# REPORTS

—OF THE—

# SUPREME COURT

—OF—

# CANADA

REPORTED BY

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# JUDGES

OF THE

# SUPREME COURT OF CANADA

DURING THE PERIOD OF THESE REPORTS.

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The Honorable SIR WILLIAM JOHNSTONE RITCHIE, Knight, C. J.

" " SAMUEL HENRY STRONG, J.

" " TÉLÉSPHORE FOURNIER, J.

" " WILLIAM ALEXANDER HENRY, J.

" " HENRI ELZÉAR TASCHEREAU, J.

" " JOHN WELLINGTON GWYNNE, J.

ATTORNEY-GENERAL OF THE DOMINION OF CANADA:

The Honorable SIR ALEXANDER CAMPBELL, K.C.M.G., Q.C.

## ERRATA.

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

Page 141—in line 11 from bottom, instead of "as it said" read "as is said."

Page 249—in line 17 from bottom, instead of "Dwarris" read "Daniels."

" 292—at foot of page, instead of (3) read (7).

" 385—in line 6 from top, instead of "pactly" read "partly."

" 512—in line 6 from top, read "34 *Vic.*" instead of "35 *Vic.*"

# A TABLE

OF THE

# NAMES OF THE CASES REPORTED

## IN THIS VOLUME.

# TABLE OF CASES CITED.

## A



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## N.



## O

## T.

THE QUEEN.....APPELLANT; 1882

AND *Oct. 30.

1883

GEORGE McLEOD.....RESPONDENT. *April 30.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

*Petition of right—Non-liability of Crown for non-feasance or misfeasance of its servants—Public work—Public police—Crown not a common carrier.*

*McL.*, the suppliant, purchased in 1880 a first-class railway passenger ticket to travel from *Charlottetown* to *Souris* on the *Prince Edward Island* railway, owned by the Dominion of *Canada*, and operated under the management of the Minister of Railways and Canals, and while on said journey sustained serious injuries, the result of an accident to the train. By petition of right the suppliant alleged that the railway was negligently and unskilfully conducted, managed and maintained by Her Majesty; that Her Majesty, disregarding her duty in that behalf and her promise, did not carry safely and securely suppliant on said railway, and that he was greatly and permanently injured in body and health, and claimed $50,000. The Attorney General pleaded that Her Majesty was not bound to carry safely and securely, and was not answerable by petition of right for the negligence of her servants.

The learned judge at the trial found that the road was in a most unsafe state from the rottenness of the ties, and that the safety of life had been recklessly jeopardized by running trains over it with passengers, and that there had been a breach of a contract to carry the suppliant safely and securely, and awarded $36,000.

On appeal to the Supreme Court of *Canada*:—

*Held*—(*Fournier* and *Henry*, J J., dissenting.) That the establishment of government railways in *Canada*, of which the Minister of Railways and Canals has the management, direction and control, under statutory provisions, for the benefit and advantage

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

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of the public, is a branch of the public police created by statute for purposes of public convenience, and not entered upon or to be treated as a private and mercantile speculation, and that a petition of right does not lie against the Crown for injuries resulting from the non-feasance or mis-feasance, wrongs, negligences, or omissions of duty of the subordinate officers or agents employed in the public service on said railways.

That the Crown is not liable as a common carrier for the safety and security of passengers using said railways.

APPEAL from the Exchequer Court of *Canada*.

The petition of right, the pleadings and the facts are set out at length in the judgment of *Henry*, J., in the Exchequer Court and in the judgments delivered in the Supreme Court.

The suppliant was represented in the Exchequer Court by Mr. *Lewis Davies*, Q.C., Mr. *Malcolm McLeod*, Q.C., and Mr. *Frederick Peters;* and the respondent by Mr. *Edward J. Hodgson*, Q.C., and Mr. *Walter Morson*,

On appeal to the Supreme Court the appellant was represented by Mr. *Lash*, Q.C., and Mr. *Edward J. Hodgson*, Q.C.; and the respondent by Mr. *Lewis Davies*, Q.C., and Mr. *A. F. McIntyre*. The arguments of counsel and authorities relied on, are reviewed in the judgments.

The following is the judgment of *Henry*, J.:

"This is an action brought by the plaintiff by petition of right, to recover damages for injuries sustained by him, when a passenger in a railway car, on the railway in *Prince Edward Island*, owned by the Dominion of *Canada* and operated under the management of the Minister of Railways and Canals. The suppliant, in his petition, alleges that the railway in question was in the year 1880 run, worked and managed as a public work of the Dominion of *Canada*, and carried, for hire and reward, such passengers as presented themselves,

and such freight as was offered to be carried from station to station, on said railway.

"He therein further alleges that during that year he presented himself as a passenger on said railway from *Charlottetown* to *Souris*, and became and was received as a passenger between the two said stations on said railway for reward, Her Majesty promising in consideration of his becoming such passenger, for such reward, to safely and securely carry him upon the said railway, upon the said journey between the stations aforesaid; that all conditions were performed by the suppliant and all things happened to entitle him to be carried safely and securely by Her Majesty upon the said railway on the said journey, but that Her Majesty, disregarding her duty in that behalf and her said promise, did not safely and securely carry the suppliant on the said railway upon the said journey, but so negligently and unskilfully conducted, managed and maintained the said railway, and the train upon which the suppliant was a passenger as aforesaid on said journey, that, in the course of the said journey, the suppliant was greatly and permanently injured in body and health, and has become seriously incapacitated in his ability to earn a livelihood and has incurred great loss of time and expense in and about the cure of his wounds and injuries, and has suffered great pain of body in consequence of his injuries.

"The suppliant claimed $35,000 as damages, but on an application made to me on affidavit at the trial I granted a rule to extend the same to $50,000.

"The Attorney General of the Dominion fyled and served an answer to the suppliant's petition in which he admits that the railway in question was and is the property of Her Majesty, but says that the same was during the whole of the year 1880 under the control and management of the Minister of Railways and

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Canals of *Canada*, under the provisions of the statutes in that behalf.

"In the third clause of his answer he says: 'He has no knowledge of the alleged contract or of the facts and circumstances set out in the third paragraph of the suppliant's petition, and, therefore, on the part of Her Majesty, denies the same.'

"In the fourth paragraph of his answer he submits that the suppliant cannot enforce his alleged claim against Her Majesty by petition of right, and that the petition of the suppliant should be dismissed, and alleges as reasons:

"1st. That the control and management of the railway being vested by statute in the Minister of Railways and Canals, Her Majesty cannot be made liable upon petition of right because the same was negligently and unskilfully conducted, managed and maintained, as alleged; and,

"2nd. That even assuming the railway to be under the management and control of Her Majesty, no negligence can be imputed to her, and Her Majesty is not answerable by petition of right for the negligence of her servants.

"The suppliant was represented by the Hon. *Lewis Davies*, Q.C., *Malcolm McLeod*, Q.C., and *Frederick Peters*, Esq.; the defendant by *Edward J. Hodgson*, Q.C., and *Walter Morson*, Esq. The action was tried before me at *Charlottetown*, *Prince Edward Island*, in July last, and occupied several days

"The suppliant proves that he was a first-class passenger on the train which left *Charlottetown* for *Souris* on the 25th August, 1880, had paid his fare at the station at the former place, and had a first-class ticket; that he was in a first-class car, in which he travelled until the train reached a place called *Robinson's* curve, near *York* station, when it left the track. The railway carriages

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were upset over a bank, and the suppliant and several other passengers severely injured.

"The train, on the occasion in question, consisted of an engine and tender, two flat cars loaded with coal, attached to the tender, and having on the top of the coal a large iron smokestack extending the length of the two cars; next to them was a luggage car, followed by a second-class car, to which was attached the first-class car, in which were the suppliant and several other passengers.

"The gauge of the road was three feet and a half, and the rate of speed at the time of the accident was shown to be from 18 to 20 miles an hour. The curve was shown to be one of the sharpest on the line—the commencement of it being on a down grade, then nearly level for a few yards, succeeded by the up grade.

"It was shown that the front one of the two flat cars was, where connected with the tender, eight to ten inches lower than the tender; that it was not connected therewith by the usual S link, but by a straight short one of not ten inches in length. It was satisfactorily shown, by evidence on the trial, that such a connection, when steam having been shut off going over a down grade and again used to increase the speed, has a tendency to lift the end of the car, and that momentum, suddenly given on a curve where the grade becomes an up one, is calculated to throw the cars off the track. Such was the position of the train when the accident occurred.

"It was shown that the part of the road at the curve in question was made in 1873, and was built principally with spruce ties, the life of which was proved to be about seven years, at which age they become rotten and useless as such; very little, if any, substitution of new for old ties had been made on that curve after the road was built, and

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when the accident occurred it was shown that the ties for eighty yards were torn up and broken, the most of them into fragments of decayed wood. It was shown, by independent testimony of a large number of respectable and reliable witnesses, that for months before the accident several of the ties were so rotten that the ends of them outside the rails could be kicked off, and several proved that they had done so. Several persons also proved that, because of the rottenness of the ties, they could and did draw out with their fingers the spikes which connected the rails with them. On a curve where there is so much lateral pressure the result might legitimately be expected to be the spreading out of the rail on one side and the going off of the train. Such was shown to have been the case where the train left the track. It was in evidence that the whole damage to the road was repaired by new ties, and the whole number required for doing so was charged by the track-master as having been used by him for that purpose.

"To show the bad state of the ties on the two lines going east and west from *Charlottetown*, evidence was given that after the accident 90,000 ties were procured and were used subsequently to replace rotten ones on the two lines.

"The only witness on the part of the defence who alleged the soundness of the ties was *Hoole*, the track-master at the section where the train went off; but his testimony was contradicted as to their state by upwards of thirty witnesses, as well as by his charge for repairing the damage to the road by *all new ties*. I have, therefore, no difficulty in reaching the conclusion and finding the fact that the road was in a most unsafe state from the rottenness of the ties, and to that cause I trace the accident; and that the safety of life had been recklessly jeopardized by running trains over it with passengers for some time before the accident occurred.

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"I also find that the connection of the coal cars, attached to the tender as they were, added to the danger when the train was running at express train speed.

"*Alexander McNab*, C.E., was in charge of the management of the road from the 1st May, 1879. He was examined as a witness on the part of the defence, and by him and others it was shown that before that date the road was worked and managed by an engineer and three other officers, all of whose duties he assumed, but which he said he found himself wholly unable to perform and had been obliged to resign. He stated that Mr. *Carvell* had made an inspection of the lines, and made a report as to their state shortly before he, Mr. *McNab*, took charge. That he had the report in his hands at *Ottawa* after or about the time of his appointment, but did not read it, and had never applied for or obtained it, or a copy of it, and that up to the time of the accident he had not inspected the lines or got any one else to do so, but depended, as he stated, upon irresponsible trackmen to keep the road in running order.

"He does not seem to have realized the importance of the duty he undertook, the first of which was to manage the road with a due and proper regard for the safety of passengers going over it.

"He had undertaken the management of a road that he knew had been several years built and worked, and his first duty was to prove its safety, but instead of that he neither inspected the lines nor availed himself of the information as to its state which Mr. *Carvell's* report was intended to, and which I have no doubt did, supply. Under the circumstances I have shortly stated, and from the evidence on the trial, the wonder is naturally not that such a serious accident occurred, but that the road was travelled so long without one. Had the road been so operated by a company the circumstances would have justified a finding of vindictive

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damages arising from the culpable conduct of their manager. When the car in which the suppliant was went over, he was thrown with great violence from one side of it to the other. His face struck on the side of the car; his upper and lower jaws were fractured on both sides so that his chin was moveable, and his nose also could be depressed by pressure, the upper and lower jaw bones on both sides having been fractured. Another portion of the upper jaw bone was also broken off. Eight of his lower teeth, with a part of the lower jaw bone, were knocked out and were left sticking in the side of the car, where his face struck against it. His back was also injured. He bled profusely from the nose and mouth and was insensible for some time. He was brought home (six miles) by a special train the same night, and attended immediately by Drs. *Hopkirk* and *Beer*, the latter sent by the railway department. They were examined and gave substantially the same description of the state of the suppliant. The former said he had been a member of the Royal College of Surgeons, *England*, since 1839, and a fellow of the same college since 1854, and had been in practice for about 40 years. He said that the suppliant was not recognizable. He said:

He was covered with blood, and bleeding from the mouth and nose profusely; that the hemorrhage was so great, and the face so much swollen, it was impossible to make any examination; that the blood went down his throat.

"And that they had difficulty in stopping it for three days. They had to place him sitting up in bed, and support him in that position, as if he were placed in a lying position, he would have been suffocated by the blood. They packed ice round his head and face to stop the hemorrhage, and continued it for three days, and they administered styptics before they could examine his face. They

found the severe injuries I have stated, which this witness fully and minutely described.

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The sufferings of the suppliant must have been intense for a long time. In the setting of the fractures of the jaw bones his mouth had to be nearly filled with supports to keep the bones in apposition, and he had to be supported for several weeks by liquid food poured into his stomach through a tube. His sufferings of mind and body were so great that it was feared by his physicians, for several weeks, that his recovery was improbable. At the trial, eleven months after the injuries, he testified to his inability to attend to his usual business as manager of a bank, and that he was continued in the position only by sufferance, he assisting only a few hours some days, when able, by advice and direction to subordinates, but unable to pursue any continued mental exertion. Previous to the injury he was very active and aged 32 years, rode a good deal on horseback, and took part in athletic exercises. When giving evidence he alleged, and I believe, truly, that he was unable to do either; that he could walk on smooth surfaces, but that he could not get down a step of a few inches without the greatest care, as the slightest shock was felt severely in his back, which, he alleged, was getting more troublesome than at first. He exhibited on the trial a photographic likeness of himself, taken four years before he was injured, compared with which he appears now a physical wreck. He showed his income from the bank which he managed to have been at the rate of $3,000 a year, and that his income from the agency of an insurance company was about $1,000 a year, both of which he stated he would have to resign in consequence of the result of his injuries. It was shown, also, by independent and reliable evidence, that as a bank manager he stood in the first rank; that besides

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his high qualifications as a bank manager in the Dominion, he was well acquainted with the system of banking in the *United States*, and was eligible to an appointment of that kind in *New York*, where salaries are paid ranging from four to ten thousand dollars. He was married a few years ago to a daughter of a worthy judge in *Charlottetown*, and has one or two children. The evidence is abundant to show that his worldly prospects, pecuniary and otherwise, have been blasted, and that he is but a wreck of what he was before the injuries complained of. Dr. *Hopkirk* said, when giving his evidence, that the suppliant was not even then out of danger from the injuries to his face. He described the result of a suppuration that supervened in his jaw after the fractures had united, which necessitated the extraction of two of his remaining teeth, and says that for months he must have suffered agony. He said that the injuries to the upper jaw were of very uncommon occurrence; that Sir *W. Ferguson*, in his late work on surgery, only mentions one case, and that in that case the patient died. He stated, with great minuteness, the then state of the suppliant, which will be found fully in the evidence, from which he gave his opinion as to the permanency of the injuries. After recounting a number of unfavourable symptoms, he says:

That shows that his injuries are connected with the brain. He cannot apply himself. He has want of application. He cannot sit down and occupy his mind for any time. Night before last he could not stand on his heels, and nearly fell down. He could not stand steady on both feet. We tried the tenderness on his back; it was there then.

