of their declaration,

1887

PION
v.
THE NORTH SHORE RY. CO.

Taschereau J.

amounted to $50,000, but which they will continue to suffer in the future. The sum claimed alone, coupled with these allegations, leaves no doubt as to the nature of their claim. For the proposition that for such damages no right to a compensation lies, and that the subject of compensation, where no part of the claimant's land has been taken, must not be of a personal character but must be damage or injury to the land itself, considered independently of any particular trade, I refer to the following additional cases: *Caledonian Railway Co.* v. *Ogilvy* (1); *Reg.* v. *Metropolitan* (2); *Hammersmith Railway Co.* v. *Brand* (3): *City of Glasgow Union Railway* v. *Hunter* (4); *Ricket* v. *The Metropolitan* (5); *Metropolitan Board of Works* v. *McCarthy* (6).

In *Reg.* v. *The Metropolitan Board of Works* (7) compensation was refused, though the execution of the works prevented access to the river for the purpose of drawing water; and in *Rex* v. *Bristol Dock Co.* (8), though the river was dammed back by the execution of the works, and the water was thereby made less pure, brewers who had been in the habit of using the water were refused compensation.

I refer also to *Rex* v. *London Dock Company* (9) and *Benjamin* v. *Storr* (10).

In France, also, the same principle prevails—*In re Le Balle* (11), held, that the damages caused to the claimant in the course of his business do not entitle him to an indemnity. To entitle him to an indemnity, the works must injure his property directly and materially.

The case of the *Duke of Buccleuch* v. *The Metropolitan*

(1) 2 Macq. H. L. Cas. 229.
(2) L. R. 4 Q. B. 358.
(3) L. R. 4 H. L. 171.
(4) L. R. 2 Sc. App. 78.
(5) L. R. 2 H. L. 175.
(6) L. R 7 H. L. 243.
(7) L. R. 4 Q. B. 358.
(8) 12 East 428.
(9) 5. A. & E. 163.
(10) L. R. 9 C. P. 400.
(11) S. V. 54, 2. 558.

1887

PION v. THE NORTH SHORE RY. CO.

Taschereau J.

Board of Works (1) is distinguishable on various grounds, besides the difference between the English law and the French law on the subject. First, the case was determined on special clauses of Imperial acts of a much wider import than the corresponding ones in the Quebec railway act of 1880, or not to be found at all in the latter. The meaning of the word "land" itself, in the Thames Embankment Act under which the claim was there made is of a much wider import than that of the same word in the Quebec Act.

Secondly, in that case, a part of the claimant's property had been expropriated, whilst here not an inch of the appellants' property has been taken or touched by the company. And the cases show what an important difference this constitutes.

Thirdly, the damages awarded to the claimant were for damages to his property, not for personal damages, or damages to any road.

Fourthly.—The damages awarded for a severance of the claimant's property from the river had arisen from the construction of works necessary, exclusively I might perhaps say, under an Imperial Statute relating to works on water fronts, and providing for compensation for damages resulting to the riparian owner from severance from the water.

Upon these authorities the appellants are not, in my opinion, entitled to compensation for the damages they claim in the present action.

I now pass to my second proposition on this part of the case, that is, even if the appellants were entitled to compensation, their action does not lie, and their only remedy was by arbitration under the statute.

That this railway has been built under the statute is unquestionable. And it has been built under the statute as well for the 30 or 40 feet opposite the ap-

(1) L. R. 5 H. L. 418.

1887

PION v. THE NORTH SHORE RY. CO.

Taschereau J.

pellant's property, as for the rest of the 170 miles between Quebec and Montreal, even if for that part of beach it had not *ab initio* the express consent of its owner the crown.

As long as its owner allows the company to have and maintain their road there, the appellants cannot question their title. As regards any one else but the crown, the company is lawfully in possession, and for that reason, no doubt, the Superior Court, though awarding some compensation to the appellants, dismissed that part of their conclusion by which they asked for the removal of the railroad from the premises.

Now, that the only remedy under the statute is by arbitration admits of no doubt. In all the cases I have cited, this proposition is incessantly repeated. I refer also to Lloyd on Compensation, (1); also to two cases in the Privy Council from the Province of Quebec directly in point, *Jones* v. *Stanstead* (2) and *Drummond* v. *Montreal* (3), cases which clearly are binding upon this court, though, as would appear by Mr. Justice Ramsay's remarks in this case, not considered by the Court of Appeal, to be binding upon them.

To resume, I say that in my opinion:—

1st. The appellants had no right to compensation at common law;

2nd. That, even if they had such right at common law, they are not, under the statute, entitled to any compensation for the damage to their trade and business as claimed;

3rd. That, even if they were entitled to such compensation, their action must fail, as their only recourse was by arbitration under the statute.

GWYNNE J.—I am of opinion that the appellants

(1) P. 109 et seq. (2) L. R. 4 P. C. 98.
(3) 1 App. Cas. 384.

1887

PION
v.
THE NORTH SHORE RY. CO.

Gwynne J.

under the provisions of the railway act, in virtue of which alone the respondents could legally have constructed the work in question, are entitled to recover in some form of proceeding for such damage as their property situate on the banks of the river St-Charles can be shewn to have suffered, by reason of free access between the appellants' property and the navigable waters of the river being obstructed by the work in question.

The point has been so decided in the courts of the late province of Upper Canada at Toronto, in 1864, in *Regina ex rel. Widder* v. *the Buffalo and Lake Huron Railway Co* (1) and the principle upon which the appellants' claim for compensation rests appears to me to have been affirmed, incidentally only it is true, by the judgment of the Privy Council, in *Bell* v. *The Corporation of Quebec* (2); although, in that case, the court held that in point of fact the plaintiff's right had not been violated.

It has been contended that the plaintiffs' declaration in the present case is not framed as a claim for such damage but only for damage done to the plaintiffs trade and that it was only for damages for injury to plaintiffs' trade that judgment was given by the learned judge of the superior court by whom the case was tried. I have been unable to see the foundation upon which this contention is based for the plaintiffs in their declaration expressly allege:—

Que dans le cours du printemps ou de l'été dernier les défendeurs, les Commissaires du Hâvre de Quebec, ont illégalement permis au défendeurs la Compagnie de chemin de fer du Nord d'obstruer la dite rivière St. Charles, vis-à-vis la dite propriété des demandeurs de manière à leur en rendre l'accès impossible.

Que la dite Compagnie de chemin de fer du Nord profitant de la permission a construit dans la dite rivière du côté des demandeurs un quai haut d'environ quinze pieds qui ferme complètement aux demandeurs l'accès de la dite rivière.

(1) 23 U. C. Q. B. 208. (2) 5 App. Cas. 98.

1887

PION
v.
THE NORTH SHORE RY. CO.

Que par suite de la dite permission ainsi accordée par les Commissaires du Hâvre de Québec, et de l'usage qui en a été fait comme susdit par la Compagnie du chemin du Nord, les demandeurs ont été mis dans l'impossibilité d'avoir accès de leur dite propriété à la dite rivière; que la navigation sur celle-ci vis-à-vis de la dite propriété a été obstruée et rendue impossible.

Gwynne J.

Then the learned judge of the Superior Court in pronouncing judgment uses language which, as it appears to me, very clearly shows that it is for damage to the plaintiffs' property by reason of such access being obstructed and not for injury to the plaintiffs' trade that he has given judgment in their favor. He says:

Considérant que la dite défenderesse n'a pris pour son chemin aucune partie du terrain des demandeurs ni aucuns matériaux sur icelui, mais que pour construire son dit chemin de fer elle a érigé sur la grève de la rivière St. Charles qui borne la propriété des demandeurs au nord, et qui à cet endroit est navigable un quai et un terrassement qui ôtent à la dite propriété des demandeurs l'accès à la dite rivière et leur enlèvent une des voies de communication qu'ils avaient auparavant.

Considérant que la privation de cette voie fait subir à la propriété des dits demandeurs une détérioration et une diminution de valeur permanentes et pour lesquelles ils ont droit à une indemnité qui d'après la preuve parait se monter à cinq mille cinq cents piastres, condamne la dite défenderesse à payer aux dits demandeurs la dite somme.

Whether the sum awarded be or not open to the imputation of being excessive it is, I think, clear from the above language that it was for the obstruction of free and uninterrupted access between the property and the navigable waters of the river, and injury and diminution in value thereby occasioned to the property that the damages were awarded and not for injury to plaintiffs' trade, and the learned judge's notes which accompany his judgment are expanded largely to the same effect.

The defendants in the Superior Court appear to have placed their defence at the trial in argument, though not upon the record, upon the contention that the land upon which the structure complained of has been

1887

PION
v.
THE NORTH SHORE RY. CO.

Gwynne J.

erected was the property of the commissioners of the Harbor of Quebec and that the defendants constructed their railway on such property by the authority of the said commissioners, although they seem to have failed in establishing the latter proposition. The learned judge in his notes accompanying his formal judgment says upon this point :—

La défenderesse a invoqué les statuts constituant la commission du Hâvre comme donnant à cette corporation le terrain sur lequel la voie est construite, et enlevant, par là aux demandeurs le droit de se plaindre d'ouvrages que la commission d'après leurs allégations aurait autorisés. La Commission du Hâvre n'exerce qu'à titre de *fidéi-commis*, les pouvoirs que lui a délégués le Parlement relativement aux grèves du St. Laurent et des rivières navigables comprises dans ses attributions ; elle ne peut pas plus y autoriser tacitement des constructions que ne le pourrait, sans un statut le gouvernement lui-même. De plus elle ne peut sur le lit ou les rives des rivières sous son contrôle, rien permettre qui nuise à la navigation, à moins que celle-ci n'y trouve plus qu'une compensation et que les travaux autorisés n'aient pour objet de l'aider et de la faciliter, ce qui est loin d'être le but du terrassement que la défenderesse a construit sur la rive entre le lit de la rivière et la propriété des demandeurs.

Mais supposant même que la commission du Hâvre eût eu le pouvoir de permettre à la défenderesse de mettre sur la rive de la rivière St Charles à laquelle touche la propriété des demandeurs, le terrassement pour y passer sa voie ferrée elle ne l'aurait pu toutefois qu'à la condition que les autorités provinciales eussent elle-mêmes autorisé cette construction ; or ces dernières n'ont pas donné d'autre autorisation que celle que comporte " l'acte refondu des chemins de fer de Québec, 1880," qui à la section et aux sous-sections suscitées, met à l'exercice des droits qu'il confère la condition d'indemniser les propriétaires des terrains qui en souffriraient des détériorations ou des dommages. La sec. 9 No. 11, n'oblige pas seulement les compagnies à payer les terrains des particuliers et les matériaux que la loi les autorise de s'approprier, mais aussi les dommages causés à d'autres terrains par l'exercise de quelqu'un des pouvoir conférés aux chemins de fer. La défenderesse n'a ni invoqué ni établi le consentement du Lieutenant Gouverneur en Conseil requis par le statut pour l'occupation par elle d'une partie du rivage pour ses terrassements ; mais là n'est pas la question principale èn cette cause. Car, si les demandeurs avaient un droit spécial d'accès à la rivière, ce consentement ne leur ôterait pas celui d'obtenir une indemnité ; et si la construction de la jetée que la défenderesse a érigée entre la propriété des demandeurs et la rivière ne les a privé

1887

PION
v.
THE NORTH SHORE RY. CO.

Gwynne J.

de l'exercise d'aucun droit appartenant à leur propriété ils sont sans motifs de plaintes et sans recours en indemnité.

La propriété des demandeurs bornait à la rivière qui y donnait une voie naturelle de communication. Ils y avaient par conséquent un droit d'accès, une espèce de servitude analogue à celle de tout propriétaire riverain sur la voie publique. C'était-là, pour les propriétaires un droit spécial, particulier et distinct de celui qu'ont tous les citoyens dans les rivières navigables. En les en privant par ses constructions, la défenderesse a diminué la valeur de la propriété des demandeurs. Elle leur doit, par conséquent, compensation pour la détérioration qu'elle a ainsi fait subir à leur terrain.