"When asked as to the probability of his complete recovery from it (the injury to his back), he replied:

He never will. He will never be able to resume his business again. In another year or so he will be quite incapable, if he lives so long, and there is some doubt about that. He was, he says, a very sound man before the accident, and that if he had not been a tough man,

he never would have recovered from the accident. He had no affection. He played cricket and indulged in various exercises. The local pain in the back is the most dangerous symptom.

"In answer to a question: 'Is there any doubt as to the disease the symptoms indicate?' the witness replied:

There is no doubt inflammation of the spinal cord or membrane.

"The witness, in answer to a question, stated that the general period at which the disease described ends fatally is from two to four years, but that there was one case reported where the patient lived ten years, but that was uncommon.

"Dr. *Beer* stated that he attended the suppliant, in consultation with Dr. *Hopkirk*, for a month, at the instance of the railway superintendent. He corroborates his statements in every particular as to the nature of the injuries, and also as to the symptoms two nights before he gave evidence. When asked as to the probable consequences, he replied:

Death within four or five years, in my opinion, it is probable. According to *Bryant* and *Erickson*, the best authorities, it is laid down as an invariable rule that railway concussion of the spine, followed by paralysis, proves almost inevitably fatal. Each one of the symptoms indicate it, and, taken altogether, it is undoubted.

"He said he had no bill for his services against the suppliant, as he was paid by the railway department.

"Dr. *McLeod* proved that he shortly before examined the suppliant, and found the symptoms as stated by the two preceding witnesses, and gives the same opinion as to the probable results.

"Dr. *Blanchard* proved that he also was present at the examination; noticed the same symptoms as the other doctors, and agreed with them as to the probable result. He says: 'I think he will grow gradually 'worse. There may be some intervals when he may 'be better, but he will get steadily worse.'

"Mr. *Creamer* states he heard the symptoms of the

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suppliant's condition described by the other doctors, when giving their evidence, and said:

His injuries will result in paralysis. He has some complaint of the spine. The symptoms indicate that he will get worse, and it will end in death, after a certain length of time.

"The foregoing is a brief statement of the evidence to the nature and extent of the injuries sustained by the suppliant, of his sufferings, and the results up to the time of the trial, with the symptoms then lately ascertained, and the medical decision unanimously pronounced by the doctors examined as to the probable consequences and result of his injuries.

"It was shown that the medical expenses up to the time of the trial, medicines and other necessary expenses, amounted to over a thousand dollars, and that it would be necessary for the suppliant, in the opinion of his medical advisers, to go to *England* to obtain further medical aid and advice.

"After the evidence of the suppliant was concluded, Mr. *Hodgson*, on the part of the defence, moved for a non-suit on the grounds set out in the fourth paragraph of the answer, and was about to argue the objections therein stated. I, however, informed him that I had recently given judgment on demurrer in two cases where the same questions were raised, and having decided them in favor of the suppliants, suggested, that as the points would in those cases probably come before the whole court on appeal, he should be satisfied to have the motion noted, which would enable him subsequently to deal with them. To this he assented. I have, therefore, to deal with them.

"The first objection is that the present action cannot be maintained, because the control and management of the railway being vested by statute in the Minister of Railways and Canals, Her Majesty cannot be made liable upon petition of right, because the same was negligently and

unskilfully managed and maintained. The first answer I give to that objection is that the action is not brought to recover damages arising from the mere negligence of management or maintenance. It is alleged and proved that for a good consideration a valid contract was entered into by Her Majesty, and that she failed to perform it. Were it an action in similar circumstances against a company, what defence could be successfully maintained? In case the breach of contract were proved, how could they save themselves from the consequences? Only by proof of *vis major* of some kind. Something beyond their control, but certainly not the negligence of their own servants. If there was a contract in this case, and a breach shown, a legal excuse or justification must be shown.

"If, again, this action were against a company for the breach of a contract to carry and convey safely, the plaintiff's evidence that they did not do so would be sufficient, in the absence of proof of contributory negligence on the part of the plaintiff, to put the defendants on their defence. It is only necessary in such cases to prove the contract and the breach, with evidence as to the resulting damage. If, therefore, the present action is at all maintainable, the question of negligence or unskilfulness does not arise as a defence, but may be given in evidence to show how the damage was caused as part of the *res gestæ*. On sound principles of pleading and evidence, the question of negligence or unskilfulness is no part of the issue where an action is brought on contract to carry safely, and in such cases it has been held by many writers and judges that the going off the track of a railway by a train is in itself *primâ facie* evidence of negligence that calls for evidence in rebuttal.

"*Redfield*, in his treatise on railways, says (1):

The fact that injury was suffered by anyone while upon the com-

(1) Vol. 2, p. 176, 3rd Ed.

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pany's train as a passenger is regarded as *primâ facie* evidence of their liability.

and cites in support of that view *Carpin* v. *London & Bir. Railway Co.* (1), and several American decisions, stated in a note at p. 177, and shews that the same rule was acted on in a case in the Supreme Court of the *United States* (2), and in *Skinner* v. *L. Bri. & S. Coast Railway* (3).

"In *Galena & Chicago Railway* v. *Yarnrod* (4), it was held "that a passenger in a railway car need only show that he has received an injury to make a *primâ facie* case against the carrier. The carrier must rebut the presumption in order to exonerate himself (5).

"In *Hammack* v. *White* (6) it was held that mere proof of an accident having happened to a train does not cast upon the company the burden of showing the real cause of the injury, but it was held in *Dawson* v. *Manchester Sh. & L. Railway* (7), that if a carriage break down or run off the rail this will be a *primâ facie* evidence of negligence.

"In *Pym* v. *Great Northern Railway* (8), it occurred from a defective rail. In a note at page 189 the same learned author says:

So that, in regard to the undertakings of carriers of goods and passengers, the law has attached certain conditions to the general undertaking, implied from entering upon the transit, that the things or the person is to be carried safely through in a reasonable or the ordinary time unless prevented, in the case of carriers of goods by some invincible obstacle like the act of God or the public enemy, and in the case of carriers of passengers that it shall be so done, unless prevented by some agency not under the carriers' control, by the exercise of the strictest care and diligence consistent with the successful conduct of the business

(1) 5 Q. B. 747.
(2) 11 Pet. 181.
(3) 2 Law & Eq. Reports 860.
(4) 15 Ill. R. 468.
(5) See 2 Redfield on Railways, vol. 2, p. 179, note.
(6) 11 C. B. N. S. 587-591.
(7) 5 L. J. N. S. 682.
(8) 2 F. & F. 619.

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"If such be the law, and I do not think it will be doubted, then a contract to carry safely was by legal implication entered into in this case, and unless it can be found that Her Majesty in all cases of contract is above the law, I cannot arrive at the conclusion that because the injuries complained of were caused by the bad management, unskilfulness or negligence of those entrusted with the working of the railway, the suppliant must be denied redress. If the claim had been one founded on mere negligence, without a contract express or implied, the case would have stood upon a very different legal footing, and to such a case would the objection be alone, in my opinion, applicable.

"The objection that the action cannot be maintained, because the control and management of the railway in question was vested in the Minister of Railways and Canals, I disposed of in my judgment in *McFarlane* v. *The Queen* (1), and in *MacLean* v. *The Queen*. "It is held in *England* that an action by petition of right will lie in all cases in the Exchequer Court for breaches of contract entered into by departmental officers of the government, and by the 58th sec. of the Act of the Dominion establishing this court, exclusive jurisdiction is given to it 'in all cases in which the demand shall 'be made, or relief sought, in respect of any matter 'which might in *England* be the subject of a suit or 'action in the Exchequer Court on its revenue side 'against the Crown.'

"I find no qualification of the term 'contract' in any decision or proceeding in *England*, nor can I discover any reason for any such qualification. If there be a contract, the law makes no difference whether it be written or verbal, express or implied. In any case it is equally binding. The law in this case makes the contract sued on, and who can say that is less potent for

(1) 7 Can. S. C. R. 216.

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that purpose than if one had been made by the parties in writing, and even under seal.

"Suppose a case wherein a departmental officer in the government, in execution of the proper functions of his department, enters into an agreement in writing expressly undertaking, for a valuable consideration, that he will, on certain works being done, pay a certain sum of money, transfer property of some kind to the other contracting party, or to do some other act, but failed to do so, and an action by petition of right was brought, would it be any answer in law to allege that the failure to perform the contract arose from the improper conduct and negligence of the officer, and that Her Majesty was not answerable for the negligence of her servants?

"The other objection, 'that even, assuming the said 'railway to be under the management and control of 'Her Majesty, no negligence can be imputed to Her, and 'Her Majesty is not answerable by petition of right for 'the negligence of Her servants,' is, I think, fully answered, as far as this case is concerned, by what I have previously said. Were there no contract existing, and a duty and obligation accepted, it might possibly be considered the doctrine would be available. It might be urged, for instance, in a case where a person not a passenger was injured, or where property, not in the possession or under the control of the railway management, was destroyed or injured, through the improper conduct of the railway agents or servants, but I think it is wholly inapplicable where a contract for safe conduct exists. When the legislature has placed the title of certain railways in Her Majesty, and provided for the management and control of them in the minister specially assigned for that duty, it is clear that the title is in trust for the Dominion, and the minister was fully clothed with power to enter into all neces-

sary contracts on the part of the Dominion for the object in view. The amount of a judgment against the crown is to be paid out of the Dominion treasury, and the action, though nominally against Her Majesty, is virtually against the Dominion.

"When, therefore, a failure to perform a contract is found, the action I conceive to be properly brought by petition of right in this court.

"The question of the obligation to perform an implied contract is elementary in law, and I have therefore cited no authorities in support of the doctrine. It is fully treated on in every work on contract, and no doubt is expressed in regard to the binding effect of one.

"I am of opinion the action is properly within the jurisdiction of this court, and that the suppliant is entitled to a judgment.

"The only question left is as to the amount of damages. I have not stated in detail the length or acuteness of the sufferings endured by the suppliant for months after he was injured; or fully the evidence as to the probability of future sufferings. The evidence, however, is full upon those points. The suppliant was a young man (aged 32 years) and of robust health. In the language of Chief Justice *Cockburn* in *Philips* v. *South Western Ry.* (1):

> His health has been irreparably injured to such a degree as to render life a burden, and a source of the utmost misery. He has undergone a great amount of pain and suffering. The probability is that he will never recover. His condition is at once helpless and hopeless.

"The suppliant in this case was in the receipt of an annual income of $4,000 up to the time of the trial; he continued by the favour of the directors of the bank to receive his salary of $3,000 as manager of the bank,

(1) 4 Q. B. D. 408.

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Henry, J. in the Exchequer.

although unable for months to perform any service, and but little afterwards. Both he and all the medical practitioners examined stated his inability to attend to business, and that, consequently, he would be unable to earn any salary or attend to any regular business. He had increased expenses, by reason of the injury, to over $1,000 for medical aid. I feel bound by the evidence he gave of his condition and inability hereafter to earn a livelihood, and sustained, as it has been, so fully by the evidence of the medical practitioners.

"In the case just mentioned, Chief Justice *Cockburn* (1) says:

It is extremely difficult to lay down any precise rule as to the measure of damages in cases of personal injury like the present. No doubt, as a general rule, when injury is caused to one person by the wrongful or negligent act of another, the compensation should be commensurate to the injury sustained. But there are personal injuries for which no amount of pecuniary damages afford adequate compensation. While, on the other hand, the attempt to award full compensation in damages might be attended with ruinous consequences to defendants, who cannot always, even with the utmost care, protect themselves against carelessness of persons in their employ. Generally speaking, we agree with the rule as laid down by *Brett*, J., in *Rowley* v. *London & N. W. Ry. Co.* (2), an action brought on the 9th and 10th *Vic.*, c. 93, that a jury in such cases must not attempt to give damages to the full amount of a perfect compensation for the pecuniary injury, but must take a reasonable view of the case, and give what they consider, under all circumstances, a fair compensation.

His Lordship then stated what he considered all the heads of damages, in respect of which a plaintiff, complaining of a personal injury, is entitled to compensation.

These are the bodily injury sustained, the pain undergone, the effect on the health of the sufferer, according to its degree, and if its probable duration is likely to be temporary or permanent; the expenses incidental to attempt to cure or lessen the amount of injury, the pecuniary loss sustained through inability to attend a profession or

(1) P. 407. (2) L. R. 8 Ex. 231.

business—as to which, again, the injury may be of a temporary character, or may be such as to incapacitate the party for the remainder of his life.

"In such a case it is necessary and proper to consider that, by accident or otherwise, a person's life may be suddenly shortened, even in cases of comparative youth and in cases of apparent robust health. On the other hand, a party like the suppliant, in his condition of health before the injury, had a reasonable prospect of living 30 or 40 years. He had, also, the reasonable prospect of enjoying his salary as long as he was able to attend to his duties, with a fair prospect of advancement. All these matters I have carefully weighed, and have adopted the heads of damage stated in the judgment of Chief Justice *Cockburn*, and, after long and full deliberation, I have concluded to award damages in this case to the amount that may, at first sight, seem high in this country, but which, in other countries, would not be so considered. I have felt great unwillingness to tax the Dominion resources more than could be helped, but, at the same time, it is my duty to award, not ample compensation for the injuries sustained, for no amount would be sufficient for that purpose, but the fair and reasonable compensation, under all the circumstances, to which I think the suppliant is entitled. To obtain a life annuity of $4,000 payable annually at six per cent., would require a sum beyond $50,000, but that would not be a correct mode of ascertaining the damages. I have, however, considered the fact as one legitimately connected with the matter of damages. Having very carefully weighed all the unfortunate circumstances of the case, I trust I have arrived at a conclusion that will do justice to all the interests involved. I award to the suppliant, for damages for the injuries sustained by him, as complained of in his petition, the sum of thirty-six thousand dollars."

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RITCHIE, C. J.:

I cannot distinguish this case from that of *McFarlane* v. *The Queen* (1), nor can we sustain this judgment without overruling the decision of this court in that case, which I am not prepared to do.

This is, in my opinion, unquestionably a claim sounding in tort, a claim for a negligent breach of duty.

The suppliant's case is based on the allegation that being entitled "to be carried safely and securely by Her Majesty upon said railway on the said journey, Her Majesty, disregarding Her duty in that behalf, and Her said promise, did not safely and securely carry the suppliant upon the said railway upon the said journey, but so negligently and unskilfully conducted, managed and maintained the said railway, and the train upon which the suppliant was a passenger, that in the course of said journey the suppliant was greatly and permanently injured in body and health."

As between private individuals, it is thus laid down in all the text authors and sustained by the cases, that a carrier of passengers, not being an insurer and liable at all events as a carrier of goods is, actual negligence must be proved; it is not sufficient merely to show an accident, unless it is of such a description as to afford a presumption of negligence. See *Chitty* and *Temple* on Carriers (2).

In actions against carriers for injuries to passengers by the negligence of the defendant it lies upon the plaintiff to prove the negligence, and not on the carrier to show that he used reasonable care.

And in *Chitty* on Contracts (3) it is thus stated:

A carrier of passengers, therefore, is liable for personal injuries which they may sustain, whilst being carried by him, only where such injuries have been occasioned by his negligence and unskilfulness.

The proposition is fully established by the case of

(1) 7 Can. S. C R. 216.
(2) P. 309.
(2) 11 Am. Ed. 1 vol. p. 728.

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*Crofts* v. *Waterhouse* (1). This was an action against a coach proprietor for having by the negligence and improper conduct of his servants overturned and injured the plaintiff—travelling in the defendant's coach.

*Best*, C. J.:

The action cannot be sustained unless negligence is proved.

*Parke*, J.:

The distinction between carriers of goods and carriers of passengers was not sufficiently left to the jury. A carrier of goods is liable in all events, except the act of God or the King's enemies—a carrier of passengers is only liable for negligence.

*Aston* v. *Heaven* (2) was a case against defendants as proprietors of the *Salisbury* stage coach for negligence in driving the said coach, in consequence of which the coach was overset and the plaintiff was bruised and her finger broken.

*Eyre*, C. J., said:

This action is founded entirely on negligence. * * * I am of opinion that the case of loss of goods by carriers and the present is totally unlike * * * this action stands on the ground of negligence alone.

But the learned judge in the Exchequer seems to base his judgment on the assumption that a carrier of passengers is liable at all events as a carrier of goods is, in other words an insurer, for as to the objection raised, "that Her Majesty cannot be made liable upon petitions "of right because the same was negligently and un-"skilfully managed and maintained," the learned judge says: "The first answer I give to that objection is "that the action is not brought to recover damages "arising from the mere negligence of management "or maintenance. It is alleged and proved that for a "good consideration a valid contract was entered into "by Her Majesty, and that she failed to perform it" Again, "If there was a contract in this case and a breach

(1) 3 Bing. 319. (2) 2 Esp. 534.

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"shown, a legal excuse or justification must be shown. "If again, this action were against a company for the "breach of a contract to carry and convey safely, the "plaintiff's evidence that they did not do so, would be "sufficient in the absence of proof of contributory "negligence on the part of the plaintiff to put the "defendants on their defence, it is only necessary in "such cases to prove the contract and the breach with "evidence as to the resulting damage." And again: "On sound principles of pleading and evidence the "question of negligence or unskilfulness is no part of "the issue where an action is brought on a contract to "carry safely."

The learned judge was addressing these observations in reference to and dealing with what was assumed to be the contract in this case; but no such contract was proved as that Her Majesty promised, in consideration of suppliant being a passenger for reward, safely and securely to carry him upon the said railway upon said journey between the said stations—the only evidence of any contract is that the suppliant paid his fare and received a ticket, as follows:

"Ticket, P. E. I. Railway, first class, *Charlottetown* to *Souris* and return.

"August 25th, 1880."

This indicates neither more nor less than that the holder had paid his toll and was entitled to a passage between the points indicated. Tolls on all public works are established under section fifty-eight of the Public Works Act (1), which deals with all tolls in the same manner; it is as follows:

The Governor may, by Order in Council to be issued and published as hereinafter provided, impose and authorize the collection of tolls and dues upon any canal, railway, harbor, road, bridge, ferry, slide, or other public works, vested in Her Majesty, or under the

(1) 31 Vic., ch. 12.

control or management of the Minister, and from time to time in like manner may alter and change such dues or tolls, and may declare the exemptions therefrom; and all such dues and tolls shall be payable in advance and before the right to the use of the public work in respect of which they are incurred shall accrue, if so demanded by the collector thereof.

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This doctrine of the learned judge might be all right enough, as between private individuals, if it could be established that carriers of passengers are, as carriers of goods were, insurers, or if there was an express contract to warrant and insure at all events the safe carriage of the passenger between the stations named in the ticket.

But the doctrine of the learned judge, as applicable to this case, cannot, in my opinion, be sustained.

The establishment of the government railways in the Dominion is, as has been said of the Post Office establishments, and as we thought of the slides in the case of *McFarlane* v. *The Queen* (1), a branch of the public police, created by statute for purposes of public convenience, and not entered upon or to be treated as private mercantile speculations.

As to the Intercolonial Railway, it was in no sense in the nature of a private undertaking, constructed for reasons influencing private promoters of similar works, or in the nature of a mercantile speculation—it was constructed as a great public undertaking essential to the consolidation of the union of *British North America*, and in fulfilment of a duty imposed on the government and parliament of *Canada* by the *British North America Act*.

And so with respect to the P. E. I. Railway now in question. We find from the Journals of the House of Assembly of P. E. I., 1871 (2), the following history of the legislation and reason for its construction:

Whereas, the trade and export of this island have much increased

(1) *Ubi supra.* (2) P. 109.

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during the past few years; and whereas, it is found almost impossible, in the absence of stone or gravel, to keep the roads in an efficient state of repair, to render easy the transport of the production of the colony: and whereas the construction and maintenance of a line of railway through the island would greatly facilitate its trade, develope its resources, enlarge its revenue, and open more frequent and easy communication with the neighboring Provinces and the United States;

Resolved, That a Bill be introduced authorizing the Government to undertake the construction of a railroad, to extend from *Cascumpec* to *Georgetown*, touching at *Summerside* and *Charlottetown*, and also branches to *Souris* and *Tignish*, at a cost not exceeding five thousand pounds currency, per mile, for construction, including all surveys and locating the line, and all suitable stations, station houses, sidings, turn-tables, rolling stock, fences, and all the necessary appliances suitable for a first class railroad, and the construction of suitable wharfs at *Cascumpec*, *Summerside*, *Charlottetown* and *Georgetown*, provided the contractors for building and furnishing the said railroad accept in payment the Government debentures of *Prince Edward Island*, at thirty years at par, without allowance for discount or otherwise.

On *Prince Edward Island* becoming a part of the Dominion this public undertaking became the property of the Dominion, the management, direction and control of which the legislature has entrusted to the Board of Works, under statutory provisions, for the benefit and advantage of the public; and being thus established for public purposes, it is subordinate to those principles of public policy which prevents the Crown being responsible for the misfeasances, wrongs, negligences, or omissions of duty of the subordinate officers or agents employed in the public service on these public works, and therefore the maxim *respondeat superior* does not apply in the case of the Crown itself, and the Sovereign is not liable for personal negligence, and, therefore, the principle *qui facit per alium facit per se*, which is applied to render the master liable for the negligence of his servant, because this has arisen from his own negligence or imprudence in selecting or re-

taining a careless servant, is not applicable to the Sovereign, to whom negligence or misconduct cannot be imputed, and for which, if it occurs in fact, the law affords no remedy; for as Mr. *Story* says, "the Government does not undertake to guarantee to any persons the fidelity of any of the officers or agents it employs, since it would involve it in all its operations in endless embarrassment and difficulties and losses which would be subversive of the public interests."

In this respect the law places the crown in reference to the post office, railways, canals and other public works, and undertakings, and those availing themselves of the convenience and benefit of such institutions, in no better or no worse position than if they were owned by private individuals, who made it an express stipulation that they should not be liable to parties dealing with them for the consequences of the negligence or misconduct, wilful or otherwise, of their agents and servants (1). This, of course, does not touch or affect the question of the liability, or the personal responsibility to third persons of officers or subordinates for acts and omissions in their official conduct when injuries and losses have been sustained, still less, where they are guilty of direct misfeasances to third persons in the discharge of their official functions.

(1) See *Haigh et al* v. *Royal Mail Steam Packet Co.* (48 L. T. N. S. p. 267) reported since this judgment was prepared, the marginal note of which is as follows:

"The ticket of a passenger by a steamer of defendants contained a notice that the defendants would not be responsible for any loss, damage or detention of luggage under any circumstances, and that they would not be responsible for the maintenance or loss of time of a passenger during any detention of their vessels, nor for any delay arising out of accidents, nor for any loss or damage arising from perils of the seas, or from machinery, boilers or steam, or from any act, neglect or default whatsoever of the pilot, master of mariners."

Held, upon demurrer, that this provision exempted the defendants from liability in an action for the loss of life of a passenger by negligence of defendants' servants in a collision with another ship.

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There is therefore nothing unreasonable in limiting the liability of the crown and freeing it from liability for negligences and laches of its servants; none of the great public works having been undertaken with a view to mercantile gain, but for the general public good.

The public who use these government railways must understand what the law is, to what extent the law, on principles of public policy, prevents actions being brought against the Crown for injuries resulting from the nonfeasance or misfeasance of its servants—in other words, parties dealing with the crown, in reference to these great public undertakings, deal subject to those prerogatival rights of the Crown and those rules and principles, well known to the law, which, on considerations of public policy, are applicable to transactions between the Crown and a subject, but not between subject and subject.

To say that these great public works are to be treated as the property of private individuals or corporations, and the Queen, as the head of the government of the country, as a trader or common carrier, and as such chargeable with negligence, and liable therefor, and for all acts of negligence or improper conduct in the employees of the crown, from the stoker to the Minister of Railways, is simply to ignore all constitutional principles. These prerogatives of the Crown must not be treated as personal to the sovereign; they are great constitutional rights, conferred on the sovereign, upon principles of public policy, for the benefit of the people, and not, as it is said, "for the private gratification of the sovereign"—they form part of and are generally speaking "as ancient as the law itself."

The judiciary of the *United States* of *America*, ignoring prerogative rights, deal with matters, such as this

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on principles of public policy, on the ground of the principles of the common law.

Thus in *Johnson* v. *United States* (1), *Nott*, J., says, in the Court of Claims:

> This court has again and again held to the principle of the common law that the government cannot be sued in an action sounding in tort, nor made liable for the tortious acts of its officers.

This constitutional principle this court cannot ignore; it must not attempt to make laws; it must administer the law, constitutional, local, public or private, as it is, and leave the Dominion Parliament, on general and constitutional questions affecting the whole Dominion, and the provincial assemblies, on local questions, each within the scope of their legislative functions, as declared by the *B. N. A. Act*, to alter or adapt the practices or principles in force, to make them, if found expedient so to do, more suitable and applicable to the circumstances of the country. As to the statutes which it is alleged recognize the right of a party to recover for damage or injuries sustained on any railroad, see 31 Vic., ch. 12; 33 Vic., ch. 23; 44 Vic., ch. 25.

The Crown not being liable, it is only necessary to say that in a case such as this at common law, if the legislature has given a remedy, the remedy prescribed must be pursued, because the statute gives no action at common law, there is only the statute to be relied on, it being clearly established that, where a new right is created by statute, the remedy is confined to that given by statute.

The statute 38 Vic., ch. 12, repealed by 39 Vic., ch. 27, giving power to this court to deal with petitions of right, expressly enacts that nothing in it shall prejudice or limit otherwise than therein provided the rights, privileges or prerogatives of Her Majesty or Her successors, or give to the subject any remedy against the

(1) 2 Nott & Hunt. 413.

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Crown in any case when not entitled in *England*, under any circumstances, by laws in force prior to the passing of the Imperial Statute 23 and 24 Vic., ch. 34.

I have not felt it necessary to go more minutely into the cases bearing on the questions involved in this case as they can be found in *McFarlane* v. *The Queen* (1). Under these circumstances, I am constrained to the conclusion that the judgment must be reversed, and this court should declare that the suppliant is not entitled to the relief sought by his petition.

I may be permitted to add that the suppliant in this case has my deepest sympathy, and, I trust, that an application on his part to the grace, favor and bounty of the Crown may yet enable him to get that relief which this court has been unable to grant him.

STRONG, J.:—

In the case of the *Queen* v. *McFarlane* (2), lately decided in this court, I stated my reasons for holding that a petition of right will not lie against the Crown in respect either of tortious injuries or breaches of contract, caused by the negligence of its servants or officers. In other words, that in the case of torts the maxim *Respondeat Superior* does not apply to the Crown, and in the case of contracts, that they are to be construed as though they contained an exception of the Crown for liability in respect of any wrongful or negligent breach by its servants.

I am unable to distinguish this case on principle from that of the *Queen* v. *McFarlane*, and as I adhere to what I then said, I refer to my judgment in that case for the grounds of the conclusion at which I have arrived as to the disposition of the present appeal, which is, that it must be allowed, and the petition of right dismissed.

(1) *Ubi supra.* (2) 7 Can. S. C. Rep. 216.

[TRANSLATED]

FOURNIER, J.:

This is an appeal from a judgment of the Exchequer Court in the matter of the petition of right of the respondent, claiming the sum of $35,000 damages for injuries suffered by him in consequence of an accident which took place on the *Prince Edward Island* Railway, the property of the Dominion of *Canada*.

On the 25th August, 1880, the respondent presented himself as a passenger, and obtained, in consideration of the payment of the ordinary fare fixed by the Government, a passenger ticket entitling him to be carried upon the said railway from *Charlottetown* to *Souris*, and by his petition alleges that he fulfilled on his part all the conditions which entitled him to be carried safely and securely on said railway on the said journey. He avers that the said railway was run, worked, and managed so negligently and unskilfully that the train upon which he (the suppliant) was a passenger was run off the rails, and that in the accident he was greatly and permanently injured in body and health, and has become seriously incapacitated in his ability to earn a livelihood for himself and his family.

By the defence put in on behalf of Her Majesty it is admitted that the *Prince Edward Island* Railway is the property of Her Majesty, but was, at the time of the accident in question, under the control and management of the Minister of Railways and Canals of *Canada*. The defence also denies any contract on behalf of Her Majesty to carry safely and securely the suppliant.