The learned judge having thus with great clearness pointed out that the statute gave to the defendants no authority to erect the structure complained of, unless upon the consent of the Lieutenant Governor in Council first obtained, which consent, as he says, was never invoked or established, and that the structure was therefore erected without any authority, I cannot I confess understand how the first *considérant* in the formal judgment came to be inserted, namely:—

Considérant que la loi permettait à la compagnie du chemin de fer du Nord un des défendeurs en cette cause, de construire sa voie ferrée sur la grève de la rivière Saint Charles dans la cité de Québec.

If this be not a mis-print in the printed case brought before us, it is clearly shown by the notes of the learned judge that the law authorised no such thing; and it is, moreover, to be observed that nothing in the rest of the adjudication in the case is predicated upon anything stated in this *considérant* as it is in the printed case.

The circumstances of the present case and of *Regina ex rel. Widder* v. *The Buffalo & Lake Huron Railway Co.* and the acts upon which the question in both cases turned, and the reasoning of the learned judges in both cases are very similar.

Draper C.J. delivering the judgment of the Court of Queen's Bench in that case referring to the Railway Clauses Consolidation Act of Canada, which subjected railway companies to the obligation of giving com-

pensation to owners of land taken, or injuriously affected by the construction of the railway, says:—

By the 9th section of that act, sub-sec. 3, any railway company with the consent of the Governor in Council may, among other things, take and appropriate for the use of their railway and works so much of the public beach, or of the land covered with the waters of any lake, river, stream or canal, or of their respective beds, as is necessary for making, completing, and raising their said railway and works.

By the 37 section of the defendant's act of incorporation they are authorized to purchase and the Canada Company are authorised to sell to them the harbour of Goderich and so much of the islands on the river Maitland and the shore adjoining that river as may be agreed between them.

In 1835 the Crown leased to the Canada Company for a term of 21 years a space along the shore of Lake Huron extending north and south a distance of a mile and five hundred yards more or less out into deep water, and along the water's edge of the lake to the river Maitland and up that river on one side nearly two miles to a certain point, and then across the river and thence down on the other side, saving and excepting to the Crown the free use of the land and premises and of any wharf, &c., that might be erected thereon, and on condition that the lessees within five years build a wharf and pier and remove a certain portion of the bar at the entrance of the river and lake there for the free navigation of vessels of seventy tons burthen.

The statute of Upper Canada, 7 W. 4 c. 50 authorised the Canada company to improve the harbor of Goderich and to levy tolls, with a proviso for the purchase thereof by the province upon certain conditions. After a purchase made by the defendants under the 37th sec. of their act of incorporation it was by the same section made lawful for them to straighten and improve the river Maitland and deepen cleanse and improve and alter the navigation thereof, &c., &c, and to construct basins, docks, piers, wharfs, warehouses, &c., &c., and also appropriate the mud and shore of the river Maitland, and the bed and soil thereof, and to do all such other acts as they might deem necessary or proper for improving Goderich Harbor and the navigation of the river, and the bed and shores thereof and the land adjacent thereto.

On the 14th of June, 1859, the Canada Company assigned to the defendants their rights, powers and privileges under their lease.

The statute 23 Vic. ch. 2. sec. 35 is also to be noted: "Whereas doubts have been entertained as to the power vested in the Crown to dispose of and grant water lots in the harbors, rivers and other navigable waters in Upper Canada and it is desirable to set at rest

1887

PION v. THE NORTH SHORE RY. CO.

Gwynne J.

any question which might arise in reference thereto, it is declared and enacted that it has been heretofore and that it shall be hereafter lawful for the Governor in Council to authorize sales or appropriations of such water lots under such conditions as it has been or may be deemed necessary to impose."

It appears to us that we should treat the powers given by the legislature and the rights thereunder for the purposes of the railway, as distinct from the powers granted for the purpose of the navigation of the river Maitland and the use of the Goderich harbor, and that an act done which expressly comes within the former class of powers leaves the rights of third parties as to compensation just where they were before the latter powers were conferred or acquired. The two sets of powers are for distinct purposes and it is abundantly clear to us that the powers to improve the navigation of the river do not and were not intended to enable the possessor of them to cover the bed of the river with railway works, or to interfere with or prevent free access to the river and harbour for the purposes of navigation. The case of the *Queen* v. *Betts* (1) though not similar in many respects tends in others to confirm the opinion that the powers conferred for the improvement of the navigation are to be exercised for that purpose solely and not as auxiliary to and extending those conferred on the defendants by their charter as a Railway Company. Adopting this conclusion it will be obvious that the defendants cannot uphold their refusal to submit to arbitration the prosecutor's claim for compensation for the injuriously affecting his land by the construction of the railway on the ground of the rights they have derived from the Canada Company.

And upon the authority of *Chamberlain* v. *The West London & Crystal Palace Railway Co.* (2), and an Irish case of *The Queen ex rel. Cowan* v. *Rynd* (3), the court granted a peremptory *mandamus* commanding the defendants to take the necessary proceedings to enable an arbitration to be entered into, under the Railway Act, to indemnify the applicant for the injury done to his property although no land was taken from him.

This case was decided in 1864; since then the cases of *Beckett* v. *Midland Railway Co.* (4) and *Metropolitan Board of Works* v. *McCarthy* (5) have been decided. Upon the authority of these cases it was decided in

(1) 16 Q. B. 1022.
(2) 2 B. & S. 605.
(3) 9 L. T. N. S. 27.
(4) L. R. 3 C. P. 82.
(5) L. R. 7. H. L. 243.

1887

PION
v.
THE NORTH SHORE RY. CO.

Gwynne J.

Yeomans v. *The County of Wellington* (1) that a county council in Ontario could not under a statute containing a similar clause of indemnity in respect of land injuriously affected raise one of their own roads, so as to obstruct the access between land adjoining the road and the road without rendering compensation to the owner of the land, and since the judgment of the House of Lords in the *Caledonian Railway Co.* v. *Walker's Trustees* (2), in which all the previous cases have been reviewed, it cannot, I think, admit of a doubt that the obstruction of access between a public highway and adjoining land, whether such highway be on dry land or on navigable waters, is an infringement of a right attached to land for which an action lies at the suit of the owner of the land access with which is so obstructed unless the obstruction can be justified, and that if the justification be that the work causing the obstruction was done under the authority of a statute containing a clause of indemnity similar to that in the statute now under consideration, although the owner of the land is thereby deprived of his remedy by action at common law, he is entitled to compensation to be ascertained by arbitration under the statute.

Now between *Regina* v. *The Buffalo & Lake Huron Railway Co.* and the present case, the only difference is in the form of the proceeding. In that case the work complained of as injuriously affecting Mr. Widder's land was treated by him as having been done by the defendants under the authority of the acts authorizing the construction of their railway, and upon that assumption he applied to the court for and obtained a mandamus *nisi*, calling upon the railway to initiate the proceedings necessary under the statute to have compensation awarded to him by an arbitration entered

(1) 43 U.C.Q.B. 522; 4 Ont. App. 301. (2) 7 App. Cas. 259.

1887

PION v. THE NORTH SHORE RY. CO.

Gwynne J.

into in accordance with the provisions of the statute, and it was upon the return to that mandamus that the question arose. The defendants did not in that return raise any question as to the propriety of the mode of procedure adopted by Mr. Widder—they did not contend that his remedy, if any he had, was by action and not by arbitration; that is to say, they did not set up that they were not acting under their statutory powers at all in the construction of the work complained of, but they insisted that they had power under their act to erect the construction without giving any indemnity to the applicant, because the work was not constructed upon any land of the applicant, but upon land of which, as the defendants contended, they were themselves possessed by title derived from the crown; namely, the bed of the river Maitland in the navigable waters of the harbour of Goderich.

In the present case, on the contrary, the substance of the plaintiffs' claim in their action is that the defendants have illegally constructed a work on the navigable waters of the river St. Charles in front of the property which cuts off all access between their property and the navigable waters of the river. If this allegation be true the cases conclusively decide that the charge involves an infringement of a right of privilege incident to land which is an actionable wrong. The defendants if the work complained of was erected by them in point of fact could not exempt themselves from liability to the plaintiffs for such damages as they could establish upon a declaration containing such a cause of action otherwise than by a special plea of justification shewing the construction of the work not to have been illegal, and under the circumstances appearing in the case such a plea to constitute a good defence must have stated all the facts necessary to shew that under the provisions of the statute under consideration the

1887

PION
v.
THE NORTH SHORE RY. CO.

Gwynne J.

defendants had authority to erect the structure which they have erected in the bed of the river St. Charles. In case such a plea should be sustained in evidence the effect would be to defeat the present action it is true, but to give to the plaintiffs a remedy by arbitration which could have been enforced as in *Regina* v. *the Buffalo and Lake Huron Railway Company* by mandamus. But the defendants have pleaded no such plea—they have contented themselves with pleading simply the general issue—they offer no defence, but a simple denial of the facts alleged in the declaration which in the evidence were not disputed, the defendants' defence on the trial being simply that the land on which the work was erected by the defendants not being the land of the plaintiffs, no actionable injury had been done to them. The Court of Appeal in the Province of Quebec have adopted this view and on appeal from the judgment of that court the defendants' contention before us was that if the plaintiffs are entitled to any compensation upon the facts as alleged and proved such compensation cannot be recovered in an action like the present, but can be recovered only by proceedings in arbitration under the statute, a defence not set up by plea upon the record, and which, if it had been, the defendants failed to establish, as has been pointed out in the notes of the learned judge of the Superior Court and which has never been questioned by the defendants, even if without a plea it could have been, namely that they never either invoked or established the consent in Council of the Lieutenant Governor to their building their railway on the bed of the river St-Charles, without which consent first obtained they could not invoke the statute as a protection or justification for their conduct; the defendants were therefore placed in the position of being mere wrong doers, having no

1887

PION
v.
THE NORTH SHORE RY. CO.

Gwynne J.

justification for doing the act causing the injury to the plaintiffs of which they have complained, and which act not having been justified as, and shewn to be, legal is actionable. I cannot see upon what principle the defendants should now be heard to insist that the plaintiffs' remedy is not by action but by arbitration. It was the duty of the defendants if they relied upon their statutory powers as authorising the construction of the work complained of to have initiated the proceedings for an arbitration. Not having justified under the statute they were liable as wrong doers and subject to an action for damages, and they cannot now be permitted to deprive the plaintiffs of the benefit of proceedings which the defendants' own neglect to bring themselves within the protection of their statute has occasioned, and at this late stage to appeal to their liability in arbitration as relieving them from liability in this action while they have not taken, or so far as appears do not propose to take, any proceedings to bring about such arbitration. The courts below have never had presented to them any issue upon the point now urged that proceedings by arbitration and not by action constitute the plaintiffs' sole remedy. The judgment appealed from proceeds upon no such question. The Court of Appeals have decided that as the defendants have not constructed the work complained of on the plaintiffs' land but on the bed of a navigable river the plaintiffs are not injured and have no ground of complaint any more than all other Her Majesty's subjects—and that therefore their action should be dismissed. This judgment being erroneous the appeal should be allowed with costs and, as no complaint has been made that the amount allowed to the plaintiffs by the judgment of the superior court is excessive (assuming the amount to have been assessed upon sound principles) as it appears to have been, that

1887

PION
v.
THE NORTH SHORE RY. CO.

the judgment should be restored.

Appeal allowed with costs. (1).

Solicitors for appellants: *Montambault, Langelier & Langelier.*

Solicitors for respondents: *Bossé & Languedoc.*

(1) Leave to appeal to the Judicial Committee of the Privy Council has been granted in this case.

1887

*Mar. 8.
*June 20.

ROBERT GILLESPIE *és qualité* (PLAINTIFF)..... } APPELLANT;

AND

ROMEO H. STEPHENS (DEFENDANT).....RESPONDENT.

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

Reddition de comptes—Settlement by mandator with his mandatary without vouchers, effect of—Action on reformation de compte.