In the fourth paragraph of the statement of defence, two other grounds are set up in answer to the suppliant's claim, the first—"That the control and management of the said railway being vested by statute in the Minister of Railways and Canals, Her Majesty cannot be made liable upon petition of right for the bad

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management of the Minister as alleged—2nd. That even assuming the said railway to be under the management and control of Her Majesty, no negligence can be imputed to Her, and Her Majesty is not answerable by petition of right for the negligence of her servants.

The evidence adduced in this case, and the finding of the learned judge who tried the case, removes all doubt on the questions of fact, the cause of the accident, the extent of the damages suffered, &c. There was no dispute on this point on the part of the counsel on the argument before us, except, perhaps, an opinion put forward, that the amount awarded was excessive, but no good reason was given. On this appeal, therefore, the only question which arises, is one of law, viz.: Whether Her Majesty is responsible towards a subject for damages resulting in consequence of acts of omission or negligence by those who represent Her Majesty, or act for Her in the execution of a contract, when such acts as between subject and subject would constitute a breach of contract? The learned counsel for the appellant contends that Her Majesty is not responsible, relying on the old common law maxim, "The king can do no wrong." Is it not greatly extending the applicability of the true meaning of this maxim, to apply it to such a case as the present one, when in truth the political power of Her Majesty is not in question, but merely Her Majesty's civil responsibility in a matter of a contract?

Although the signification of this maxim is somewhat well known, it is necessary for me, in consequence of the opinion of the majority of the court in this case, to cite the opinion of some authors. Amongst others *Chitty*, in his work on Prerogatives of the Crown (1), says:—

"The king can do no wrong." The constitutional signification of

(1) P. 5.

this maxim was in former times misrepresented. It was pretended by some that it meant that every measure of the king was lawful, a doctrine subversive of all principles of which the constitution is compounded. It is a fundamental general rule, that the King cannot sanction any act forbidden by law, it is in that point of view that His Majesty is under, and not above, the laws, that he is bound by them equally with his subjects.

In *Broom's* Legal Maxims (1) it is said:

"The king can do no wrong." Its true meaning is—First, that the sovereign individually and personally, and in his natural capacity is independent of, and is not amenable to, any other earthly power or jurisdiction; and that whatever may be amiss in the condition of public affairs is not to be imputed to the king, so as to render him answerable for it personally to his people. Secondly, the above maxim means, that the prerogative of the crown extends not to do any injury, because, being created for the benefit of the people, it cannot be exercised to their prejudice, and it is therefore a fundamental rule that the king cannot sanction any act forbidden by law; so that, in this point of view, he is under, and not above, the laws, and is bound by them equally with his subjects.

And in *Todd's* Parliamentary Government in British Colonies (2):

Prominent among these constitutional maxims, is the principle that "the king can do no wrong." Rightly understood this precept means, that the personal actions of the sovereign, not being acts of the government, are not under the cognizance of the law, and that as an individual he is not amenable to any earthly power or jurisdiction. He is nevertheless in subjection to God and to the law. For the law controls the king, and it is, in fact, the only rule and measure of the power of the Crown, and of the obedience of the people. And while the sovereign is personally irresponsible for all acts of the government, yet the functions of royalty which appertain to him, in his political capacity, are regulated by law, or by constitutional precept, and must be discharged by him solely for the public good, and not to gratify personal inclinations.

*Kent's* Commentaries (3):

Another attribute of the royal character is irresponsibility, it being an ancient fundamental maxim that the king can do no wrong. This

(1) p. 53. (2) P. 1.
(3) P. 479 and 480.

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is not to be understood as if everything transacted by the government was, of course, just and legal. Its proper meaning is only this: that no crime or other misconduct must ever be imputed to the sovereign personally. However tyrannical or arbitrary, therefore, may be the measures pursued or sanctioned by him, he is himself saved from punishment of every description. On the same principle no action can be brought against the sovereign, even in civil matters. Indeed this immunity, both from civil suit and penal proceeding, rest on another subordinate reason also, viz: that no court can have jurisdiction over him. For all jurisdiction implies superiority of power, and proceeds from the Crown itself.

While the sovereign himself however is, in a personal sense, incapable of doing wrong, yet his acts may, in themselves, be contrary to law, and are in some cases subject to reversal on that ground.

After stating that patents granted by the sovereign may be declared null, not on account of any error or injustice on his part, but because the sovereign was misinformed by his agents, the author adds:

So, if a person has in point of property a just demand upon the sovereign, though he cannot bring an action against him, he may petition him in the High Court of Justice, and obtain a redress as a matter of grace, though not upon compulsion.

The passage I have above cited from *Chitty* shows that it is not the first time that the proper signification of this maxim has been misunderstood. The terse language used in order to prove how limited its signification is, clearly establishes the fact that this maxim cannot be invoked as laying down an absolute principle. Such a doctrine, in his opinion, would be subversive of all the principles of the constitution. It is a general and fundamental rule that the king cannot sanction any act forbidden by law. It is in this sense that the king is under and not above the laws, and is bound by them equally with his subjects. Therefore the laws relating to contracts, as well as other laws, are binding on the sovereign. Now, it is an elementary principle of law, that the conditions of a contract are as binding between the contracting parties, as if they were dispositions or provisions of the law itself.

If Her Majesty, as it is Her undoubted right, can enter into contracts, must she not be considered to be bound towards those with whom she contracts, in the same manner and to the same extent as they are bound to her? There must be reciprocity in such cases; as Lord Justice *Blackburn* says in *Thomas* v. *The Queen* (1):

> Contracts can be made on behalf of Her Majesty with subjects, and the Attorney-General, suing on her behalf, can enforce those contracts against the subject, and if the subject has no means of enforcing the contract on his part, there is certainly a want of reciprocity in such cases.

The right of Her Majesty to contract either in her name, or the name of her agents or public officers, cannot be doubted. The statutes creating the public departments, the Public Works Department and the Department of Railways and Canals, apart from the general power which Her Majesty possesses, as sole corporation, contain also numerous provisions relating to the manner in which Her Majesty may become a contracting party either in her name or in the name of her agents.

Moreover, the maxim that the king can do no wrong is not only limited in the manner stated in *Chitty*, but it is further limited by the allowance of the petition of right, "an ancient common law remedy for the subject against the Crown," as *Chitty* describes it, giving to the subject the right to claim from the sovereign, moveables, lands, debts, and unliquidated damages (2). This gives the subject the same right he would have by action against another subject. "The petition (he says) is, however, substantially as well as nominally, a petition of right, as the prayer, if it is grantable, is *ex debito justitiæ*." This is not a new question, it has been treated of in the case already referred to of *Thomas v.*

(1) L. R. 10 Q. B. 33.

(2) See Chitty's Prerogatives of the Crown pp. 340-345.

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*The Queen.* And in *Broom's* Constitutional Law (1), when speaking of the redress which the subject has against the sovereign, I find the language more precise. He recognizes but a single exception, that is when the redress sought is against the personal act of the sovereign. He adds :

> As for the most petty and inconsiderable trespass committed by his fellow subjects, so for the invasion of property by his sovereign, does our law give to a suppliant, fully, freely, and efficiently redress. One exception, and one only, to this rule (as just intimated) occurs, and that is, where the sovereign has done himself personally an act which injures or prejudices another, for the king of *England* can theoretically do no wrong. Our law thus recognizes his supremacy, it has omitted to frame any mode of redress for that which it deems to be impossible.

True, that out of respect for the dignity of the Crown, a petition cannot be tried without Her Majesty's consent, but when the petition is tried, it carries the same effect as an action between subject and subject. The petition is, however, substantially as well as nominally, a petition of right, as the prayer, if it is granted, is *ex debito justitiæ*. The mode of exercising this right has been regulated by our statute.

Now, in the present case, however, I find that Her Majesty, by her present statement of defence, as I have before stated, denies to the suppliant any right to claim a redress for the damages he has suffered, and, on the other hand, the suppliant contends that Her Majesty, having contracted to carry him safely and securely, is responsible to him for a breach of said contract, which took place by the accident happening under the circumstances disclosed by the evidence in the case. To decide whether this proposition is correct, I may say, is the principal question to be determined by this court on the present appeal. The question of the responsibility of the Crown in matters of breach of contract,

(1) P. 246.

is not a new one. In the case of *Thomas* v. *The Queen*, the Court of Queen's Bench in *England* decided the question affirmatively (1). In that case, the suppliant, being the inventor of a new system of heavy artillery, had made an agreement with the Secretary of State for the War Department, by which he consented to refer to a special committee at *Woolwich* the merits of his invention and to furnish all descriptions, plans and models necessary to enable the committee to express an opinion on the matter, obliging himself personally to give such explanations as would be required. The consideration of this arrangement was, that should his inventions be approved of by the committee, he should be remunerated by a sum of money to be determined by Her Majesty's General Board of Ordnance. He alleged also in his petition that he had been put to considerable expense and outlay in perfecting his invention, the Government having promised, should the experiment to be made be successful, to reimburse him for such outlay. That, although he had fulfilled all the conditions of the arrangement on his part, yet the amount which he was to receive had not yet been determined or paid.

After filing a demurrer to the petition, the Attorney General abandoned all preliminary objections which might be remedied by amending, and the points argued before the court were the following: "That a petition of right will not lie for any other object than specific chattels or lands, and that it will not lie for breach of contract, nor to recover money claimed either by way of debt or damages." I will only cite that part of Mr. Justice *Blackburn's* elaborate judgment which refers to the question whether a petition of right will lie for damages resulting from a breach of contract.

But it is quite settled that on account of Her dignity no action

(1) L. R. 10 Q. B. 33.

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can be brought against the Queen; the redress, if any, must be by petition of right, which is now regulated by 23 and 24 *Vic.* c. 34. If the suppliant ultimately recovers, he obtains, under section 9, a judgment of the court that he is entitled to such relief as the court shall think just. And this form of judgment would be applicable to the case in which it appeared to the court that the plaintiff was entitled to be paid damages for non fulfilment of a contract.

It appears that at the time of the passing of the act there was a general impression that a petition of right was maintainable for a debt due on a breach of contract by the crown; the opinion to that effect expressed in Lord *Somers'* argument in the Banker's case (1) had been adopted by Chief Baron *Comyns* (2), and by Sergeant *Manning* in his treaties on the practice of the Court of Exchequer, where he says (3):

"That chattels, personal debts, or unliquidated damages may be recovered under it." * * * * Indeed, the framers of the act appeared to have considered its chief utility to consist in the applicability of its improved procedure to petitions on contracts between subjects and the various public departments of the government, so vastly on the increase in recent years, both in numbers and importance; whilst petitions of right in respect of specific lands or chattels for the future will be exceedingly rare.

But as sec. 7 of the act above quoted, declares expressly that, "nothing in this statute shall be construed to give to the subject any remedy against the Crown in any case in which he would not have been entitled to such remedy before the passing of this act," it became necessary to determine whether the general impression above mentioned, was well founded, and whether, before the passing of the statute, a petition would lie for breach of a contract, made with an authorized agent of the crown.

The determination of this question is of the utmost importance, as our statute regulating the procedure in petitions of right, 35 *Vic.*, c. 12, by sec. 19, gives to the subject only such rights as are given in *England* by 23 and 24 *Vic.*, c. 34. And as this latter act only gave such remedies as were in existence before the passing

(1) 14 How. St. Tr. p. 39. (2) 1 Com. Dig. Prer. D. p. 78.
(3) P. 84.

of the Act, it necessarily follows that if the right did not exist in *England* prior to 23 and 24 *Vic.* c. 34, in cases of breach of contract, it would not exist in this country in a similar case, as the rights of the subject are declared to be the same in both countries. The learned judge after an able and exhaustive review of all the authorities and precedents relating to this question, concludes by answering it in the affirmative. I will only cite the concluding remarks of the learned judge at p. 43 of the report:

In *Comyns'* Digest, Prer. D. 78, it is said that petition lies if the king does not pay a debt, wages, &c., citing Lord *Somers* arg. 85, and Chief Baron *Comyns* expresses no doubt as to the soundness of the doctrine thus cited by him. It appears in *Macbeth* v. *Haldimand* (1) that Lord *Thurlow* and *Buller*, J., (both *obiter dicta* it is true) expressed an opinion that a petition of right lay against the Crown on a contract; and a similar opinion seems to have been expressed by the barons in the Exchequer in *Oldham* v. *Lord of the Treasury* (2); and in *Baron de Bode's Case* (3), in which the point was raised, but was not decided—Lord *Denman* declares "an unquestionable repugnance to the suggestion that the door ought to be closed against all redress and remedy." A doctrine much resembling what Lord *Somers* called Lord *Holt's* "popular opinion," that if there be a right there must be a remedy. In *Viscount Canterbury* v. *Attorney General* (4) it was decided that the sovereign could not be sued in petition of right for a wrong. But in neither case was any opinion expressed that a petition of right will not lie for a contract. *Erle*, C. J., expressly saying that "claims founded on contracts and grants made on behalf of the Crown are within a class legally distinct from wrongs;" and in *Feathers* v. *Reg.* (5), it is assumed in the judgment that it does lie "where the claim arises out of a contract, as for goods supplied on the public service." We think, therefore, that we are bound by the bankers case to hold that the judgment on the demurrer should be for the suppliant.

This decision and the numerous authorities there cited are so decisive in my opinion, that there can be no doubt a petition of right will lie for a breach of a

(1) 1 T. R. 178.
(2) 6 Sim. 270.
(3) 8 Q. B. 274.
(4) 1 Phill. 306.
(5) 6 B. & S. 294.

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contract, and that the Crown is responsible to the other contracting party for any damages suffered in consequence of such breach.

But, although the right of the subject in such cases to claim redress by petition of right does not, in my opinion, suffer any doubt, it is contended also on behalf of the appellant, that as by 33 *Vic.* ch. 23, a special redress is given for damages in cases of accident on government railways, it was not open to the respondent to urge his claim otherwise; in other words, that he had only the redress *ex gratiâ* provided by that statute, and that he could not exercise his legal right (*ex debito justitiæ*) by petition. This statute, 33 *Vic.* c. 23, passed to extend the jurisdiction of the official arbitrators, in addition to the different kind of claims over which they had jurisdiction, enacted that the Minister of Public Works may, under 31 *Vic.* c. 12 s. 34, refer to the decision of the official arbitrators, amongst others, any claims for damages arising from accidents on railways and canals, causing death and grievous injuries. This claim must be made in accordance with the provisions contained in 31 *Vic.* c. 12, which, amongst others, provides that the minister may in his discretion arbitrarily refuse or grant a reference to the arbitrators. By 42 *Vic.* c. 7, which creates the Department of Railways and Canals, the minister of the new department is given the same powers in reference to claims for damages that was given to the Minister of Public Works. There can be no doubt that in virtue of the 5th section of the said Act the Minister of Railways and Canals can in his discretion receive and refer to the official arbitrators a claim in the nature of the present one. This power of reference existed by statutes relating to the construction of public works prior to 31 *Vic.* c. 12. It was extended, as I have just stated, in 1870 by 33 *Vic.* c. 23 to personal injuries.

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But can we not infer that, in addition to this right to obtain redress *ex gratiâ*, which by experience was shown to be exercised not without inconvenience, the legislature has thought fit to add a redress by legal right *ex debito justitiæ* by passing the 39 *Vic.* c. 27 regulating the procedure in matters of petition of right. This redress *ex gratiâ* must have been considered to be insufficient, as it placed the claimant entirely in the hands of his adversary. There were, no doubt, good reasons which induced the legislature to give to the subject a legal right by passing the petition of right act. And, therefore, I do not think the following rule of law has any application to the present case: "If the statute which imposes the obli-"gation, whether private or public, provides in the same "section a specific means or procedure for enforcing it, "no other course than that thus provided can be resorted "to." The statute in question, 33 *Vic.* ch. 23, did not give the right of action to the respondent, it merely enacts that official arbitrators shall hereafter have, at the minister's discretion, jurisdiction in matters over which they, prior to the passing of that statute, had no jurisdiction. The respondent in this case has not based his claim on that statute. His right of action is founded on the contract implied by his purchasing a passenger ticket, and on the statutes hereinafter mentioned relating to railways, and it is in virtue of the petition of right act that he proceeds to maintain his right of action. Moreover, the statute, 33 *Vic.*, ch. 23, cannot be said to have taken away any legal right a party may have, because it provides an optional remedy, and its provisions cannot affect the petition of right act which was passed subsequently.

Parliament, having by the latter statute regulated the procedure in matters of petition of right, had no doubt the power to revoke or modify statute 33 *Vic.*, ch. 23;

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but I may be permitted to express a doubt whether it has the power to deprive a subject of his constitutional right to submit by petition of right a claim he has against the Crown. And if this be so, it is evident that the subject cannot be deprived of such a right impliedly by a statute which merely provides for the mode of addressing oneself to the discretionary power of a minister. In my opinion the two remedies are not incompatible, and therefore both exist. Having the liberty of choice, it will not be denied that the majority of claimants would prefer to put forward their legal right.

It was contended also on behalf of Her Majesty that the decision of the majority of this court, in the case of the *Queen* v. *McFarlane* (1), laid down the principle of law which should govern this case. The facts are, however, in my opinion, totally different. In that case, the suppliant prayed that Her Majesty should be held responsible for the tort of a public officer, as may be seen by the following opinion given by Sir *William Ritchie*, Chief Justice, on the nature of *McFarlane's* claim, in these words:

> I am of opinion there was no contract or breach of contract to give to the suppliant any claim against the Crown, nor do the suppliants put forward their claim to relief on any such grounds. The claim in the petition is a tort pure and simple.

Then as to the cases cited on the argument of *Lane* v. *Cotton* (2), and *Whitfield* v. *Le Despencer* (3); I am of opinion that they are not applicable to the present case. In these cases it was attempted to make the Postmaster General responsible for the acts of his employees. In the first case the majority of the court were of opinion that the establishment of the post office was a branch of the public services of police, created by statute, as well for the purpose of raising a state

(1) 7 Can. S. C. R. 216.

(2) L. Ray. 646.

(3) 2 Camp. 754.

revenue as for the convenience of the public, and that it was under the control and administration of the Government. That the Postmaster General did not enter into any contract with individuals, and received no reward as in the case of a common carrier, proportionate to the number and value of the letters confided to his care, but a general remuneration from the Government in the form of a salary. In the second case, the claim was for certain monies stolen from a letter, and in that case Lord *Mansfield* says:

The postmaster has no hire, enters into no contract, carries on no merchandise or commerce. But the post office is a branch of revenue, and a branch of police, created by act of parliament. As a branch of revenue there are great receipts, but there is likewise a great surplus of benefit and advantage to the public arising from the fund. As a branch of police, it puts the whole correspondence of the country (for the exceptions are very trifling) under Government, and entrusts the management and direction of it to the Crown. There is no analogy, therefore, between the case of a postmaster and a common carrier.

Mr. *Story*, commenting on these observations, adds:

In truth in *England* and in *America*, the postmasters are mere public officers, appointed by the Government; and the contracts made by them officially are public and not private contracts.

This doctrine is now generally admitted. The same author adds (1):

In the ordinary course of things, an agent contracting on behalf of the government or the public, is not personally bound by such contract, even though he would be by the terms of the contract, if it were an agency of a private nature.

This principle I find also admitted in the case of *Dibley* v *Lord Palmerston* (2) as follows:

This is an action brought against the defendant, as Postmaster General, for an alleged breach of an implied undertaking, said to attach upon him in that character. With reference to this ground, it will be sufficient to advert to a class of cases too well known and established to be more particularly mentioned, and which in sub-

(1) No. 302. (2) 3 Brod. & King 275.

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stance and result have established, that an action will not lie against a public agent for anything done by him in his public character or employment, and constituting a personal and particular liability.

As it is seen, these decisions do no more than confirm what has since become a general principle, as remarked by Mr. *Story*, that is, that a public officer is not personally responsible for acts done in his official capacity. This is very different from the question to know whether or not Her Majesty is responsible for acts committed by her agents and constituting a breach of contract.

The law of the *United States* is also relied on; although in that country the maxim that "the king can do no wrong," is not applicable, yet the principle of law which declares the irresponsiblity of the State is also recognized there. See *Story* on Agency (1).

In the next place, as to the liability of public agents for torts or wrongs done in the course of their agency, it is plain that the government itself is not responsible for the misfeasance or wrongs, or negligences, or omissions of duty of the subordinate officers or agents employed in the public service; for it does not undertake to guarantee to any person the fidelity of any of the officers or agents whom it employs, since that would involve it in all its operations in endless embarrassments and difficulties and losses, which would be subversive of the public interest, and indeed laches are never imputable to the government. Our next inquiry therefore is, whether the heads of its departments or other superior functionaries are in a different predicament. And here the doctrine is now firmly established (subject to the qualification hereafter stated) that public officers and agents are not responsible for the misfeasances or positive wrongs, or for the misfeasances or negligences, or omissions of duty, of the sub-agents, or servants, or other persons properly employed by and under them in the discharge of their official duties. Thus, for example, it is now well settled, although it was formerly a matter of learned controversy, that the Postmaster General is not liable for any default, or negligence, or misfeasance, of any of the deputies or clerks employed under him in his office. This exemption is founded upon the general ground that he is a public officer, and that the whole establishment of the Post Office being for public purposes, and the officers therein being appointed

(1) P. 411, s. 319.

under public authority, it would be against public policy to make the head of the department personally responsible for the acts of all his subordinate officers, seeing it would be impracticable for him to supervise all their acts, and discouragement would thus be held out against such official employment in the public service.

It is true that the doctrine is there enunciated in such terms as would at first sight make us believe that the law in the American republic is upon this point more absolute than it is in *Great Britain*. In *England*, at all events, this doctrine is limited, as stated by *Chitty*, and also by the existence of the petition of right. But on reading attentively this passage of *Story*, it will be seen that this doctrine is only applicable to agents in the public service for acts committed in their official capacity, as forming part of the political government of the country. That it is an attribute of the State, as a political power, to be irresponsible, is a political truth not only in *Great Britain* and in the *United States*, but is common to all countries. But is this principle also true in civil matters? On this point this passage of *Story* has no bearing, for I find, on the contrary, that in the *United States* the responsibility of the State is expressly admitted in matters of contracts. They have there what is known as a special tribunal, viz.: the Court of Claims, whose jurisdiction, which has often been exercised, embraces claims for damages resulting from breach of contracts (1). The Court of Claims shall have jurisdiction to hear and determine the following matters:

First—All claims founded upon any law of Congress, or upon any regulation of any executive department, or upon any contract express or implied, with the Government of the *United States*, and all claims which may be referred to it by either House of Congress.

By the terms of this section jurisdiction is given in matters of contract express or implied. It is evident, as stated in 21 vol., *Albany* Law Journal (2), that the right

(1) Rev. Stats. U. S., sec. 1059, p. 195. (2) P. 397.

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exists only when the claim is founded upon a contract made with a person duly authorized, or on an implied contract when such a contract can be implied from the acts of a duly authorized person. And it is equally clear, that this section does not make the Government of the *United States* responsible for the wrongful acts nor even for contracts either expressed or implied made by parties, however exalted their position may be, if not duly authorized. But this section does not relieve the Government from being liable for damages resulting in consequence of a breach of contract. And the intrepretation which has been put upon it by the Court of Claims, as may be ascertained by referring to the long list of cases reported in the reports of the Court of Claims, and which are given under the word "damages," all prove that this liability has been admitted and acted upon.

It is manifest therefore that the responsibility of the State for a breach of contract is as well recognized and acted upon by the law and jurisprudence of the *United States* as it has been by the decisions in *England*. Now the respondent in this case relies on that responsibility, and does not put forward any pretension that could extend that doctrine. In order to see whether it is applicable to the present case, we must now examine whether the damages claimed arose in consequence of a breach of contract.

The respondent has alleged and proved that when he presented himself as a passenger on the railway in question he obtained from the duly authorized person to that effect, in consideration of a sum of money, equal to the tariff rate fixed by the Government, a passenger's ticket from *Charlottetown* to *Souris*. Now, was there not a contract, by this fact alone, entered into between Her Majesty and the suppliant? Has not Her Majesty obliged herself to carry this respondent on said railway

on the ordinary conditions fixed by law on a contract for the carriage of passengers?

What is a contract at common law?

A contract is an agreement upon sufficient consideration to do or not to do a particular thing (1). A contract in legal contemplation is an agreement between two parties for the doing or the not doing of some particular thing (2).

In the note at the foot of the page I find also the following definition:

"A contract is an agreement in which a party undertakes to do or not to do a particular thing" (3).

In *Campbell's* law of negligence I find the following definition:

The English law makes no attempt to classify obligations arising out of contracts, but contemplates all contracts as moulded on a single type, namely, a promise grounded on a consideration. Where obligation is contracted by deed, consideration is presumed. But in other cases, the question whether or not a contract is enforceable by law generally resolves itself into the question whether or not the promise to be enforced is grounded upon a good legal consideration.

In the present case, these two essential elements for the existence of a contract of conveyance are to be found, on the part of *McLeod*, a good and valid consideration, given in exchange for the service demanded, by paying the railway fare according to the tariff,—on the part of the Government, the handing over of a passenger ticket as evidence of the promise to convey the respondent from *Charlottetown* to *Souris*. I should not have deemed necessary to refer at length to these elementary principles, had not the learned counsel for Her Majesty, on his argument, strongly contended that the right of action for damages resulting from an accident is founded in such a case on a tort and not on a contract. Although, according to the defini-

(1) 2 Bl. Com. 448. (2) Parsons on Contracts, Vol. 1, p. 7.
(3) Marshall, C. J., 4 Wheat. 198.

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tions above cited, there can be no doubt as to the nature of the obligation which results from the purchasing of a passengers' ticket for a journey over a railway, it may not be amiss to refer to the decisions in cases in *England*, in order to ascertain what they decide as to the character of such a transaction.

In *Mytton* v. *The Midland Ry. Co.* (1), the plaintiff, who had purchased a passengers' ticket from the *South Wales Ry. Co.* from *Newport* to *Birmingham* and lost his portmanteau while travelling on the *Midland Ry. Co.*, and with which latter company the *South Wales Ry. Co.* had connections, sued the *Midland Ry. Co.* for the value of the articles contained in his portmanteau. It was there decided that the purchase of the ticket created a contract, and that the contract was only with the company that had sold the ticket and received the price, and not with the *Midland Ry. Co.*, which was in accordance with certain arrangements, to receive only a proportionate part of the money. Baron *Martin* thus states his opinion on this point:

> Upon these facts the only question is, whether there was any contract between the plaintiff and the *Midland Ry. Co.*, or whether the contract was not an entire contract with the *South Wales Ry. Co.* to convey the plaintiff the whole distance from *Newport* to *Birmingham*. We are of opinion that there was but one contract with the *South Wales Ry. Co.*, and not with the *Midland Ry. Co.* There was one sum paid and one ticket given for the entire journey, and there was no evidence whatever of any privity of the *Midland Ry. Co.* to that contract, except that by arrangement with the *South Wales Ry. Co.*, they conveyed on their line passengers booked from *Newport* to *Birmingham*.

*Cockburn*, C.J., in the case of *Tatton* v. *Great Western Ry Co.* (2), says:

> The question therefore is, whether the present is an action of contract, or on the case. Now whatever may be the distinction between an obligation arising out of a contract and a duty imposed by the common law on persons entering into a contract, it is impossible to

(1) 4 H. & N. 615. (2) 2 El. & El. 844.

refer to cases to which our attention has been called, without seeing that they establish that a duty was imposed upon the defendants in the present case by the custom of the realm, so soon as they entered into the contract with the plaintiff, and independently of the terms of the contract itself. The plaintiff might, had he thought fit, have brought his action on the contract, but he was also entitled to sue the defendants for the breach of the common law duty.

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*Crompton*, J., in the same case, appears to have expressed a different opinion, by stating that an action against a common carrier is in substance an action of tort, and he relies on the decision given in the case of *Pozzi* v. *Shipton* (1), and to which he refers as follows:

But ever since *Pozzi* v. *Shipton* it has been settled law that an action against a common carrier, as such, is substantially an action of tort on the case, founded on his common law duty to carry safely, independently of the particular contract which he makes.

Now, this opinion is not, as a matter of fact, opposed to that of *Cockburn*, C.J., who says that when there is a contract, the action can either be brought on the contract, or in tort on the case. In the case of *Pozzi* v. *Shipton*, the court did not hold, that whether there was a contract or not, the action was necessarily one of tort. What was there decided was, that even had there been no contract, the common carrier, according to the custom of the realm, *i.e.*, the common law, was responsible for his negligence. I find in this latter case nothing opposed to the opinion expressed by *Cockburn*, C. J., as may be seen by the following extract from *Patteson*, J's. judgment (2), when speaking of the declaration:

It does not state that the goods were delivered to the defendants at their special instance and request, nor contain any other delegation necessarily applicable to an express contract only, or even pointing to an express contract only; and it is sufficient for the present purpose, if the language in which it is couched is consistent with its being founded on the general custom as to carriers.