Held, affirming the judgment of the court below, that if a mandator and a mandatary, labouring under no legal disability, come to an amicable settlement about the rendering of an account due by the mandatary without vouchers or any formality whatsoever, such a rendering of account is perfectly legal; and that if subsequently the mandator discovers any errors or omissions in the account his recources against his mandatary is by an action *en reformation de compte*, and not by an action asking for another complete account.

APPEAL from the judgment of the Court of Queen's Bench for Lower Canada (appeal side) (1), reversing the judgment of the Superior Court in favor of the plaintiff.

The present action was brought by the appellant, a resident of London, England, in his capacity of devisee in trust, and sole acting executor of the last will and testament of the late Robert Gillespie.

The plaintiff in his declaration alleges:—

---

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

(1) M. L. R. 3 Q. B. 167.

1887

GILLESPIE v. STEPHENS.

That after the said twenty-sixth day of January, eighteen hundred and sixty-four, up to the first day of July, in the year eighteen hundred and eighty-one, the said defendant continued to act as the agent of the said plaintiff in his said capacity, and received as such large sums of money arising from the sales made by him of property belonging to the said estate and succession, as well as those theretofore made by others and from various other causes and sources within the scope of his said agency.

That from time to time the said defendant rendered accounts of his said gestion to the said plaintiff, which the said plaintiff then received in good faith and believed the same to be complete and accurate.

That since the rendering of the last account, to wit: since the first day of July, eighteen hundred and eighty-one, the said plaintiff hath discovered that the said accounts are inaccurate, incomplete and misleading, and that they do not contain a full statement of all the monies had and received by the said defendant in his said capacity, and that the said defendant hath not returned the whole of the amounts which he received as the agent of the said plaintiff in his said capacity, and that divers large amounts still remain in his hands.

That it has come to the knowledge, amongst other things, of the said plaintiff that the following sums of money have been received by the said defendant in his said capacity, which have not been accounted for or paid over to the said plaintiff, to wit: a payment of thirteen hundred and eighty-two dollars and forty-five cents made to him by Messrs. Whitney and Morton on or about the seventh day of July, eighteen hundred and seventy-five; a sum of seven hundred and twenty dollars and seventy cents paid to him also in his said capacity by the same parties; by one F. H. Lalonde the sum of two hundred and forty-nine dollars and twenty-five cents; by one Francis Villeneuve fifty-four dollars and five cents; by Antoine Mercier two hundred and fifty six dollars and forty cents; by one Robertson Burch one hundred and fifty one dollars and eighty-two cents.

That the said defendant has never put in the hands of the said plaintiff or of his agent, legally qualified to demand the same, the correspondence, deeds, vouchers and other records belonging to the said plaintiff in his said capacity, and entered into, made and recorded in the books kept by him as received from the debtors of the said estate to enable the said plaintiff to properly audit the accounts of the said defendant.

That it is only since the said defendant has ceased to act as the said plaintiff's said agent under the said power of attorney, and since other persons have become in a measure acquainted with the various sums had and received by the said defendant in his said

capacity that the said plaintiff has become aware or has had eason to believe that the various accounts rendered heretofore by the said defendant of his said gestion were incorrect, incomplete and misleading.

That the plaintiff hath frequently requested the said defendant to revise his said accounts and to render him a new, complete and truthful account of his said trust, but the said defendant hath failed so to do and now doth refuse the same.

That the plaintiff is entitled to have a full account of the gestion of the said defendant in his said capacity, with the vouchers in support thereof, and the possession of all letters, agreements, contracts, deeds, accounts and other documents relative to the same rendered under oath and in due course of law.

Wherefore the said plaintiff, in his said capacity, prays that any and all pretended accounts rendered by defendant to plaintiff be declared null and void and of no effect; that the said defendant be ordered to render an account, under oath, of his gestion from the date whereon he entered upon the said duties, to wit, from and after the twenty-sixth day of January, eighteen hundred and sixty-four, in due form of law, and to submit therewith for inspection and examination all correspondence had by him with the various debtors of the estate, as well as all accounts kept by him during the said period in connection with the said estate, and all vouchers, documents, contracts, agreements or deeds in his possession respecting the same, and that after such accounts have been rendered and inspection allowed, the plaintiff be allowed a reasonable time to examine the same, and to accept or contest the same as may be found right and proper; the whole within such delay as may be ordered by this court, unless defendant prefer to pay plaintiff the sum of ten thousand dollars; the whole with costs against the said defendant, including costs of exhibits should he contest the said plaintiff's *demande*, the said plaintiff reserving to himself his right to take such further and other conclusions in the premises as to law, justice and the practice of this court appertain, even again the whole with costs.

The respondent pleaded to the action admitting that he had acted as agent for a number of years, but alleged that he had always rendered accounts of moneys received by him from time to time, which accounts were verified and accepted by the appellant That about five years previous to the institution of this action, the respondent gave up the agency and retired from busines that the accounts rendered by

1887

GILLESPIE v. STEPHENS.

him to appellant had been by appellant submitted to a professional accountant in London, who examined and verified the same, and that the appellant by a letter of the 5th February, 1879, declared his satisfaction with all said accounts; that said respondent having retired from business, and having no further occasion for his books and documents (the accumulation of years) destroyed the most of them, and that it was impossible for him to render anew to the appellant any account of his administration of the agency, owing to the absence of said books, documents, and papers; that on production of all accounts by respondent rendered to appellant, he was willing to re-examine the same and to give all information in connection therewith; that although the respondent had requested the said accounts from appellant, they have not been produced; that with reference to the items specially referred to in appellant's declaration, it was impossible for him (respondent) to say whether he had received the said moneys in the absence of said accounts, but if he had received the same, they were remitted by him to the appellant; that under the circumstances the respondent was not legally bound to render any such account as called for by the appellant's declaration: that the appellant's action was frivolous and vexatious.

The judgment of the Superior Court was in favor of the plaintiff The judgment of Court of Queen's Bench is as follows:—

Considering that the respondent, who has received and accepted the accounts to the number of fifty-five, which the appellant has rendered of his administration of the property of the respondent from the time he was appointed his agent and attorney in 1865, till the first day of July, one thousand eight hundred and eighty-one, when he ceased to be such agent and attorney, and that, without any objection as to the form in which the said accounts were rendered, has no right to ask, as he has done by his declaration, that the said accounts be declared null and set aside, and that the appel-

lant be ordered *en justice* to render another and complete account of the whole of his administration.

And considering that the respondent, upon his allegation that he has discovered errors and omissions in the said accounts, is only entitled to demand that such errors and omissions, which he may establish by sufficient evidence, be corrected and the accounts reformed as regards such errors and omissions, and that the appellant be condemned to pay such sums of money as may be found due by him to the respondent after the correction and reformation of such accounts.

The court reversed the judgment of the Superior Court and dismissed the respondent's action, reserving however to respondent his recourse against appellant for all sums not accounted for and for all balances due after reformation of accounts.

Fleming Q C. and *Nicolls* for the appellant referred to Troplong (1); Art. 1710 C. C. *Muldoon* v. *Dunne* (2); Journal du Palais (3).

Carter for the respondents cited Pigeau (4); *Cummings* v. *Taylor* (5); *Blais* v. *Vallières* (6); *School Commissioners of Chambly* v. *Hickey* (7).

Sir W. J. RITCHIE C.J.—This being rather matter of procedure than otherwise in view of the plaintiff's letter to the defendant dated 5th February, 1879, in which he says:—

I have recently had a thorough audit of the accounts of my late father's estate, and I am glad to say they come out very satisfactorily.

The audit has been by an official accountant, and therefore has been a complete scrutiny. In going over the voluminous accounts from your side it has been satisfactory to us to find them on the whole so correct: there is, however, an error in the account as rendered by you in 1871, commencing in February and ending in May of same year; if you will refer to the entry under date of the 29th May, '71, on the credit side you will observe that you take credit for remittance of $3,989.61 in bill of exchange for £560 6*s*. 9*d*., whereas

(1) Vol. 18 p. 234.
(2) 7 L. N. 239.
(3) Vol. 9 p. 76.
(4) 5 ed. Verbo "Compte" vol. 2 p. 423.
(5) 4 L. C. J. 304.
(6) 10 Q. L. R. 382.
(7) 1 L. C. J. 189.

1887

GILLESPIE v. STEPHENS.

Ritchie C.J.

$3,989.61 presents at 10⅞ per cent. premium of exchange £813 5*s.* 7*d.*;—will you look into this and explain.

Yours faithfully,

ROBT. GILLESPIE.

R. H. STEPHANS, Esq, Montreal.

it appears to me that the decision of the Court of Appeal is much more consistent with the justice of the case, and the dealings of the parties, in reference to the rendering and settlement of accounts from time to time by the parties than the judgment of the court of first instance, which :—

Condamne le défendeur à rendre compte au demandeur de sa gestion et administration depuis le vingt-six de janvier mil huit cent soixante et quatre jusqu'au premier de juillet mil huit cent quatre vingt-un, sous serment, avec pièces justificatives à l'appui et à remettre au demandeur tous contrats, actes, comptes, livres de comptes, correspondances et autres documents concernant la dite gestion et administration qu'il a ou peut avoir en sa possession, sous un mois de la signification qui lui sera faite du présent judgement à moins que le défendeur n'aime mieux payer au demandeur la somme de dix mille piastres, ce qu'il sera tenu d'opter dans le dit délai, le tout, avec dépens contre le défendeur qui a contesté la dite action, desquels dépens distraction est accordée aux avocats du demandeur, Mtres. Church, Chapleau, Hall & Atwater, avocats du demandeur és qualité.

The judgment and reservation of the Appeal Court gives to the plaintiff, in my opinion, all he is entitled to ask for and therefore I think this appeal should be dismissed.

STRONG and FOURNIER JJ. concurred in the judgment of Taschereau J. in dismissing the appeal.

HENRY J.—I am of the same opinion. The appellant by the accounts rendered to him from time to time got all the information it was ever intended should be given by an agent to his principal. The accounts rendered are alleged to contain one or two errors. He (the appellant) knew what the errors were, and although he might have an action to recover the money which such errors show him to be entitled to, he has

1887

GILLESPIE v. STEPHENS.

no right to force the respondent to give another account. I think therefore the appeal herein should be dismissed with costs.

Henry J.

TASCHEREAU J.—I am of opinion that this appeal should be dismissed. By the judgment appealed from it is held that if a mandator and a mandatary, laboring under no legal disability, come to an amicable settlement about the rendering of account due by the mandatary, without vouchers or any formality whatsoever, such a rendering of account is perfectly legal, and that if, subsequently, the mandator discovers any error or omissions in this account, his recourse against his mandatary is by an action *en redressement de compte*, and not by an action asking another complete account. The cases cited by the respondent establish clearly that the jurisprudence in Quebec is in that sense. Art. 21 ch. 29 of the ordonnance of 1667 has always been extended to *comptes rendus à l'amiable*. In France also the courts refuse in such a case the action to account; *re Dephelines*, in the Orleans Court (1); *re Pellain*, Court of Cassation (2). In this last case, it was held that even for an account rendered verbally, it was the action *en redressement* only that the mandator should have recourse to. I refer also to 2 Boitard Proc. Civ. page 164 and the cases there cited. Title 29 of the Ordonn. of 1667 evidently bears only on accounts rendered in justice, with the exception of art. 23 which expressly enacts that accounts may be rendered *à l'amiable*. Stricter rules are followed by the courts when the account is between a tutor and his pupil, which is not the case here.

Appeal dismissed with costs.

Solicitors for appellant: *Church, Chapleau, Hall & Nicolls.*

Solicitors for respondent: *Kerr, Carter & Goldstein.*

(1) S. V. 55, 2. 298. (2) S. V. 57.1.102.

1887

*Mar. 21, 22.

*June 22.

LEWIS SPRINGER (DEFENDANT).....APPELLANT;

AND

THE EXCHANGE BANK OF CANADA (PLAINTIFF) ..... } RESPONDENT.