(1) 8 A & E 963. (2) P. 975.

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In the case of *Alton et al* v. *The Midland Ry. Co.* (1) it was also decided that the purchasing of a ticket created a contract between the company and the passenger. *Erle*, C. J., says:

> On the face of the declaration it appears that the relation between the defendants and *Baxter* arose out of a contract, for it alleges that *Baxter* was received by the defendants as a passenger to be carried by them upon their railway for hire and reward.

*Shearman* and *Redfield*, in their work on the law of negligence, after remarking that the obligations on the part of the carrier of passengers do not solely depend on a contract, but are in great measure founded on the provisions to be found in the common law as well as in the statutes passed for the protection of human life, conclude that these obligations are in the nature of a contract. At No. 261 (2) they say:

> Nevertheless the legal obligations of a carrier being called into activity by the action of each person separately who offers himself as a passenger, are in the nature of a contract, and no one can complain of their breach except the person with whom, or for whose benefit, the contract was made, or can rarely be other than the passenger himself.

There can be no doubt, that according to these English authorities it is well settled in *England* that the purchase of a passenger ticket constitutes a contract between the buyer and seller. On this contract, although the parties are silent thereon, the law engrafts an obligation to convey the passenger with sufficient care, skill and foresight to ensure his safety. Mr. *Campbell*, in his work on the law of negligence (1), after having treated of the responsibility of a carrier in the case of a latent defect in a tyre, which could not be attributed to any fault of the manufacturer, and which could not have been discovered before the accident, and after having cited the opinion of the judges in the case of *Redhead* v. *The Midland Ry. Co.*,

(1) 19 C. B. N. S. 213. (2) P. 353.

exonerating in such a case the company of all responsibility, continues as follows:

And the judges were unanimously of opinion that there is no contract either of general warrantry or insurance (such as that in the contract of a common carrier of goods), or of limited warranty (as to the vehicle being sufficient) entered into by the carrier of passengers, and the contract of such a carrier and the obligations undertaken by him are to take due care (including in him the use of skill and foresight) to carry a passenger safely.

In No. 41, after comparing the responsibility of a company to that of an individual who undertakes to erect a building for a public exhibition, as in the case of *Francis* v. *Cockerell* (1), the author adds the following observations:

This last case and the case of *Redhead* between them very clearly define the degree and kind of negligence which is sufficient to infer liability in the contract to carry passengers by fast conveyance. And it comes to this, that the carrier is bound to use the most exact diligence, and is answerable for any negligence however slight, and not only for his own personal default, but for the default of all employed by him, or from whom he has purchased work done or skill employed upon the thing. He is also bound to use such precautions for the preventions of accidents as a reasonable person having the management of the line would adopt for such purpose. *Daniel* v. *Metropolitan Ry. Co.* (2).

We find also the same doctrine propounded in the case of *Pym* v. *The Great Northern Ry. Co.* (3), where the accident was caused by a defective rail.

Now, does not the obligation contained in the contract, although implied, to carry passengers safely, form part of the contract as well as if it was expressly stated? And when an accident happens proving want of care or diligence, is there not a breach of the obligation to carry safely? True, it is negligence which causes the accident and which gives rise to the action for damages, but the origin of the action is nevertheless

(1) 5 Q. B. 184.

(2) L. R. 3 C. P. 216, 591 (a).

(3) 2 F. & F. 619.

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founded upon the contract, for a breach of one of its essential conditions, as in ordinary actions brought for breach of contract.

I admit that there exists an action independently of any contract, but it would be illogical to say that it is not founded on the contract when such a contract is proved.

If in the public interest the common law imposes on the carrying of passengers without any contract the obligation to carry safely, does it not follow as a necessary consequence that a breach of this duty through negligence entitles the party injured to claim damages? And in such a case if it is not a breach of contract, there is a breach of duty, for which the same remedy exists, as is shown by the following authorities. In *Bretherton* v. *Wood* (1), *Dallas*, C.J., in delivering the judgment of the Court of Error says:

> This action is on the case against a common carrier upon whom a duty is imposed by the custom of the realm, in other words by the common law, to carry and convey their goods or passengers safely and securely, so that by their negligence or default must no injury or damage happen. A breach of this duty is a breach of the law, and for this breach an action lies founded on the common law, which action wants not the aid of a contract to support it.

The same doctrine is laid down in the following cases: *Marshall* v. *The York & Newcastle Ry. Co.* (2); *Pozzi* v *Shipton* (3); *Peppin* v. *Shepherd* (4); and other cases cited at p. 296 of the volume of the Law Journal above cited.

*Brown*, on the Law of Railways (5), says:

> As carriers of passengers the company are bound, in the absence of any special contract, to exercise a due care and diligence, but they are not liable for accidents in the absence of negligence.
>
> They are liable for an accident arising from a defect in the carriages which can be detected by an ordinary reasonably proper and

(1) 3 Bro. & B. 54.
(2) 21 L. J. (C. P.) 34.
(3) 8 Ad. & E. 963.
(4) 11 Price 400.
(5) P. 303.

careful examination, but not for a latent defect which a careful and thorough examination would not disclose.

The liability for injury to a passenger from negligence does not depend upon express contract.

*Addison* on Torts (1) :

The action for negligence proceeds upon the idea of an obligation on the part of the defendant towards the plaintiff to use care, and a breach of that obligation to the plaintiff's injury.

These authorities and numerous others in the same sense clearly demonstrate that in order to create the liability there need be no express contract. In the interest of the public the liability exists in favor of persons, who, although they have not purchased any ticket, are lawfully on the train of a railway company. But we must not conclude that in all cases negligence is the sole foundation for the right of action. No; it is negligence as violation of contract or duty.

*Brown* (*idem*) (2), after referring again to the well settled rule that a company engaged in carrying or conveying goods or passengers is bound to exercise due care and diligence, adds : " But they are not liable in the absence of negligence." What is meant by this restriction? Is it anything else than declaring that a company shall not be liable when an accident happens through no fault of the company? In other words, is it not just admitting the exception in favor of accidents caused by *vis major* and latent defects, as would be the case in ordinary contracts between individuals? This exception from liability is just as expressly recognized by the English law as it is by all civil codes.

Neither must we conclude that because this doctrine has been well established, an action for damages cannot originally be founded upon a contract, but can only be supported on the fact that the company has been negligent. The first part of the passage I have read

(1) P. 21. (2) P. 303.

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from the above text-writer is equally applicable to the latter part, and the only true conclusion to come to is the one which was arrived at in the case of *Tattan* v. *The Great Western Railway* (1), to wit, that an action for damages may, according to the circumstances of the case, either be brought on the contract or based entirely on the negligence of the company. In order to avoid all liability in this case, the learned counsel for Her Majesty contend that the breach of contract or breach of duty is nothing more than a simple tort or wrongful act, and thus claim the right of invoking the maxim "The king can do no wrong." But I cannot adopt that view. The authorities have expressly made a clear distinction between the two cases. For example, *Addison* on Torts (2), "Distinction between contracts and torts :"

When the foundation of the action is a contract, and no right to sue exists independently of the contract, the action, though in form *ex delicto*, is in substance an action *ex contractu*, and the plaintiff must recover more than £20, or obtain a certificate rule or order in order to entitle himself to costs in the Superior Courts. On the other hand, when the foundation of the action is a wrongful act, as, for instance, a tort to the right of property and not a breach of contract, the action is in fact founded on tort. Where goods are delivered to a common carrier to be carried, and are lost on the road, the action against the common carrier is founded on contract; for, where an action is brought against a common carrier for breach of the common law duty to carry safely, the action is founded on a contract, and is not an action *ex delicto* for negligence, and therefore if the plaintiff does not recover more than £10 he is not entitled to costs.

In the present case the duty being imposed on Her Majesty by a contract, it is a breach of that contract that has taken place by the negligence which was the cause of the accident for which the respondent claims damages. The action must therefore be considered as being one *ex contractu* and not *ex delicto*. If Her Majesty is not to be held liable in such a case, when will

(1) 2 El. & El. p. 884. (2) P. 726.

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any responsibility be cast upon Her Majesty? If we adopt the contention of the learned counsel for the appellant, the Crown can never be held liable. For, after all, a breach of contract must always be the result of negligence, or omission to do something voluntarily or maliciously. If malice is relied on, I admit that in such a case Her Majesty cannot be made liable, but if she is not responsible for negligence or omission to do something under a contract then the right to petition is a mere delusion. In the case of *Thomas* v. *Queen* the contrary doctrine is certainly laid down. For on what was founded the suppliant's claim? Although he alleged that he had fulfilled all the conditions which he had undertaken to fulfil, the amount to which he claimed he was entitled to had neither been determined upon or paid. Evidently what he complained of was the negligence to do that which the Crown had contracted to do, and in that case it was not found to be derogatory to the dignity of the crown, nor was any principle of law supposed to be violated by granting the suppliant's prayer. This decision, which has not been in any way impugned by any other decision, settles, in my opinion, this question as to the responsibility of the Crown for negligence in matters of contract. And it also decides that it is by petition of right that the subject can obtain compensation in such cases, and therefore disposes, in my opinion, of all the questions raised on the present appeal in favor of respondent, for it, at the same time negatives the extraordinary proposition advanced by the learned counsel for the appellant, that Her Majesty is not answerable in the present case by petition of right, because the control and management of the government railways are by statute under the direction of the Minister of Railways and Canals. In virtue of 42 *Vic.* c. 7 this minister is the head of a Department of State as much as the Secretary of War is in

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*England*; and within the scope of his authority he acts not for himself but for the government of Her Majesty. It was not personally with Her Majesty that *Thomas* had contracted in respect of his invention, but with the Secretary of the War Department. This is the manner in which this ground of demurrer was disposed of in that case :

> Indeed the framers of the Act (Petition of Right Act, 23 and 24 *Vic.* c. 34) appeared to have considered its chief title to consist in the applicability of its improved procedure to petitions on contracts between subjects and the various public departments of the government so vastly on the increase in recent years, both in numbers and importance, whilst petitions of right in respect of specific lands or chattels for the public will be exceedingly rare.

Having considered the question of the responsibility of Her Majesty in matters of contract, and also in connection with the duty imposed by law on the carrier of passengers, it now remains for me to examine whether Her Majesty is not also liable in virtue of the statute laws passed in reference to the Government railways of *Canada*. I will at once state that I readily admit that the Government of the Dominion of *Canada*, when exercising its legislative authority over railways belonging either to private companies or to the Dominion, is free from all responsibility. But this irresponsibility ceases the moment the Government undertakes to work a railway as an ordinary company would. In such a case the Government ceases to exercise its political authority and undertakes an ordinary civil transaction, and in such transaction is not above, but under and subject to the ordinary rules of the common law. This would have been the legal and logical position to hold the Government to be in, when it undertook to do the business of a common carrier of passengers, without any statutory declaration to that effect, as was held by the Supreme Court of *Belgium*, when the government of that country began to work their railways. But our

Government, in order to remove all doubt on this subject, has thought proper to define and limit its responsibility in the working of its railways.

That the Government should be considered as a common carrier of passengers does not seem to me to admit of a doubt according to the following definitions. *Shearman* and *Redfield* (1):

> Any person or corporation making it a regular business to carry persons for hire or advantage of any kind is a common carrier between the places to and from which he is accustomed to transport persons. The owner of a stage, a railroad car, a ship or ferry boat, is, if he carries on such a business by means of such vehicles, a common carrier of persons.

This is certainly what the Government does when working its railways.

Now, then, what responsibility attaches under our statutes and the regulations passed by order in council for the working of said railways. It has been admitted that the *Prince Edward Island* Railway upon which the accident happened, causing damage to the respondent, is one of the railways which is under the control and management of the Minister of Railways and Canals. By 41 *Vic.*, ch. 3, sanctioned on the 16th April, 1878, the railway acts are made applicable to this railway. Since then there has been a consolidation of the railway acts, and the Consolidated Railway Act 42 *Vic.* c. 9 was passed and sanctioned on the 15th May, 1879.

The provisions of the first portion of this act, from the 5th section to the 34 section inclusive, are declared to be applicable to the Intercolonial Railway, also the property of the Government, in so far as they are not contrary to the provisions contained in the special acts relating to this railway.

The Act 41 *Vic.* c. 3, being repealed by the new consolidated act, it was declared by sec. 102 that the provi-

(1) P. 303.

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sions of the consolidated act were substituted for those of the act repealed.

Section 101 is even more precise, for it says that the whole act, with the exception of sections 29 and 34, are applicable to the *Prince Edward Island* railway. Sec. 29 having reference to certain statistics, and section 34 relating to certain reports to be made to the minister. Among the provisions of this Act which are applicable to the Intercolonial as well as to the *Prince Edward Island* railway are to be found those in sec. 25 regulating the working of railways.

I will only cite those sections which declare that the working of these railways by the government, shall be a business of common carrier, and also those which have any bearing upon the responsibility of government in such case.

Sec. 25, sub. s. 2, is as follows:

The trains shall be started and run at regular hours to be fixed by public notice, and shall furnish sufficient accommodation for the transportation of all such passengers and goods as are within a reasonable time previous thereto offered for transportation.

3. Such passengers and goods shall be taken, transported and discharged at, from and to such places on due payment of the toll, freight or fare legally authorized therefor.

4. The party aggrieved by any neglect or refusal on the premises, shall have an action against the company, from which action the company shall not be relieved, by any notice, conditions or declarations, of the damages from any negligence or omissions of the company or of its servants.

13. Any person injured whilst on the platform of car, or on any baggage, wood, or freight car, in violation of the printed regulations posted up at the time in a conspicuous place inside of the passenger cars then in the train, shall have no claim for the injury, provided room inside of such passenger cars sufficient for the proper accommodation of the passengers was furnished at the time.

These sub-sections 4 and 13 clearly demonstrate that it was not the intention of the Government to work these railways on a different basis than that of railways of private companies. Evidently they have sub-

jected themselves to all the obligations and to the responsibility attached to private companies, by declaring these sections applicable to both government and private railways, and in order to make this plainer, if we replace the word "company" that is to be found in these sections by the word "Government," and which should be done in virtue of sections 2, 4, 101 and 102, there can be no question as to the result. Thus, for example, sub-sec. 4 should read as follows:

"Any person aggrieved by any neglect or refusal in the premises, shall have an action against the *Government* from which action the *Government* shall not be relieved, &c., &c."

It is evident also that by sec. 13 the Government is made responsible for injury to the person, for by claiming exemption from all responsibility for damage or injury caused to a person standing on the platform, it was in fact admitting the general principle of responsibility. This provision is also to be found in the orders in council regulating the working of the Government railways.

To my mind, it is sufficient to read these sections to convince one on this question of responsibility. If necessary to add to this, I will refer to sec. 27, also applicable to the *Prince Edward Island* Railway, which regulates and limits the right of action; it reads as follows:

All suits for indemnity for any damage or injury sustained by reason of the railway shall be instituted within six months after the time of such supposed damage sustained.

This section, as well as the preceding sections cited, whenever they are applicable either to the Intercolonial Railway or the *Prince Edward Island* Railway, in virtue of secs. 2, 4, 101 and 102 should be read as if the words "Government of *Canada*," were there specially inserted.

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As is seen, not only is the responsibility of the Government duly recognized, but the right of action, which is the natural sequence of such responsibility, is also provided for Then, again, notwithstanding that I consider it sufficiently established by the above sections, I might refer to the statute passed in 1881 by the parliament of *Canada*, entitled "an Act to consolidate and amend the law relating to Government railways" This act contains in a great measure a re-enactment of the clauses of the General Railway Act of 1879. The provisions relating to passengers journeying on said railways are identical in both acts, as can be readily ascertained by comparing secs. 1, 2, 3, 4 and 13 of the act of 1879 with secs. 71, 72, 73, 74 and 81 of the latter act. Although the act of 1881 came into force only after the accident in question in this cause, it may be looked at to discover what was the legislative interpretation of the act of 1879, as to government responsibility. In the act of 1879, as the sections which dealt with the question of responsibility only mentioned companies, it was necessary to refer to secs. 2, 4, 101 and 102 to find out whether they also could be applicable to the Government. In sec. 4 and other sections having reference to the Government, the language used is made clearer by stating that the "department" shall be liable in all cases mentioned, and, as I have already said, they are the same as those mentioned in the act of 1879. In sec. 123, which repeals the act of 1879, it is enacted that such portions of the new act as do not essentially differ from the provisions contained in the old act, can be referred to. This section has so much bearing upon this view of the case that I will cite it at length.

And provided also that anything heretofore done in pursuance of or contravention of any provision in any act heretofore in force and applying to government railways, which is repealed without material additions in this act, may be alleged or referred to as having been

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done in pursuance of or in contravention of the act in which such provision was made or of this act; and every such provision shall be construed, not as a new enactment, but as having and as having had the same effect, and from the same time as under such act, and every reference in any former act or document, to any such act, or to any provisions in any such act, shall hereafter be construed as a reference to this act or to the c rresponding provisions in this act.

In virtue of this section, the provisions contained in sections 74 and 81, which are in substance the same as those of sections 4 and 13 of the act of 1879, can be referred to as applicable to the present case, and in any case can be relied on to establish the applicability of the principle of responsibility when working railways.

For these reasons I have come to the conclusion that the maxim "the king can do no wrong" is literally true in a limited sense, *i.e.*, when the political authority of the sovereign is in question; that whenever the sovereign enters into a contract, either personally or by his duly authorized agent, he is subject to the laws relating to contracts; for all authors who have commented on this maxim agree that the sovereign is under and not above the laws, and is bound by them equally with the subjects; that it is true that in consequence of the immunity attached to his person, the sovereign cannot be summoned before the ordinary civil tribunals of the land to fulfil the obligations of his contracts, or to restore lands or chattels, or to pay a just debt, but, nevertheless, in all such cases the maxim must be accepted in a restricted sense, viz., subject to the constitutional right of every subject to claim from his sovereign, by petition, the payment of a just debt, the fulfilment of the obligations of a contract, or the delivery of lands or chattels, or unliquidated damages. True, this petition can only be adjudicated upon after leave has been granted and the fiat "let right be done" signed, but the right to the petition, which is founded on *ex debito justitiæ*, is in

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reality the same as the right of action of a subject against another subject; that a petition of right will lie for unliquidated damages for breach of a contract made in the name of or in the interest of the sovereign or the Government by persons duly authorized to that effect; that public departments are but agents of the crown, and when acting for the crown in matters of contract render the Crown liable, as has been decided in the case of *Thomas* v. *The Secretary of the War Department*; that in the present case a contract was entered into, by the purchase of a ticket, between the Government of *Canada* and the respondent, and to that contract the law implies the obligation to convey the passenger with ordinary care, diligence and skill for his personal safety; that under the circumstances disclosed by the evidence in this case there has been a breach of that contract which entitles the respondent to claim damages; that, moreover, as the common law, independent of any contract, imposes upon the common carrier of passengers the duty to convey safely and securely, and renders him liable for any damage caused by his negligence, there has been in the present case a breach of that duty, giving to the respondent the further and equal right to petition for the damages he has suffered; that the Government when working railways for gain and hire is subject to the same responsibility as a common carrier of goods and passengers; that the consolidated railway act of 1879 and the act of 1881, consolidating the laws relating to government railways, have expressly recognized this responsibility; that 33 *Vic.*, ch. 23 by giving to the injured person the option of addressing himself to the discretionary power of the Minister of Railways and Canals in order to obtain in the particular mode provided, redress for any damage suffered by him, has not thereby taken away his constitutional right to make his claim by way of

petition of right, and that the respondent having the option of choosing his remedy, he, in this case, is justified in relying upon his petition of right, and this appeal ought to be dismissed.

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HENRY, J.:—

In giving the judgment of the Exchequer Court in this case I laid down certain propositions as I thought affecting the positions of the different parties to this suit. I may possibly have laid down some of them a little too strongly—stronger than I intended. The legal obligation with regard to the carrying of passengers is well understood by those who have turned their attention to the subject. The obligation and the contract entered into by a railway company when issuing a ticket, is to convey the party from one point to another safely. That is part of the contract, but it goes further and includes a guarantee against negligence. It is part of the contract itself. But we are told when negligence comes in, that the contract is not to be performed, inasmuch as the *Queen* cannot be assumed to be guilty of negligence, and with regard to the negligence of her servants, the same doctrine applies. But I take it, there are two kinds of breach of contract, there may be a tortious breach as well as one that is not tortious, but the mere fact that a breaches of contract is tortious does not relieve the Crown from the breach of a contract by its servants. I take it that the principle applicable to those questions arising between companies and those they engage to carry, should be held applicable to the Crown when a contract has been entered into. How then are companies relieved from liability if an accident occurs and parties are injured? Only by showing why they were not only guilty of negligence; by showing that it was some thing over which they had no

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control; and that only. The absence of proof of negligence does not necessarily relieve a railway company. Sometimes it is assumed from the peculiarity of the accident which produced the injury. For instance, if two railway trains owned by the same company running on its own line come into collision, and thereby injure passengers, it is not necessary for a party to show where the negligence was, and which train caused the damage.

It is assumed the company being answerable for the conduct of both trains, the collision was the result of negligence. Then, it is not necessary in an action against a company to prove negligence at all: all that is necessary, is to prove circumstances under which negligence can be fairly presumed by a jury. Now, I consider that is the question which is involved when a company issues a railway ticket to a party to carry him safely. But we are told that this would negative our decision, in *The Queen* v. *Macfarlane* (1). Possibly it might, but possibly a decision the other way would negative one or two other judgments of this court. In *The Queen* v. *McLean & Roger*, which was an action brought to recover damages for violation of contract, this court, by a majority, decided that through the negligence or improper conduct of the Queen's officers, the work was not given to the contractors to perform according to their contract; and that, therefore, they were entitled to recover damages. How then can it be said that if the Queen is answerable under the circumstances in that case for the improper conduct of her officers and subordinates, she is not to be answerable in every like case? There was another case tried before my learned brother *Taschereau* in *Quebec* (2). It was an action brought to recover damages under similar circumstances. A party undertook to take all the rails imported for the

(1) 7 Can. S. C. R. 216. (2) Kenny & Queen, 2 Can. L. T. 193.

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Government at *Montreal*, from ship there, and deliver them on the wharf at *Lachine*. By the negligence and improper conduct of the parties, who were acting there for the Government, a portion (about one-half) of these rails were transported by other means. The contractor brought his action in the Exchequer Court, and my learned brother decided, I think correctly, that the contract was broken; and that the contractor was entitled to damages, and judgment was given in his favor for such damages for, I think, $1,500. I cannot distinguish that case from this. If the Queen is answerable for the fulfilment of a contract, is it necessary to inquire whether it is through negligence or the wilful misconduct of the officers that a party sustained damage through a breach of it?

If the contract is broken or violated, does it make it any the less broken or violated because it was negligence that caused it? My learned brother *Fournier* has referred to the statute which provides certain exemptions from liability, which, however, do not touch this case. I take it there is in the statute making such exemptions a legislative acknowledgment of liability; but even without that we know that in *England* a foreign sovereign cannot be sued, nor a foreign minister, but there are many cases which show that if the foreign sovereign sends his ship into *England* and undertakes to take freight for payment, he becomes liable to be sued in *England*. Why? Because he puts himself in the place of a common carrier, and, therefore, although his prerogative right in one case shields him, the very moment he steps away from his prerogative position and becomes a common carrier, the law follows him and makes him answerable for all his contracts the same as all other common carriers. Apply that principle to this case and what have we? The Government, in the Queen's name, undertakes for hire to carry

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passengers, and convey them safely, for everyone must admit that failure to do so is neglect, and we are told because the servants of the Queen negligently managed her business, the party who was injured thereby cannot recover. It is not a recovery for mere negligence that is sought for in this case. If there were no contract, of course the Queen is not answerable, and the cases referred to are those where actions were brought for mere negligence without any contract. Therefore, they do not apply to this case. If this suit were against a company, it is admitted the company would have to respond for the negligence of its servants, but we are told the Queen is not answerable for the misconduct of her servants in such a case. But I take it the contract here is not unilateral, and that there is a liability to others under it on the part of the Queen. It is her duty to fulfil her contracts, is it any answer for the Queen any more than for a company to say, "My servants were guilty of negligence and other improper conduct, and therefore I am not bound to fulfil my contract?" It appears to me the reasoning is all on the side of liability. I have considered this case very fully, to some extent before I gave my judgment in the Exchequer Court, and since very fully, with a view to changing my opinion, if I could do so conscientiously, and coming to the same conclusion as my learned brothers. I have not been able to do so, but, on the contrary, consider that the verdict I gave in the first place is the right one. I think it should be held to be the law of the land, that where the Government of the country enters into contracts it should be obliged to keep them, and if it fails to do so, it should be as amenable to the law as private parties. I consider for the foregoing reasons and those appearing in my previous judgment that the appeal should be dismissed with costs.

TASCHEREAU, J., who was not present at the argument took no part in the judgment.

GWYNNE, J.:—

The suppliant's claim in this case is stated in his petition of right to be founded upon a contract for the carriage of the suppliant for hire and reward, upon the *Prince Edward Island* Railway, alleged to have been entered into with the suppliant by Her Majesty, whereby, as is alleged, Her Majesty contracted with the suppliant and promised him, in consideration of certain hire and reward paid by him, to carry him safely and securely upon the said railway from a station called *Charlottetown* to another station called *Souris* upon the said railway, and the breach alleged is that Her Majesty, disregarding the duty which is alleged to have arisen from such her alleged contract and promise, did not carry the suppliant safely and securely upon the said railway upon his said journey, but so negligently and unskilfully conducted, managed, and maintained the said railway and the train upon which the suppliant was a passenger, in the course of his said journey, that he was greatly and permanently injured in body and health, &c., &c.

Upon behalf of the suppliant it was contended that, as the petition thus presented the suppliant's claim as founded upon a contract, no objection could be entertained founded upon the principle, which was admitted to be established by authority, that Her Majesty could not be made liable for an injury occasioned either by the negligence of the persons having in charge the maintenance of the road bed, or of the persons in charge of the engine and train running upon it.

In actions of this nature between an injured person and a railway company the gist and gravamen of the action, whether it is framed in contract or in tort, is the

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negligence and misconduct of the defendants, or of their servants, for whom they are responsible. The action, although in form it be founded upon a contract, is in substance and reality for a negligent breach of a duty arising out of the alleged contract, so that Her Majesty could not be made liable by the mere fact that the pleader has framed his complaint as upon a contract, if she would not be liable under the like circumstances, if it had been framed in tort. Her Majesty's liability can not depend upon the pleader's choice as to the form of the complaint; no authority was cited in support of such a contention, and in principle it cannot be sustained.

In the *Metropolitan Railway Co.* v. *Jackson* (1), Lord *Blackburn*, in the House of Lords, says:

> In all cases to recover damages for a personal injury against Railway Companies, the plaintiff has to prove first that there was, on the part of the defendants, a neglect of the duty cast upon them under the circumstances, and second that the damage he has sustained was the consequence of that neglect of duty.

If Her Majesty could not be made liable in tort for the negligence of the persons who caused the injury to the suppliant of which he complains, it is impossible that she should become liable from the fact that the negligence which is said to have caused the injury is alleged to be in breach of a duty arising out of a contract.

But in truth there never was any such contract between the suppliant and Her Majesty as is alleged in the petition of right. It is not pretended that there was any express contract, but it is contended that the force and effect of certain sections of the Consolidated Railway Act of 1879 is to make the Dominion Government, and Her Majesty, as the executive head of that Government, common carriers, and that upon receipt

(1) 3 App. Cases 208.

by the agents and servants of the Government of the suppliant's railway fare, and upon his becoming a passenger upon the railway, a contract is to be implied to the effect that the Government shall and will carry the suppliant safely, and that he shall not suffer any damage or injury upon his journey upon the railway for which he had so become a passenger: and *Thomas* v. *The Queen* (1) is relied upon in support of this contention; but that case relates to contracts of a wholly different nature from that which is relied upon as existing here, namely, express contracts made with officers of the Government upon behalf of Her Majesty for the payment of reward for services rendered to the Government. I have already, in *McFarlane* v. *The Queen* (2), expressed my opinion to be that the argument upon which the existence of such a contract as is relied upon is rested is fallacious.

The facts disclose no contract whatever between the suppliant and Her Majesty.

The sections of the act of 1879, which are relied upon are section 101 and section 25, sub-sections 2, 3 and 4. The 101st section declared that all the provisions of the act of 1879, except those contained in the 29th to the 34th both inclusive, shall be held to have applied to *Prince Edward Island* from the time of the passing of 41st *Vict.* ch. 3, unless declared to be applicable only to one or more of the provinces composing the Dominion. By sec. 25, sub-sections 2, 3 and 4, it was enacted that—

2nd. Trains should be started and run at regular hours to be fixed by public notice and should furnish sufficient accommodation for the transportation of all such passengers and goods as are within a reasonable time previous thereto offered for transportation at the place of starting, and at the junctions of other railways and at usual stopping places established for receiving and discharging way passengers and goods from the train.