THOMAS BARNES, EXECUTOR, &c. OF GEORGE BARNES, DECEASED (DEFENDANT)..... ..... } APPELLANT;

AND

THE EXCHANGE BANK OF CANADA (PLAINTIFF) ..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL OF ONTARIO.

Security—Cashier of bank—Misconduct of—Illegal transactions—Proper banking business—Sanction of directors.

The sureties of an absconding bank cashier are not relieved from liability by showing that the bank employed their principal in transacting what was not properly banking business in the course of which he appropriated the bank funds to his own use the claim against sureties being for the moneys so appropriated by the principal and not for losses occasioned by such illegal transactions.

APPEAL from a decision of the Court of Appeal for Ontario (1) affirming the judgment of Ferguson J. in the Chancery Division (2) in favor of the plaintiff.

These actions are brought by the Exchange Bank of Canada against Charles Robert Murray, formerly their cashier, and Lewis Springer and Thomas Barnes his sureties.

These are separate actions against each surety but were heard and disposed of together, the contract sued upon and the pleading and evidence being substantially the same in each case.

---

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

(1) 13 Ont. App. R. 390. (2) 7 O. R. 309.

1887

SPRINGER v. EXCHANGE BANK OF CANADA.

BARNES v. EXCHANGE BANK OF CANADA.

The action in each case was on a bond given by the said Murray as principal, and the respective defendants as sureties, such bond containing the following condition:—

"Now the condition of the above written bond or "obligation is such that if I, the said Charles Robert "Murray, do and shall from time to time, and at all "times hereafter, so long as I shall continue in the "service or employ of the said Exchange Bank of "Canada (hereinafter called the bank) in the capacity "aforesaid, or in any other capacity at the said branch "or agency, or at any other branch or agency of the "bank, or at the chief seat of business of the bank, "honorably, diligently and faithfully demean and con-"duct myself in such service or employ, and use my "utmost endeavors for the benefit and advantage of "the bank, and willingly obey all the lawful com-"mands of the bank touching my duties therein, and "shall in all instances, as well whilst in the service "or employ of the bank, as after I shall be discharged "therefrom, retain and keep secret, except from the "President and Directors of the bank and such officers "and other employees thereof as shall be entitled to "the knowledge, all such transactions and matters re-"lative to the affairs of business of the bank as in the "course of such service or employ shall be entrusted "to me, or shall either directly or indirectly come to "my knowledge; and shall also duly, truly and "regularly render and deliver to the bank or to such "person or persons as the bank shall from time to time "appoint for that purpose, a just, true and faithful ac-"count in writing of all such moneys, securities for "money, bills, notes, bonds, deeds, writings, books, "securities, goods, chattels, effects, matters and things "whatsoever, as have, or shall from time to time come to "my hands, custody or charge of or belonging to the

1887

SPRINGER v. EXCHANGE BANK OF CANADA.

BARNES v. EXCHANGE BANK OF CANADA.

"bank or to the correspondents or depositors thereof or "therein, or to any other person or persons whomso- "ever wherewith the bank shall or may be charge- "able."

The bond also contained a covenant by the obligors to make good all losses occasioned by the misconduct of the said Murray, and provision for ascertaining the amount of any such loss by means of an account taken from the books of the bank. It was also agreed that such account should bear interest from the time it was delivered.

The cashier having absconded the bank claimed that he had appropriated their funds to the extent of some $30,000 and brought these actions to recover from the sureties the amounts of the penalties of their respective bonds, namely, $5,000 dollars each.

The defence set up in these actions was that the contract was made with the bank in the belief that Murray, the cashier, would only be employed in ordinary and legitimate banking business, and that he was not so employed but was employed in speculating in, and buying and selling, on margin and otherwise, large amounts of the stock of the bank and other stock, in the course of which improper business his defalcations occurred, and that the sureties were relieved from the obligations of their bonds by reason of the facilities for misconducting himself thus afforded by the bank to Murray.

The evidence showed that the bank had become possessed of a quantity of Montreal Telegraph stock on the security of which advances had been made. To avoid loss on this stock the usual means of affecting the market were employed, and an account was opened in the books of the bank called the "C. R. Murray trust account" in which these stock transactions were entered. Murray drew cheques upon this account

1887

SPRINGER v. EXCHANGE BANK OF CANADA.

BARNES v. EXCHANGE BANK OF CANADA.

some of which he deposited to the credit of his private account and afterwards withdrew for his private speculations. And it was by this method of dealing with the trust account that nearly all his defalcations occurred.

On the trial before Ferguson J. judgment was given in each action in favor of the bank for the full amount of the penalty and interest on the account delivered according to the agreement in the bond. The Court of Appeal varied the judgment by deducting the amount of such interest, holding that no more than the penalty of the bonds could be recovered. The defendants then appealed to the Supreme Court of Canada.

Robinson Q.C. and *Malone* for the appellants cited following authorities: *Phillips* v. *Foxall* (1); *Watts* v. *Shuttleworth* (2); *Mansfield Union* v. *Wright* (3); *Sanderson* v. *Aston* (4); *Pearce* v. *Foster* (5); *The Queen* v. *Pringle* (6); Morse on Banking (7); *Corporation of Adjala* v. *McElroy* (8).

Bain Q.C. for the respondents referred to *Jones* v. *Imperial Bank of Canada* (9); Thomson on Liability of Officers of Corporations (10); Morse on Banking (11); De Colyar on Guarantees (12).

Sir W. J. RITCHIE C.J.—The breach of duty complained of has no connection with the dealing of the bank with the stocks taken in payment of debts with a view to saving themselves from loss, but the breach of duty complained of is based upon the alleged misapplication of the money of the bank placed in charge,

(1) L. R. 7 Q. B. 666.
(2) 5 H. & N. 235; 7 H. & N. 353.
(3) 9 Q. B. D. 683.
(4) L. R. 8 Ex. 73.
(5) 17 Q. B. D. 536.
(6) 32 U. C. Q. B. 308.
(7) 2 Ed. p. 239.
(8) 9 O. R. 580.
(9) 23 Gr. 262.
(10) Pp. 357-8.
(11) P. 196.
(12) 2 Ed. p. 285

1887

SPRINGER v. EXCHANGE BANK OF CANADA.

BARNES v. EXCHANGE BANK OF CANADA.

Ritchie C.J.

and under the control, of Murray the cashier.

I think there is clear proof, in this case, that Murray drew cheques for his private purposes and thereby appropriated the funds of the bank to his own use to an amount greater than the penalties of the two bonds, and such appropriation was in no way authorized or sanctioned by the directors. I therefore agree with the learned Chief Justice, that the defaults of the cashier are sufficiently proved, and that no legal grounds have been shown to exonerate the sureties; and therefore the appeal should be dismissed.

STRONG J.—I am of opinion that this appeal should be dismissed for the reasons given by the court below.

FOURNIER J. concurred.

HENRY J.—I entertained some doubts on the argument, and still have doubt on the matter, but under all the circumstances of the case I am inclined to agree with the rest of the court that the sureties are not relieved from liability and that the appeal should be dismissed.

TASCHEREAU J.—Concurred.

GWYNNE J.—It is unnecessary for us to express an opinion whether or not, assuming that the evidence of Mr. Murray could be implicitly relied upon, his sureties would be released from all liability under their bonds, for I entirely concur in the opinion of the Chief Justice of the Court of Appeal for Ontario that little weight can be attached to that evidence, and apart from it there can be no doubt of the liability of the sureties. If Mr. Murray's statements are indeed true, it is unfortunate for himself and for his sureties that he should not have procured at least some evidence corroborative of his own evidence of the irregular and in some res-

pects illegal transactions which he accuses himself as having been engaged in at the instance of the directors of the bank whose trusted cashier he was, so as to bring home against the instigators of these transactions a conviction of the truth of the charges which, after having deserted his post and absconded from the country, he now makes against them.

As to the point raised by the defendant Barnes that the death of his testator terminated his contract of suretyship it is also unnecessary to express an opinion for two reasons, namely, 1st. No such point is raised upon the pleadings, on the contrary, in the only answer of the defendant Barnes which is in the case laid before us he speaks of himself as the person who and not his testator had become Murray's security, and

2nd. Because by the evidence of the inspector (which is not disputed) it appears that Mr. Murray at the time of George Barnes's death which now appears to have been on the 30th June, 1877, was a defaulter to an amount in excess of the amount recoverable under the bond; for these reasons, I am of opinion that the appeals in both cases should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for appellants: *Martin & Malone.*

Solicitors for respondents: *Bain, Laidlaw & Co.*

1887
*March 5.
*Nov. 15.
*Dec. 20.

JAMES D. LEWIN AND ANOTHER (PLAINTIFFS) ..... } APPELLANTS;

AND

JOHN HOWE AND OTHERS (DEFENDANTS)..... } RESPONDENTS.

ON APPEAL FROM THE EQUITY COURT OF NEW BRUNSWICK.

Appeal—Direct from Equity Court—C. S. C. ch. 135 s. 26—Special circumstances—Practice—Judgment of Privy Council—Re-payment of costs.

An appeal came before the Supreme Court, by consent, from the decision of the Judge in Equity of New Brunswick, without an intermediate appeal to the Supreme Court of the province, and, after argument, was dismissed (1). The judgment of the Supreme Court was subsequently reversed by the Privy Council and the case sent back to the Judge in Equity to make a decree. The plaintiffs being dissatisfied with the decree pronounced by the Judge in Equity applied for leave to appeal direct under R. S. C. ch. 135 s. 26 therefrom.

Held, Taschereau and Gwynne JJ. dissenting, that under the circumstances of the case such leave should be granted.

Where a judgment of the Supreme Court of Canada has been reversed by the Privy Council the proper manner of enforcing the judgment of the Privy Council is to be obtain an order making it a rule of the Supreme Court of Canada.

Where such judgment of the Privy Council was made a rule of court the court ordered the re-payment by one of the parties of costs received pursuant to the judgment so reversed.

---

*PRESENT—Strong, Fournier, Henry, Taschereau and Gwynne JJ.

(1) 9 Can. S. C. R. 617.

JAMES G. BOYCE (PLAINTIFF).....APPELLANT; 1887

AND

THE PHŒNIX MUTUAL LIFE INSURANCE CO., (DEFENDANT.)..... } RESPONDENT.

*May 6.
*June 22.

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

Life insurance—Declarations and statements in application—Intemperate habits—Increase of risk—Promissory warranty—Locus standi—Art. 153 *C. C.*

An application for life insurance signed by the applicant contained in addition to the question and answer, viz.: Are your habits sober and temperate? A. Yes, an agreement that should the applicant become as to habits so far different from the condition in which he was then represented to be as to increase the risk on the life insured, the policy should become null and void. The policy stated that "if any of the declarations or statements made in the application of this policy upon the faith of which this policy is issued shall be found in any respect untrue, in such case the policy shall be null and void."

On an action on the policy by an assignee, it was proved that the insured became intemperate during the year preceding his death, but medical opinion was divided as to whether his intemperate habits materially increased the risk.

Held, on the merits per Ritchie C. J. and Strong J., (Fournier and Henry JJ. *contra*,) that there was sufficient evidence of a change of habits which in its nature increased the risk on the life insured to avoid the contract.

The appellant's interest in the policy was as assignee of Dame M. H. B., the wife of one Charles L., to whom the insured had transferred his interest in the policy on 27th October, 1876.

Held, per Strong, Taschereau and Gwynne JJ. that the appellant, had no *locus standi*, there being no evidence that M. H. B. had been authorised by her husband to accept or transfer said policy.

APPEAL from a judgment of the Court of Queen's Bench, for Lower Canada, appeal side (1) affirming a

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

(1) M. L. R. 2 Q. B. 323.

1887

BOYCE v. PHŒNIX MUTUAL L. INS. CO.

judgment of the Superior Court, which dismissed appellant's action.

The Company respondent, on the 27th September, 1876, issued a policy on the life of William A. Charlebois, of Montreal, for the sum of $3,000, payable to his executors, administrators or assigns ninety days after proof of his death.

On the 27th of October, 1876, Charlebois, for value, assigned the policy to one Mrs. Lefebvre, and she on the 9th of September, 1882, assigned it for value to plaintiff who was the holder of it on the 17th of September, 1882, when Charlebois died.

In an action on the policy, the appellant's declaration set up that Charlebois' interest in the said policy was on the 27th October, 1876, transferred "to Dame "Marie Eliza Helmina Belle, wife of Charles Hamilton "Lefebvre, of Montreal, aforesaid, who became thereby "the legal holder and owner thereof; that afterwards, "to wit, on the 9th day of September, 1882, said Dame "Marie Eliza Helmina Belle by the ministration of her "duly authorized agent and attorney, James Baxter, of "the city and district of Montreal aforesaid, broker, "duly assigned and transferred all her right, title and "interest in said policy for value received to said "plaintiff, who became thereby the legal holder and "owner thereof, the whole as appears from copies "of said transfers, duly fyled. That the said transfers "above mentioned were duly signified and notified to "the company, defendants, who duly accepted the "same previous to the 17th September, 1882, at the "city of Montreal."

The defendants answered this action by two pleas, the first in effect denying the plaintiff's title, averring that the assignment and transfer of Dame Belle's rights in said policy were null and void; that Baxter had no right nor authority whatsoever to make such assign-

ment and transfer; that the plaintiff had not become in consequence of the said alleged transfer and assignment the legal holder and owner of the policy; that the company were never notified of this transfer, and that any assignment of the policy was not binding on the company; that the plaintiff was a mere *prête-nom* of Baxter and had no interest in the policy and assignment; and concluding with a general denial.

The second plea was directed specially to the terms and conditions of the policy, and was to the effect that the policy was null on account of false representations as to his sober habits made by Charlebois in his application therefor, and further on account of his violation of the terms and conditions of the application and of the policy by increasing the risk on his life by the excessive use of spirituous intoxicating liquors.

The pleas were met by general answers.

With the exception of that part of the second plea, which sets up false representations in the application as to the insured's sober habits at the time of making the application, both these pleas were maintained by the judgment of the Hon. Mr. Justice Mathieu in the Superior Court, and the action of plaintiff was dismissed accordingly, which judgment was confirmed by the Court of Queen's Bench. The opinions delivered in the Court of Queen's Bench relate entirely to the defence made by the second plea. The evidence as to a change of his habits was that during the last year of his life the insured took to drink heavily, but medical opinion was divided as to the cause of death, two doctors holding that the insured died of dropsy, produced by heart disease, and that intemperate habits did not increase the risk to an appreciable degree, while a third doctor, his regular medical attendant, stated that he died of disease of the liver, and that his intemperate habits materially increased the risk.

1887

BOYCE v. PHŒNIX MUTUAL L. INS. CO.

MacLaren for the appellant.—A policy is a negotiable commercial instrument under the law of Lower Canada, and its assignees are not bound by collateral contracts. See Art. 2482, C.C. Daniels on Negotiable Instruments sec. 1. Arts. 2490–1 C. C. contain the law as to what are warranties and what conditions. And see Crawley on Life Insurance (1).

Creighton for the respondents.—There was no authority in Dame Lefebvre to take an assignment of the policy or to assign it afterwards. Art. 183, C.C. See *Crevier* v. *Rochèleau* (2).

The demand of separation on the record is not certified. If she had a right to the policy she forfeited it and lost it by the terms of this judgment. *Cherrier* v. *Bender* (3) is relied on by the other side, but there is a case of *L'Heureux* v. *Boivin* (4) decided by Chief Justice Meredith overruling it.

The following cases were also cited. *Kenck* v. *Mutual Life Insurance Co.* (5); *Towle* v. *National Guardian Assurance Society* (6); *Kimball* v. *Ætna Insurance Co.* (7).

MacLaren in reply referred to Art. 144 C. C. May on Insurance p.p. 182–3.

Sir W. J. RITCHIE C.J.—The application for insurance headed "The questions to be answered by the "party whose life is proposed for insurance and which "formed the basis of the contract" contained *inter alia*; "Q. Are your habits sober and temperate?" "A. Yes." and at the end;

It is hereby agreed that this application shall form the basis of the contract of insurance herein applied for, and that the same shall form part of said contract as fully as if therein recited, and that all answers and declarations contained in this application are, and shall

(1) P. 136 and cases there cited.
(2) 16 L. C. R. 328.
(3) 3 L. C. R. 419.
(4) 7 Q. L. R. 221.
(5) 35 Am. Rep. 641.
(6) 30 L. J. Ch 900.
(7) 9 Allen (Mass.) 540.

1887

BOYCE v. PHŒNIX MUTUAL L INS. CO.

Ritchie C.J.

be taken to be strict warranties, and that should the applicant become as to habits, so far different from the condition in which he is now represented to be as to increase the risk on the life insured, or neglect to pay the premium on or before the day it becomes due, the policy shall become null and void, and all payments made thereon shall be forfeited. The contract of insurance here applied for, shall be completed only by the delivery of the policy and payment of the premium. It is also agreed and warranted that this application has been made, prepared and written by the applicant or by his own proper agent, and that the assurer is not to be taken to be responsible for the preparation, or for anything contained therein or omitted therefrom, and any untrue answers or representations or suppressions of any fact, shall void the contract.

And in the policy itself it is provided

This policy is issued, and accepted by the assured, upon the following express conditions and agreements.

First. If the said William A. Charlebois shall at any time during the continuance of this policy, without the consent of the said company previously obtained in writing, visit any part of the Western Hemisphere lying between the tropics, or of the Eastern Hemisphere between the 36th parallel north and the Tropic of Capricorn, or engage in the manufacture or transportation of gunpowder or fireworks, or in submarine operations, or in any military or naval service whatsoever, [the militia not in actual service excepted] or in case he shall die by the hands of justice; or in, or in consequence of a duel, or of the violation of the law of these States, or of the United States, or of any other country, which he may be permitted under this policy to visit, or reside in, or, if any of the declarations or statements made in the application of this policy, upon the faith of which this policy is issued, shall be found in any respect untrue, or in case any note given for the cash part of premium on this policy shall not be paid at maturity, or in case the interest is not paid annually in advance, or any notes which may be given for any portion of the premiums on this policy, then, and in such case this policy shall be null and void.

The policy and declaration are one and must be read together and so as to make one consistent whole and so reading them it is impossible, in my opinion, to escape the conclusion that should the applicant become as to habits so far different from the condition in which he was then represented to be as to increase the risk of the life insured or neglect to pay the premium on or before the day it became due, the

1887

BOYCE v. PHŒNIX MUTUAL L. INS. CO.

Ritchie C.J.

policy therefore became null and void and all payments made thereon forfeited. Mr. Crawley on Life Insurance p. 35, thus states the law.

The first step towards effecting an insurance is for the person intending to effect it to fill in a form of proposal containing a searching number of questions as to his age, health, mode of life and habits, and to sign a declaration varying in form in the different companies, but generally to the effect that the answers are true, and that the declaration shall be the basis of the contract, and that any untrue statement, omission, or suppression shall avoid it; and frequently providing in addition that the premiums paid shall in such a case be forfeited to the company.

The declaration is generally incorporated in the policy by reference, but whether this is so or not, when in this form it must be construed with the policy, and together they form the contract; *Fowkes* v. *Manchester, &c., Co.* (1).

And at p. 134 :—

As we have seen, the almost universal practice of insurance companies is to require intending insurers to sign a declaration containing detailed answers to an elaborate series of searching questions, and stating that the declaration shall form the basis of the contract and is true, and that any untrue statements, omissions or suppressions shall avoid the policy: and in such cases the declaration is expressly or impliedly incorporated with the policy, and they must be construed together and together form the contract; *Fowkes* v. *Manchester &c., Co.*, (1); and where this is the case truth becomes a condition precedent to liability, and any untrue representation whether material or not avoids the policy, for it is part of the contract that if a particular statement is untrue the contract is at an end; *Anderson* v. *Fitzgerald* (2).

And May on Insurance (3).

Warranties are distinguished into two kinds; affirmative, or those which allege the existence at the time of insurance of a particular fact, and avoid the contract if the allegation be untrue; and promissory, or those which require that something shall be done or omitted after the insurance takes effect and during its continuance, and avoid the contract if the thing to be done or omitted be not done or omitted according to the terms of the warranty.

So that as regards this case it is resolved into a question of fact namely, the assured having represented that his habits were sober and temperate did he

(1) 3 B. & S. 917-927). (2) 4 H. L. Cas. 484, at p. 504.
(3) 2nd Edition, p. 157.

become as to habits so far different from the condition he then represented himself to be, as to increase the risk to his life? The court of first instance distinctly finds that such was the case; that habits of intemperance which he acquired in the immoderate use of intoxicating drinks was different from what he had represented to be his condition at the time of application and issuing of the policy and that such use considerably impaired his health and, that his addiction to intemperance and his habits of intemperance have augmented considerably the risk of insurance on his life; and Mr. Justice Cross who delivered the judgment of the majority of the Court of Queen's Bench confirming the judgment of the Superior Court after stating the terms of the application which I have read says:—

I have no hesitation in saying that a contract thus formed was valid and became binding upon Charlebois and his assignees. It then becomes purely matter of evidence whether the alleged violation of the condition as to change of habits is proved, The learned judge of the Superior Court who rendered the judgment appealed from found it proved, and the majority of this court concur in the conclusion he arrived at.

There was ample evidence to sustain these findings; in fact, on the evidence, I do not see how any other conclusion could have been arrived at than that a change in the habits of the insured took place which increased the risk on his life and thereby the policy by the terms of the contract became void.

I do not think the doctrine of representation as distinguished from warranty is applicable to this case because the representation is included and forms part of the contract. The appeal must therefore be dismissed.

STRONG J. was of opinion that the judgment should be affirmed for the reasons given by the court below and by Mr. Justice Taschereau.

1887

BOYCE v. PHŒNIX MUTUAL L. INS. CO.

Fournier J.

FOURNIER J.—I am of opinion that this appeal should be allowed. The evidence, I think, is not sufficient to warrant us in holding that the risk has been increased by the habits of the insured so as to avoid the policy.

HENRY J.—I am of opinion in this case, reading the application and policy together, that the respondent is entitled to our judgment on the merits of the case.

I do not think that it has been proved that the assured imperilled or shortened his life. It is in evidence that he suffered from heart disease and it was only a question as to how long his life could be saved. It was then thought that taking spirits even to an excess might or might not benefit him and, after a careful perusal of the evidence, I think there is not evidence sufficient to say that the policy was avoided by his so indulging in spirits. One of the doctor's examined said he died from the effects of liver complaint, whilst two other doctors put it on the ground of heart disease. The issue that his life was endangered by the use of spirits has not, in my opinion, been satisfactorily proved.

On the other point, whether or not the respondent was entitled to bring the suit, I am not so clear. However this court has power to amend and join the parties entitled to recover and as the merits of the case have been tried I am of opinion an amendment might be ordered and that the respondent in the case would be entitled to our judgment if such amendment were made.

TASCHEREAU J.—I am of opinion that this appeal should be dismissed. The respondent's plea that the appellant has no *locus standi* is sufficient to dismiss the plaintiff's action.

GWYNNE J.—The plaintiff has, in my opinion, failed to establish his title to the policy sued upon which title was distinctly put in issue by the pleadings on the record, and for this reason, without considering the other point raised, I am of opinion that the appeal should be dismissed with costs.

1887
BOYCE
v.
PHŒNIX MUTUAL L. INS. CO.
Gwynne J.

Appeal dismissed with costs.

Solicitor for appellant: *John L. MacLaren.*

Solicitor for respondents: *J. G. A. Creighton.*

PROVIDENCE WASHINGTON INSURANCE CO. (DEFENDANTS)..... APPELLANTS;

1888
*Feb. 28, 29.

AND

GEORGE W. GEROW (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Marine Insurance—Description of voyage—Deviation—Question for jury—Misdirection—Waiver—Defective case—Application for the re-hearing of the judgment under.

A marine policy insured a ship for a voyage from Melbourne to Valparaiso for orders, thence to a loading port on the western coast of South America, and thence to a port of discharge in the United Kingdom. The ship went from Valparaiso to Lobos, an island from twenty-five to forty miles off the coast of South America and was afterwards lost. In an action on the policy.

Held, that whether or not Lobos was a loading port on the western coast of South America within the policy was a question for the jury, and it not having been submitted to them a new trial was ordered for misdirection.

After judgment application was made to vary or reverse the judgment on affidavits showing that the question was submitted and answered.

1888
*Mar. 17.

Held, that the application was too late, as the court had to determine the appeal case transmitted, and the respondent had allowed the appeal to be argued and judgment rendered without taking any steps to have the case amended.

---

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

1888

PROVIDENCE WASHINGTON INS. CO. v. GEROW.

APPEAL from a decision of the Supreme Court of New Brunswick refusing to set aside a verdict for the plaintiff and order a non-suit or new trial.

This was an action on a marine policy by which the respondent's ship the "Minnie H. Gerow" was insured for a voyage from Melbourne to Valparaiso for orders, thence to a loading port on the western coast of South America and thence to a port of discharge in the United Kingdom The only material question raised in the case is whether Lobos, an island from twenty-five to forty miles distant from the mainland of South America, is a port of loading on the coast under the policy. At the trial the question as to this was withdrawn from the jury, the judge holding that it was well understood by shipowners in St. John that Lobos was a loading port and would be understood to be included in the provision in the policy, and he directed the jury, as a matter of law, that Lobos was such a port.

The Supreme Court of New Brunswick affirmed the verdict obtained by the plaintiff at the trial. The company then appealed to the Supreme Court of Canada.

Straton for the appellants, refers to *McManus* v. *The Etna Ins. Co.* (1); *Grainger* v. *Martin* (2); *Deybel's Case* (3).

Weldon Q. C. and *Palmer* for the respondent, cite *McManus* v. *Etna Ins. Co.* (1); *Stoneham* v. *The Ocean, &c., Ins. Co.* (4).

By the Court.—This was purely a question for the jury, and it not having been left to them there must be a new trial.

Appeal allowed and a new trial ordered.

(1) 6 All. (N.B.) 314.
(2) 31 L. J. Q. B. 186.
(3) 4 B. & Al. 243.
(4) 19 Q. B. D. 237.

1888

PROVIDENCE WASHINGTON INS. CO. v. GEROW.

On a subsequent day *Weldon* Q. C. moved to vary or reverse the judgment, on affidavits showing that the question had been submitted to the jury and answered although by oversight the answer was not in the printed case.

By the Court.—The court must determine an appeal on the case transmitted to it; as no application was made to amend the case before the appeal was argued it is too late now. To grant this motion would necessitate a re-argument of the appeal.

Motion dismissed with costs.

Solicitors for appellants: *Gilbert & Straton.*

Solicitors for respondent: *Weldon, McLean & Devlin.*

APPENDIX.

—:o:—

Unreported Cases Decided Since the Issue of Cassels's Digest in 1886.

1886
May 17.

STUART *v.* MOTT.

Partnership—Interest in Mine—Agreement as to—Evidence.

Held, affirming the judgment of the Supreme Court of Nova Scotia, that in a suit for a share of the profits of a gold mine where the plaintiff relied on an agreement by the defendant for a transfer of a portion of the latter's interest in such mine for valuable consideration, the evidence was not sufficient to establish a partnership between the parties in the working of the mine and the suit was dismissed.

1886
June 22.

THE GREAT WESTERN INS. CO. *v.* JORDAN.

Marine insurance—Loss from detention by ice—Perils insured against—Ordinary perils of the seas.

A vessel on her way to Miramichi, N. B. was chartered for a voyage from Norfolk, Vir., to Liverpool with cotton. She arrived at Miramichi on November 25th and sailed for Norfolk on the 29th. Owing to the lateness of the season, however, she could not get out of the river and she remained frozen in the ice all winter and had to abandon the cotton freight.

Held, reversing the judgment of the Supreme Court of New Brunswick (1), Henry J. dissenting, that the loss occasioned by the detention from the ice was not a loss by "perils of the seas" covered by an ordinary marine policy.

WOODWORTH *v.* DICKIE.

1886
Oct. 26.

Action on bail bond—Alteration of after execution—Proof of—Form of bond.

In an action on a bail bond the defence was that it had been altered after execution, and that it was not in the form required by the statute.

Held, affirming the judgment of the Supreme Court of Nova Scotia (2) that the defendant having refused to call the attesting witness to the bond, who was their counsel in the case, the defence as to the alteration, alleged to be in the attestation clause, could not succeed.

(1) 24 N. B. Rep. 421. (2) 19 N. S. Rep. 96.

Held also, that the objection as to be the form of the bond being merely technical and unmeritorious, could not be taken for the first time before this court.

MUIRHEAD *v.* SHIRREFF.

1886
Nov. 8.

Appeal—Death of party—Suggestion—Judgment nunc pro tunc—Solicitor—Authority to bind client.

Where the losing party in a suit died after verdict and before judgment on a rule for a new trial, and judgment *nunc pro tunc* was entered, by order of a judge, as of a day prior to his death and a suggestion of the death entered on the record, the court refused to quash an appeal by his executors.

Held, affirming the judgment of the Supreme Court of New Brunswick (1) that a promise of indemnity to the sheriff by an attorney is binding on his client where the attorney had the conduct of the suit in the course of which such promise was made and the subsequent acts of the client showed that he had adopted the attorney's proceedings.

SCOTT *v.* BENEDICT.

1886
Nov. 8.

Vendor's lien—Sale of land—Notice.

W. S. agreed to transfer his timber limits to W. A. S. in case the latter should, within two years, pay off a mortgage to R. and other liabilities, and in case W. S. was obliged to pay any of such liabilities he was at liberty to sell such portion of said limits as would recoup him. At the same time W. S. wrote to R. authorising him to transfer to W. A. S. said lands which he held as security on payment of his claim. R. assigned his claim and the limits to B. who, by agreement with W. A. S. and the executors of W. S. continued to carry on the lumber business formerly owned by W. S. certain of the liabilities of W. S. not having been paid his estate claimed a vendor's lien on such limits, and relied on the letter to R., and on notice to an attorney who prepared the agreement with B. to establish notice of such lien in B.

Held, affirming the judgment of the court below, that even if such lien existed B. could not be said to be affected with notice of it.

McGREEVY *v.* THE QUEEN.

1886
Nov. 8.

Petition of right—46 *Vic. ch.* 27 (2)—*Appeal to Supreme Court of Canada.*

The provisions of the Supreme and Exchequer Courts acts relating to appeals from the Province of Quebec, apply to cases arising under the Petition of Right Act of that Province, 46 Vic. ch 27.

(1) 25 N. B. Rep. 196.

1886 Nov. 29.

THE ATTORNEY GENERAL OF ONTARIO *v.* THE ATTORNEY GENERAL OF CANADA.

Statement of claim in Exchequer Court—Insufficiency of—Appeal to Exchequer Court from order of judge in chambers.

A statement of claim was filed by the Attorney General for the Province of Ontario in the Exchequer Court of Canada, praying "that it may be declared that the personal property of persons domiciled within the Province of Ontario, dying intestate and leaving no next of kin or other person entitled thereto other than Her Majesty, belongs to the province or to Her Majesty in trust for the province." The Attorney General for the Dominion of Canada in answer to the statement of claim made prayed that "it be declared the personal property of persons who have died intestate in Ontario since confederation, leaving no next of kin or other person entitled thereto except Her Majesty, belongs to the Dominion of Canada, or to Her Majesty in trust for the Dominion of Canada."

No reply was filed, and on an application to Mr. Justice Gwynne in chambers for a summons for an order to fix the time and place of trial or hearing, the summons was discharged on the ground that the case did not present a proper case for the decision of the court. A motion was then made before the Exchequer Court, Sir W. J. Ritchie, presiding, by way of appeal from the order of Mr. Justice Gwynne, for an order to fix the time and place of trial. The motion was dismissed without costs, on the ground that he was not prepared to interfere with the order of another judge of the same court.

On appeal to the full court,

Held, affirming the decisions appealed from, that the pleadings did not disclose any matter in controversy in reference to which the court could be properly asked to adjudge, or which a judgment of the court could affect.

1886 Dec. 7.

ARPIN *v.* THE QUEEN.

Appeal—Questions of fact.

Where a judgment appealed from is founded wholly upon questions of fact the Supreme Court of Canada will not reverse it unless convinced, beyond all reasonable doubt, that such judgment is clearly erroneous.

Judgment of the Court of Queen's Bench for Lower Canada, appeal side, affirmed.

1886 Dec. 7.

McMILLAN *v.* HEDGE.

Servitude—Aggravation of—Art. 558 C. C.

On the 26th March, 1853, one G. L. by deed of sale granted to P. C. "a right of passage through the lot of land of the said vendor

fronting the public road as well on foot as with carriage," and to the charge to the said purchaser "of keeping the gates of the said passage shut."

In 1882 McM., having acquired the dominant land, built a coal oil refinery and warehouses thereon. In the course of his trade he had several heavy carts making three or four trips a day through this passage leaving the gates open, and in addition to his own carts most of the coal oil dealers of the city of Montreal, wholesale and retail, were supplied there with their own carts. At the time of the grant the land was used as agricultural land.

Held, affirming the judgment of the Court of Queen's Bench for Lower Canada (1), Henry J. dissenting, that the passage could not be used for the purposes of a coal oil refinery and trade, as McM. thereby aggravated the servitude and rendered it more onerous to the servient land than it was when the servitude was established. Art. 558 C. C.

MARSHALL *v.* MUNICIPALITY OF SHELBURNE. 1887 Feb. 15.

Onus probandi—Action on bond—Execution of bond—Seal.

In an action on a bond against the sureties of the defaulting clerk of the Municipality of Shelburne, the defence raised was that the bond was not executed by them as it had no seals attached when the sureties signed it.

Held, affirming the judgment of the Supreme Court of Nova Scotia (2), Henry J. dubitante, that the plaintiffs had proved a *primâ facie* case of a bond properly executed on its face, and as the defendant had not negatived the due execution of the bond, it being quite consistent with his evidence that it was duly executed, the *onus* of proving want of execution was not thrown off the defendant, and as neither the subscribing witnesss nor the principal obligor was called at the trial to corroborate the evidence of the defendant, plaintiffs were entitled to recover.

THE QUEEN *v.* HUBERT. 1887 Mar. 1.

Award of official arbitrators—Inclusive of past and future damages—Appeal—42 Vic. ch. 8.

On a reference being made to the official arbitrators of certain claims made by one H. against the government for damages arising out of the enlargement of the Lachine Canal to land situated on said canal, the arbitrators awarded H. $9,216 in full and final settlement of all claims. On an appeal taken to the Exchequer Court by H. (Taschereau J. presiding) this amount was increased to $15,990, including $5,600 for damages caused to the land from 1877 to 1884 by leakage from the canal since its enlargement,

(1) M. L. R. 1 Q. B. 376. (2) 19 N. S. Rep. 171.

and the judge reserved the right to H. to claim for future damages from that date. On appeal to the Supreme Court of Canada it was:

Held, reversing the judgment of the Exchequer Court and confirming the award of the arbitrators, that it must be taken that the arbitrators dealt with every item of H.'s claim submitted to them and included in their award all past, present and future damages, and that the evidence did not justify any increase of the amount awarded.

Gwynne J. was of opinion that under 42 Vic. ch. 8 sec. 38 the Supreme Court had power (although the crown did not appeal to the Exchequer Court) to review the award of the arbitrators, and that in this case $1,000 would be an ample compensation for any injury that the claimant's land can be said to have sustained, which upon the evidence can be attributed to the work of the enlargement of the canal.

1887
Mar. 3.

WALSH *v.* HEFFERNAN.

Appeal—Quo warranto—Jurisdiction.

An appeal from a decision of the Court of Queen's Bench for Lower Canada, appeal side (1), was quashed on motion for want of jurisdiction, the proceedings being by *quo warranto* as to which there is no appeal by the statute.

1887
Mar. 14.

L'ASSOCIATION PHARMACEUTIQUE DE LA PROVINCE DE QUEBEC *v.* BRUNET.

Quebec Pharmacy Act (Q.) ch. 36 sec. 8—Construction of partnership contrary to law—Mandamus.

Held, affirming the judgment of the Court of Queen's Bench for Lower Canada (2), that section 8 of 48 Vic., ch. 36 (Q.) which says that all persons who, during five years before the coming into force of the act, were practising as chemists and druggists in partnership with any other person so practising, are entitled to be registered as licentiates of pharmacy, applies to respondent who had, during more than five years before the coming into force of the said act, practised as chemist and druggist in partnership with his brother and in his brother's name, and therefore he (respondent) was entitled under section 8 to be registered as licentiate of a pharmacy.

1887
Mar. 14.

PARISH OF ST. CESAIRE *v.* McFARLANE.

Municipal debentures—Future conditions—Municipal code, Art. 982.

Held, affirming the judgment of the Court of Queen's Bench for Lower Canada (3) that a debenture being a negotiable instrument, a railway company that has complied with all the condi-

(1) M. L. R. 2 Q. B. 482. (2) M. L. R, 2 Q. B. 362.
(3) M. L. R. 2 Q. B. 160.

tions precedent stated in the by-law to the issuing and delivery of debentures granted by a municipality is entitled to said debentures, free from any declaration on their face of conditions mentioned in the by law to be performed in future, such as the future keeping up of the road, etc. Art. 962 Municipal Code. Fournier J. dissenting.

DILLON *v.* THE TOWNSHIP OF RALEIGH.

1887
Mar. 15.

Estoppel—Action by ratepayer—Improper construction of municipal work—Ratepayer a contractor—Acceptance of surplus money.

A ratepayer of a municipality cannot maintain an action, on behalf of himself and the other ratepayers, against the municipality for the improper construction of a drain authorized by by-law when such ratepayer has himself been a contractor for a portion of the work and has received his share of the money voted for the work in excess of the amount expended.

Judgment of the Court of Appeal for Ontario (1) affirmed.

DOULL *v.* McILREITH.

1887
May 2.

Master's report—Excess of authority.

A decision of the Supreme Court of Nova Scotia (2), confirming the report of a master on a reference, reversed on the ground that the master had exceeded his authority and reported on matters not referred to him.

PLUMB *v.* STEINHOFF.

1887
June 20.

Title to land—Old grant—Starting point to define metes and bounds—How ascertained.

In an action of ejectment the question to be decided was whether the *locus* was situate within the plaintiff's lot No. 5, in concession 18, or within defendant's lot adjoining No. 24, in concession 17.

The grant through which the plaintiffs title was originally derived gave the southern boundary of lot 5 as a starting point, the course being thence eighty-four chains more or less to the river. The original surveys were lost, and this starting point could not be ascertained.

Held, affirming the judgment of the Court of Appeal for Ontario (3), Strong and Taschereau JJ. dissenting, that such southern boundary could not be ascertained by measuring back exactly 84 chains from the river.

(1) 13 Ont. App. R. 53. (2) 19 N. S. Rep. 341.
(3) 11 Ont. App. R. 788.

1887

June 20.

ELLS *v.* BLACK.

Trespass—Disturbing enjoyment of right of way—User—Easement.

E. and B. owned adjoining lots, each deriving his title from S. E. brought an action of trespass against B. for disturbing his enjoyment of a right of way between said lots and for damages. The fee in this right of way was in S., but E. founded his claim to a user of the way by himself and his predecessors in title for upwards of 40 years. The evidence on the trial showed that it had been used in common by the successive owners of the two lots.

Held, affirming the judgment of the Supreme Court of Nova Scotia (1), Ritchie C. J. and Gwynne J. dissenting, that as E. had no grant or conveyance of the right of way, and had not proved an exclusive user, he could not maintain his action.

1887

June 20.

MOONEY *v.* McINTOSH.

Trespass—Title to land—Boundaries—Easement—Agreement at trial—Estoppel.

In an action for damages by trespass by McI. on M's. land and by closing ancient lights defendant claimed title in himself and pleaded that a conventional line between his lot and the plaintiffs had been agreed to by a predecessor of the plaintiff in title. On the trial the parties agreed to strike out the pleadings in reference to lights and drains and to try the question of boundary only.

Held, affirming the judgment of the Supreme Court of Nova Scotia, (2), Ritchie C.J. and Gwynne J. dissenting, that independently of the conventional boundary claimed by the defendant the weight of evidence was in favor of establishing a title to the land in question in the defendant and the plaintiff could not recover, and that by the agreement at the trial the plaintiff could not claim to recover by virtue of a user of the land for over 20 years. *Semble*, that if it was open to him such user was not proved.

1887

June 22.

DUFFUS *v.* CREIGHTON.

Sheriff—Action against—Execution of writ of attachment—Abandonment of seizure—Estoppel.

A writ of attachment against the goods of M. in the possession of S. was placed in the sheriff's hands and goods seized under it. After the seizure the goods, with the consent of the plaintiff's solicitor, were left by the sheriff in charge of S., who undertook that the same should be held intact. The sheriff made a return to the writ, that he had seized the goods. The sheriff subse-

(1) 19 N. S. Rep. 222. (2) 19 N. S. Rep. 419.

quently seized the goods under execution of the creditors. In an action against the sheriff.

Held, reversing the judgment of the Supreme Court of Nova Scotia, that the act of leaving the goods in the possession of S. was not an abandonment by the plaintiff's solicitor of the seizure, and if it was the sheriff was estopped by his return to the writ from raising the question.

Held, also, that the act of plaintiff's solicitor acting as attorney for S. in a suit connected with the same goods was not evidence of an intention to discontinue proceedings under the attachment.

SNOWBALL *v.* RITCHIE. 1888 Feb. 28.

Boundary—Disputes as to—Reference to Surveyors—Duties of surveyors under.

R. who held a license from the Government of New Brunswick to cut timber on certain crown lands, claimed that S., licensee of the adjoining lot, was cutting timber on his grant, and he issued a writ of replevin for some 800 logs alleged to be so cut by S. The replevin suit was settled by an agreement between the parties to leave the matter to surveyors to establish the line between the two lots, the agreement providing that the lines of the land held under said license (of R.) should be surveyed and established by (naming the surveyors) and the stumps counted, etc.

Held, reversing the judgment of the Supreme Court of New Brunswick (1) that under this agreement the surveyors were bound to make a formal survey, and could not take a line run by one of them at a former time as the said boundary line.

CITY OF MONTREAL *v.* LABELLE. 1888 Mar. 2.

Damages—Art. 1056 *C. C.* - *Solatium* - *Cross appeal—Notice.*

In an action for damages brought against the corporation of the city of Montreal by Z. L. *et al*, the descendant relations of L. who was killed driving down St. Sulpice street, alleged to have been at the time of the accident in a bad state of repairs, by being thrown from the sleigh on which he was seated against the wall of a building, the learned judge before whom the case was tried without a jury granted Z. L. *et al.* $1,000 damages on the ground that they were entitled to said sum by way of solatium for the bereavement suffered on account of the premature death of their father.

Held, reversing the judgment of the Court of Queen's Bench for Lower Canada, appeal side, that the judgment could not be affirmed on the ground of solatium, and as the respondents had not filed a cross appeal to sustain the verdict on the ground that

(1) 26 N. B. Rep. 258.

there was sufficient evidence of a pecuniary loss for which compensation could be claimed, Z. L. *et al's* action must be dismissed with costs (1).

1888
Mar. 15.

POITRAS *v.* LEBEAU.

Action—Right of—Malicious prosecution—Favorable termination of.

Where a party pays under protest a penalty imposed upon him by a justice of the peace in proceedings taken against him under the provisions of ch. 22 of the Consolidated Statutes of Lower Canada, "An act respecting good order in and near places of public worship," and such party afterwards brings an action in damages against the person, whom he alleged had maliciously instigated such proceedings, and at the trial before a jury there is no evidence of the favorable termination of the prosecution against him, the court were equally divided as to the right of such party to maintain his action.

Sir W. J. Ritchie C.J. and Strong and Taschereau JJ. were of opinion that the action could not be maintained under such circumstances, and Fournier, Henry and Gwynne JJ. *contra.* The appeal was in consequence dismissed without costs.

1888
Mar. 15.

O'MEARA *v.* THE CITY OF OTTAWA.

Municipal by-law—Sale of meat—Quantity—Time and place—License.

Sec. 503, sub-sec. 5 of the Municipal Act of 1883 empowers the council of a municipality to regulate the place and manner of selling meat, subject to the restrictions in the five next preceding sections. Sec. 497 authorizes the sale after certain hours at places other than the market of any commodity which has been offered for sale in the market.

Held, affirming the judgment of the Court of Appeal for Ontario Strong and Taschereau JJ. dissenting, that by-law No. 629 of the city of Ottawa requiring everybody offering fresh meat for sale in the city to take out a license, and providing that no meat should be sold in any place except the stalls of the different city markets, was a valid by-law and within the power of the city council to pass.

Held, per Strong and Taschereau JJ, that those portions of the by-law fixing the places at which fresh meat should be sold and prohibiting its sale elsewhere, are *ultra vires* of the city council under the said sections of the Municipal Act, 1883.

The Ontario Act 50 Vic. ch. 29 sec. 29 passed since this decision has now settled the law on this subject.

(1) See *Can. Pac. Ry. Co.* v. *Robinson ante* p. 105.

DICKSON *v.* KEARNEY. 1888 June 14.

Title to land—Dedication - Public highway—Expropriation—Presumption—User.

K. brought an action for trespass to his land in laying pipes to carry water to a public institution. The land had been used as a public highway for many years and there was an old statute authorising its expropriation for public purposes, but the records of the municipality which would contain the proceedings on such expropriation, if any had been taken, were lost.

Held, reversing the judgment of the Supreme Court of Nova Scotia (1) that in the absence of any evidence of dedication of the road it must be persumed that the proceedings under the statute were rightly taken and K. could not recover

BICKFORD *v.* CANADA SOUTHERN RAILWAY CO. 1883 June 14.

Contract for hire—Agreement to purchase railway—Rolling stock—Appeal.

B., the contractor for building the E. & H. Railway, and, practically, the owner thereof, negotiated with the solicitor of the C. S. R. for the sale to the latter of the E. & H. Railway when built. While the negotiations were pending B. went to California, and the agents who looked after the affairs of the E. & H. Railway in his absence applied to the manager of the C. S. R. for some rolling stock to assist in its construction. The manager of the C. S. R. was willing to supply the rolling stock on execution of the agreement for sale of the road which was communicated to B., who wrote a letter to the manager in which the following passage occurred: "If from any cause our plan of handing over the road to your company should necessarily fail, you may equally depend on being paid full rates for the use of engine and cars and any other assistance or advantage you may have given Mr. Farquier (the agent)."

The negotiations for the purchase of B.'s railway by the C. S. R. having fallen through, an action was brought by the latter company against B. and the E. & H. Railway for the hire of the rolling stock which was resisted by B. on two grounds, one that the rolling stock was supplied in pursuance of the negotiations for the sale of his road to the plaintiffs which had fallen through by no fault of B. and the other, that if the plaintiffs had any right of action it was only against the E. & H. Railway and not against him.

By consent of the parties the matter was referred to the arbitration of a County Court Judge, with a provision in the submission that

(1) 20 N. S. Rep. 95.

the proceedings should be the same as on a reference by order of the court, and that there should be a right of appeal from the award as under R. S. O. ch. 50 sec. 189.

The arbitrator gave an award in favor of the plaintiffs; the Queen's Bench Divisional Court held that there was no appeal from the award on the merits, and as it was regular on its face refused to disturb it; the Court of Appeal held that there was an appeal on the merits but upheld the award. The defendants then appealed to the Supreme Court of Canada.

Held, affirming the judgment of the Court of Appeal that the arbitrator was justified in awarding the amount he did to the plaintiffs, and that B. as well as the company was liable therefor.

INDEX.

CROWN GRANT—47 *Vic. c.* 14 *sec.* 2 *B.C.*—*Effect of—Provincial Crown grant—Illegality of.*] By section 11 of the Order in Council, admitting the Province of British Columbia into confederation, British Columbia agreed to convey to the Dominion Government, in trust, to be appropriated in such manner as the Dominion Government might deem advisable, in furtherance of the construction of the Canadian Pacific Railway, an extent of public lands along the line of railway. After certain negotiations between the governments of Canada and British Columbia, and in order to settle all disputes, an agreement was entered into, and on the 19th December, 1883, the legislature of British Columbia passed the statute 47 Vic. ch. 14, by which it was enacted *inter alia* as follows:—"From and after the passing of this act there "shall be, and there is hereby, granted to the "Dominion Government for the purpose of con- "structing and to aid in the construction of the "portion of the Canadian Pacific Railway on "the main land of British Columbia, in trust, to "be appropriated as the Dominion Government "may deem advisable, the public lands along "the line of railway before mentioned, wherever "it may be finally located, to a width of twenty "miles on each side of said line, as provided in "the Order in Council section 11 admitting "the Province of British Columbia into Con- "federation. On the 20th November, 1883, by public notice the Government of British Columbia reserved a belt of land of 20 miles in width along a line by way of Bow River Pass. In November, 1884, the respondent in order to comply with the provisions of the provincial statutes, filed a survey of a certain parcel of land, situate within the said belt of 20 miles, and the survey having been finally accepted on 13th January, 1885, letters patent under the great seal of the Province were issued to F. for the land in question. The Attorney General of Canada by information of intrusion sought to recover possession of said land, and the Exchequer Court having dismissed the information with costs, on appeal to the Supreme Court of Canada, it was:—*Held* reversing the judgment of the Exchequer Court, Henry J. dissenting, that at the date of the grant the Province of British Columbia had ceased to have any interest in the land covered by said grant and that the title to the same was in the crown for the use and benefit of Canada. THE QUEEN *v.* FARWELL — — — — — 392

2——*of water lots* — — — — 232

See EASEMENT.

DAMAGES—*Misdirection as to solatium—New Trial—Art.* 1056 *C. C.*] In an action of damages brought for the death of a person by the consort and relations under art. 1056 C. C. which is a re-enactment and reproduction of the Con. Stat. L. C. ch. 78, damages by way of solatium for the bereavement suffered cannot be recovered. Judgment of the court below reversed and new trial ordered. CANADIAN PACIFIC RY. CO. *v.* ROBINSON — — 105

2——*Award of official arbitrators—Inclusive of past and future damages—42 Vic. ch.* 8.] On a reference being made to the official arbitrators of certain claims made by one H. against the government for damages arising out of the enlargement of the Lachine Canal to land situated on said canal, the arbitrators awarded H. $9,216 in full and final settlement of all claims. On an appeal taken to the Exchequer Court by H. (Taschereau J. presiding) this amount was increased to $15,990, including $5,600 for damages caused to the land from 1877 to 1884 by leakage from the canal since its enlargement, and the judge reversed the right to H. to claim for future damages from that date. On an appeal taken to the Supreme Court of Canada it was, *Held*, reversing the judgment of the Exchequer Court and confirming the award of the arbitrators, that it must be taken that the arbitrators dealt with every item of H.'s claim submitted to them and included in their award all past, present and future damages, and that the evidence did not justify any increase of the amount awarded. Gwynne J. was of opinion that under 42 Vic. ch. 8 sec. 38 the Supreme Court had power (although the crown did not appeal to the Exchequer Court) to review the award of the arbitrators, and that in this case $1,000 would be ample compensation for any injury that the claimant's land can be said to have sustained, which upon the evidence can be attributed to the work of the enlargement of the canal. THE QUEEN *v.* HUBERT — — — — — 737

3——*Damages—Art.* 1056 *C. C.—Solatium—Cross appeal.*] In an action for damages brought against the corporation of the city of Montreal by Z. L. *et al.*, the descendant relations of L. who was killed driving down St. Sulpice street, alleged to have been at the time of the accident in a bad state of repairs, by being thrown from the sleigh on which he was seated against the wall of a building, the learned judge before whom the case was tried without a jury granted Z. L. *et al* $1,000 damages on the ground that they were entitled to said sum by way of solatium for the bereavement suffered on account of the permature death of their father. *Held*, reversing the judgment of the Court of Queen's Bench for Lower Canada, appeal side. that the judgment could not be affirmed on the ground of solatium, and as the respondents had not filed a cross appeal to sustain the verdict on the ground that there was sufficient evidence of a pecuniary loss for which compensation could be claimed, Z. L. *et al's* action must be dismissed with costs. CITY OF MONTREAL *v.* LABELLE 741

EASEMENT—*Navigation—Interference with—Public navigable waters—Water lots—Crown grants—Trespass.*] W. was the lessee, under lease from the city of Toronto, of certain water lots held by the said city under patent from the crown, granted in 1840, the lease to W. being given by authority of the said patent, and of certain public statutes respecting the construction of the Esplande which formed the boundary of said water lots. *Held,* affirming the judgment of the court below, that such lease gave to W. a right to build as he chose on the said lots, subject to any regulations which the city had power to impose, and in doing so to interfere with the right of the public to navigate the water. *Held* also, that the said waters being navigable parts of the Bay of Toronto, no private easement by prescription could be acquired therein while they remained open for navigation. London and Canadian Loan Co. *v.* Warin — — — — — 232

EJECTMENT—*Action of, by devisee—Sale of land to pay debts of estate—Validity of sale—Mortgage by testator—Assignment of—Statute confirming title* — — — — 33
See Will.

ELECTION PETITION—*Election Petition—Service of Copy—Extension of time—Discretion of Judge—R.S.C. ch.* 9, *sec.* 10.] An order extending time for service of an election petition filed at Halifax from five days to fifteen days, on the ground that the respondent was at Ottawa, is a proper order for the judge to make in the exercise of his discretion under section 10 of ch. 9, R.S.C. *Semble,* per Ritchie C. J. and Henry J., that the court below had power to make rules for the service of an election petition out of the jurisdiction. Per Strong J.—An extremely strong case should be shown to induce the court to allow an appeal from the judgment of the court below on preliminary objections. Shelburne Election Case — — — 258

2——*Legislative Assembly—Disqualification—Enjoying and holding an interest under a contract with the crown—What constitutes—*30 *Vic. c.* 3 *secs.* 4 *and* 8 *P.E.I.*] By commission or instrument under the hand and seal of the Lieutenant Governor of P. E. I., one E. C. was constituted and appointed ferryman at and for a

ELECTION PETITION—*Continued.*

certain ferry for the term of three years, pursuant to the acts relating to ferries, and it was by the commission provided that E.C. should be paid a subsidy of $95 for each year of said term. E.C. had given to the government a bond with two sureties for the performance of his contract. By articles of agreement between E. C. and S. F. P. (the respondent) E. C. for valuable consideration assigned to S. F. P. one-fourth part or interest in the ferry contract, and it was agreed that one-fourth part of the net proceeds or profits of said contract should be paid over by the said E. C. to the said S. F. P. or his assigns. At the time the agreement was entered into S. F. P. was a member of the House of Assembly of P.E.I. having been elected at the general election held on the 30th June, 1886. Subsequently S. F. P. was returned as a member elect for the House of Commons for the electoral district of Prince County, P.E.I., and upon his return being contested. *Held,* affirming the judgment of the court below, Taschereau J. dissenting, that, by the agreement with E. C., F. S. P. became a person holding and enjoying, within the meaning of section 4 of 39 Vic. c. 3 P.E.I., a contract or agreement with Her Majesty, which disqualified him and rendered him ineligible for election to the House of Assembly or to sit or vote in the same, and by section 8 of the said act, to be read with section 4, his seat in the assembly became vacated; and he was therefore eligible for election as a member of the House of Commons. Prince County (P.E.I.) Election Case — — — — — — 265

3——*Dominion Controverted Elections Act—R. S. C. c.* 9 *secs.* 32, 33 *and* 50—*Petition—Time, extension of—Appeal—Jurisdiction.*] An order in a controverted election case made by the court below or a judge thereof not sitting at the time for the trial of the petition, and granting or rejecting an application to dismiss the petition on the ground that the trial had not been commenced within six months from the time of its presentation, is not an order from which an appeal will lie to the Supreme Court of Canada under sec. 50 of the Dominion Controverted Elections Act (R. S. C. c. 9.) Fournier and Henry JJ. dissenting. L'Assomption Election Case, Quebec County Election Case. — 429

4——*Election petition—Ruling by judge at trial—Appeal—Dominion Controverted Elections Act c.* 9, *R. S. C. secs.* 32, 33 *and* 50—*Construction of—Time—Extension of—Jurisdiction.*] *Held,* 1st. That the decision of a judge at the trial of an election petition overruling an objection taken by respondent to the jurisdiction of the judge to go on with the trial on the ground that more than six months had elapsed since the date of the presentation of the petition, is appealable to the Supreme Court of Canada under sec. 50 (*b.*) c. 9 R.S.C., Gwynne J. dissenting. 2nd. In computing the time within which the trial of an election petition shall be commenced the time of a session of parliament

SURETY—*Cashier of bank—Misconduct of—Illegal transactions—Proper banking business—Sanction of directors.*] The sureties of an absconding bank cashier are not relieved from liability by showing that the bank employed their principal in transacting what was not properly banking business, in the course of which he appropriated the bank funds to his own use, the claim against sureties being for the moneys so appropriated by the principal, and not for losses occasioned by such illegal transactions. Springer *v.* Exchange Bank of Canada—Barnes *v.* the same — — 716

SURVEY—*Manner of—Boundary—Disputes as to Reference to Surveyors—Duties of surveyors under.*] R., who held a license from the Government of New Brunswick to cut timber on certain lands, claimed that S., licensee of the adjoining lot, was cutting timber on his grant, and he issued a writ of replevin for some 800 logs alleged to be so cut by S. The replevin suit was settled by an agreement between the parties to leave the matter to surveyors to establish the line between the two lots, the agreement providing that the lines of the land held under the said license (of R) shall be surveyed and established by (naming the surveyors) and the stumps counted, etc. *Held,* reversing the judgment of the Supreme Court of New Brunswick (26 N. B. Rep. 258) that under this agreement the surveyors were bound to make a formal survey, and could not take a line run by one of them at a former time as the said boundary line.. Snowball *v.* Ritchie — — — — 741

2——*Ancient—Starting point, how ascertained* — — — — — 739
See Title to Land.

TIME—*Extension of, for trial of Election Petitions* — — — — 258, 429, 453
See Election Petition 1, 3, 4.

TITLE TO LAND—*Ancient grant—Starting point to define metes and bounds—How ascertained.*] In an action of ejectment the question to be decided was whether the *locus* was situate within the plaintiff's lot, No. 5 in concession 18, or within defendant's lot adjoining, No. 24 in concession 17. The grant through which the plaintiff's title was originally derived gave the southern boundary of lot 5 as a starting point, the course being thence eighty-four chains more or less to the river. The original surveys were lost, and this starting point could not be ascertained. *Held,* affirming the judgment of the Court of Appeal for Ontario (11 Ont Ont. App. R. 788), Strong and Taschereau J.J. dissenting, that such southern boundary could not be ascertained by measuring back exactly 84 chains from the river. Plumb *v.* Steinhoff — — — 739

2——*Statute confirming* — — — 33
See Will.

3——*Held in trust for society* — — 39
See Quakers.

4——*Right of way—User* — — — 740
See Trespass 1.

5——*Easement—User* — — — 740
See Trespass 2.

6——*Dedication—Presumption—User* — 743
See Trespass 3.

TRESPASS—*Disturbing enjoyment of right of way—User—Easement.*] E. and B. owned adjoining lots, each deriving his title from S. E. brought an action of trespass against B. for disturbing his enjoyment of a right of way between