(1) L. R. 10 Q. B. 31. (2) 7 Can. S. C. R. 216.

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3rd. Such passengers and goods shall be taken, transported and discharged, at, from and to such places on the due payment of the tolls, freight or fare legally authorized therefor.

4th. The party aggrieved by any neglect or refusal in the premises shall have an action therefor against the company, from which action the company shall not be relieved by any notice, condition or declaration, if the damage arises from any negligence or omission of the company or of its servants.

Now, as it appears to me, it is obvious that, apart from the act, no obligation to carry passengers or goods, even upon receipt of tolls, freight, or fare in consideration of such carriage, could ever be imposed upon the Government by the common law, as it could upon a trading corporation assuming the duties and responsibilities of common carriers for reward; assuming, therefore, the 25th section and its sub-sections to be by the 101st section made to apply to the working of the *Prince Edward Island* Railway by the Government and not by a company, although it seems to me to be difficult so to read the 4th sub-section, still the obligation imposed in that case upon the Government by the 3rd sub-section would be a duty imposed by the act of Parliament and not one arising from any contract, the neglect or refusal to discharge which would be what is made by the 4th sub-section actionable; so that whatever may have been intended by applying the 25th section and the sub-sections, assuming them to apply to the working of this railway under the control and management of the Government, no proceeding by petition of right against Her Majesty can be authorized by the 3rd sub-section of section 25, for what is there made actionable is the tort or wrong consisting in the neglect or refusal to discharge a statutory duty imposed upon the Government and not the breach of any contract; moreover, with this act of 1879 must be read the provisions of 33 *Vic.* c. 23, which enacted among other things, that

if any person should have any claim against the Government of *Canada* for alleged direct or consequent damages arising out of any death or any injury to person or property on any railway, canal, or public work under the control and management of the Government of *Canada*, such person might give notice in writing of such claim to the Secretary of State for *Canada*, stating the particulars thereof and how the same has arisen, which notice the Secretary of State should refer to the head of the department with respect to which the claim has so arisen, who should then have power to tender satisfaction, and, if it be not accepted, to refer the claim to one or more of the official arbitrators appointed under the act respecting the public works of *Canada*, and the said official arbitrators should then have power to hear and award upon such claim, and that all the provisions of the act respecting the public works of *Canada* with respect to cases referred to arbitration and to the powers of the arbitrators, and proceedings by or before them, should apply to such claim, to the head of the department concerned and to the said official arbitrators respectively: Provided always, that nothing in the said act 33 *Vic.* c. 23 should be construed as making it imperative on the Government to entertain any claim under said act, but that the head of the department concerned should refer to arbitration such claims only as he might be instructed so to refer by the Governor in Council.

The Act 44 *Vict.*, ch. 25, entitled "An Act to amend and consolidate the laws relating to Government Railways," was also relied upon by the learned counsel for the suppliant. This act was passed after the happening of the accident at which the suppliant sustained the injuries complained of; assuming it, however, to have application to the present case, its provisions do not in my judgment support the suppliant's contention.

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The 3rd sub-sec. of the 27th section of this act makes provision for the case of any person having any supposed claim arising out of any death or any injury to person or property on any such railway, similar to the provision, above extracted, which had in like case been made by 33rd *Vict.*, ch. 23. Sections 65 to 84 inclusive make provision for the working of the Government Railways. Section 72 makes provision for the Government Railways identical with the provision by the 2nd sub-section of section 25 of the Consolidated Railway Act of 1879, and section 73 is identical with sub-sec. 3 of section 25 of the act of 1879. Section 74 enacts that:

> The department shall not be relieved from liability by any notice, condition or declaration in case of any damage arising from any negligence, omission or default of any officer, employee or servant of the department; nor shall any officer, employee or servant be relieved from liability by any notice, condition or declaration if the damage arise from his negligence or omission.

By sec. 78 it is enacted that: every locomotive engine shall be furnished with a bell of at least 30 lbs. weight and with a steam whistle; and by section 79, that: the bell shall be rung and the whistle sounded at the distance of at least 80 rods from every place where the railway crosses any highway, and be kept ringing or be sounded at short intervals until the engine has crossed such highway; and the department shall be liable for all damages sustained by any person by reason of any neglect thereof, and one half of such damages shall be chargeable to and deducted from any salary due to the engineer having charge of such engine and neglecting to sound the whistle or ring the bell as aforesaid, or shall be collected from such engineer. By sec. 81 it is enacted that any person injured while on the platform of a car, or on any baggage, wood or freight car, in violation of the printed regulations posted up at the time in a conspicuous place inside of the passenger cars then in the train, shall have no claim for the injury, provided

room inside of such passenger cars sufficient for the proper accommodation of the possengers was furnished at the time. Section 64 was relied upon as enacting that,

Neither the department nor any officer, employee or servant thereof (except where the killing or injuring is negligent or wilful) shall be liable for any damage which may be done by any train or engine to cattle, horses or other animals on the railway.

1. Where they, being at large contrary to the provisions of section 60, are killed or injured by any engine, &c., &c.

2. Where they gain access to the railway from property other than that of the owner, or in which the owner has a right of pasturage.

3. When they gain access to the railway through a gate of a farm or private crossing, the fastenings of which are in good order, unless such gate is left open by an employee of the department.

4. When they gain access to the railway through or over a fence constructed in accordance with sec. 55.

6. Where they being at large contrary to the provisions of sec. 60, gain access to the railway from the highway at the point of intersection.

Secs. 108 and 109 enact, the former that all claims for indemnity or injury sustained by reason of the railway shall be made within six months next after the time of such supposed damage sustained, or, if there be continuance of damage, then within six months next after the doing or committing of such damage ceases, and not afterwards; and sec. 109, that no action shall be brought against any officer, employee or servant of the department for anything done by virtue of his office, service or employment unless within three months after the act committed, and upon one month's previous notice thereof in writing; and the action shall be tried in the county or judicial district where the cause of action arose.

Sec. 101 enacts, that the Minister, or any person acting for him in investigating and making enquiry into any accident upon the railway, or relating to the management of the railway, may examine witnesses under oath,

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and for that purpose shall have full power to administer such oath. By sec. 85 it is enacted, that the Governor may, by Order in Council to be issued and published (in the *Canada Gazette*), impose and authorize the collection of tolls and dues upon any railway under the control or management of the Minister, and from time to time in like manner may alter and change such dues or tolls, and may declare the exemptions therefrom, and that all such dues should be payable in advance, if so demanded by the collector thereof; and by sec. 86, that all such tolls and dues might be recovered with costs in any court having civil jurisdiction to the amount, by the collector or person appointed to receive the same, in his own name or in the name of Her Majesty, and by any form of proceeding by which debts to the Crown may be recovered; and by sec. 83 it was enacted, that for the due use and proper maintenance of Government railways, and to advance the public good, the Governor might, by Order in Council, enact from time to time such regulations as he might deem necessary for, among other things, the management of all or any such railways, or for the ascertaining and collection of the tolls, dues and revenues thereon, or to be observed by the conductors, engine drivers and other officers and servants of the department; and by sec. 89, that he might by such orders and regulations impose such fines, not exceeding in any case four hundred dollars, for any contravention or infraction of any such orders or regulations, as he should deem necessary for insuring the observance of the same, and the payment of the tolls and dues to be imposed as aforesaid, &c.; and that such orders and regulations should be read as part of the act. Now, from this act it is, I think, sufficiently clear that all superintendents, engineers, conductors, engine drivers and all other officers and servants of the department, are severally and respectively servants of

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the public, having certain statutory duties imposed upon each of them; for any injury caused to any person by their negligent and improper conduct in the discharge of which duties they are, each of them severally, responsible to the injured person, and this not in virtue of any contract, but as tortfeasors by reason of their negligent and improper conduct in the discharge of the duties imposed upon them by the statute having been the direct cause of injury to another. It is also, I think, obvious that all tolls, dues or fares, payable by all persons travelling upon or using the railway, are payable and recoverable solely under the authority of the statute which makes them to be recoverable, when not paid in advance to the person authorized to collect them, either by the collector in his own name, or in the name of Her Majesty as a statutory debt due to the Crown. The payment and collection of them rests upon the provisions and authority of the statute alone, and not upon any contract made with Her Majesty or with any person. There is no foundation whatever for the contention that Her Majesty is by the statute constituted a common carrier of goods and passengers by railway, and so exposed to all the liabilities by the common law attached to such carriers, or that the use of the railway for the carriage of passengers and freight is in virtue of a contract entered into by Her Majesty as such carrier; that is a position in which Her Majesty could never be placed, unless at least by the express terms of an Act of Parliament to which she herself should be an assenting party. But it is said that several of the above sections recognize and refer to a liability "of the department," and that, there being no mode indicated by the statute for suing the department *eo nomine*, it must be liable in this mode of proceeding by petition of right against Her Majesty.

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To this contention there are, as it appears to me, two answers.

By the interpretation clause of the statute it is declared that the word "department" shall mean the Department of Railways and Canals, and the word "minister" the Minister of Railways and Canals. Now, there is no pretence that the department is made a corporation and capable of being sued as such. Indeed, its not being so is made the basis of the contention that Her Majesty may be proceeded against by petition of right. All officers and servants of the department of every degree are individually responsible for any injury directly caused to any person by their own negligent or improper conduct in the discharge of the duties imposed upon them respectively by the statute, but the remedy to give effect to the liability of the department referred to in certain clauses of the act must, I am of opinion, be that given by the 27th section of the act, and if that remedy be insufficient it is for the Parliament to interfere. The statute which imposes a liability upon the department without making it liable to be sued *eo nomine* by any process, and which at the same time provides a particular mode of ascertaining the extent of the liability in each particular case, must, I think, be construed as confining all persons having, or supposing themselves to have, any claim upon the Government of *Canada* arising out of any injury to person or property on any Government railway, to the particular mode given in the act, while as against all officers of the department for their individual misconduct aggrieved parties are left unrestricted in their right to pursue whatever remedy the law may give them.

2nd. It is sufficient to say that by virtue of the provisions of 39 *Vic.*, ch. 27, sec. 19, Her Majesty cannot be proceeded against by petition of right in respect of

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any liability of the department, unless it be such a case as would have entitled the suppliant to the remedy by petition of right under similar circumstances in *England* by the laws in force there prior to the passing of the Imperial Statute, 23 and 24 *Vic.*, ch. 34.

Now, the case of the carriage of letters by the Post Office Department under the provisions of the statutes regulating that Department, is a case precisely similar in circumstances, as it appears to me, to the carriage of passengers and freight on a Dominion Government railway under the statutes in that behalf, and, although at an early period an attempt was made to make the head of the Post Office Department responsible for losses occasioned by the negligence of subordinate officers of the Department, no attempt has ever been made to institute proceedings by petition of right against Her Majesty in such a case, nor has it ever been supposed that such a proceeding could be taken, although there is as much reason for implying a contract in that case as in the present. So neither can such proceeding be instituted in the present case in the absence of special legislation authorizing it. However much the suppliant's grievous sufferings and the great injury sustained by him call for and receive our deepest sympathy with him, I can come to no other conclusion upon the question of law involved than that the appeal must be allowed and the petition of right dismissed.

*Appeal allowed with costs.*

Solicitors for appellants: *O'Connor & Hogg.*

Solicitors for respondent: *Cockburn & McIntyre.*

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*Mar. 6.
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*Jan'y 11.

THE GRAND JUNCTION RAILWAY COMPANY ..... } APPELLANTS;

AND

THE CORPORATION OF THE COUNTY OF PETERBOROUGH, AND JOHN BURNHAM, THE WARDEN, AND EDGCOMBE PEARSE, THE TREASURER THEREOF } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL, ONTARIO.

*Municipal by-law, validity of—Grant of bonus to railway company by municipal by-law—Remedy—Action at law—Mandamus—34 Vic., ch. 48 (O.), construction of.*

By 18 *Vic*, ch. 33, the Grand Junction Railway Co. was amalgamated with the Grand Trunk Railway Co. of *Canada*. The former railway not having been built within the time directed, its charter expired. In May, 1870, an act was passed by the Dominion Parliament to revive the charter of the Grand Junction Railway Co., but gave it a slightly different name, and made some changes in the charter. After this, in 1870, a by-law to aid the company by $75,000 was introduced into the county council of *Peterborough*. This by-law was read twice only, and, although in the by-law it was set out and declared that the ratepayers should vote on said proposed by-law on the 16th November, it was on the 23rd November that the ratepayers voted on a by-law to grant a bonus to the appellant company, construction of the road to be commenced before the 1st May, 1872.

At the time when the voting took place on the by-law, there was no power in the municipality to grant a bonus. On the 15th February, 1871, the Act 34 *Vic.*, ch. 48 (*O.*) was passed, which declared the by law as valid as if it had been read a third time, and that it should be legal and binding on all persons, as if it had been passed after the act.

On the same day of the same year, ch. 30 was passed, giving power to municipalities to aid railways by granting bonuses.

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

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The 37 *Vic.*, ch. 43 (*O.*) was passed, amending and consolidating the acts relating to the company.

In 1871 the company notified the council to send the debentures to the trustees who had been appointed under 34 *Vic.* ch. 48 (*O*). In 1872 the council served formal notice on the company, repudiating all liability under the alleged by-law. Work had been commenced in 1872, and time for completion was extended by 39 *Vic.* ch. 71 (*O*). No sum for interest or sinking fund had been collected by the corporation of the county of *Peterborough*, and no demand was made for the debentures until 1879, when the company applied for a mandamus to issue and deliver them to the trustees.

*Held*, affirming the decision of the court below, that the effect of the statute 34 *Vic.* ch. 48 (*O.*), apart from any effect it might have of recognizing the existence of the railway company, was not to legalize the by-law in favor of the company, but was merely to make the by-law as valid as if it had been read a third time, and as if the municipality had had power to give a bonus to the company, and, there being certain other defects in the said by-law not cured by the said statute, the appellants could not recover the bonus from the defendants.

Per *Gwynne*, J., (*Fournier* and *Taschereau* JJ., concurring). As the undertaking entered into by the muncipal corporation contained in by-law for granting bonuses to railway companies, is in the nature of a contract entered into with the company for the delivery to it of debentures upon conditions stated in the by-law, the only way in *Ontario* in which delivery to trustees on behalf of the company can be enforced, before the company shall have acquired a right to the actual receipt and benefit of them by fulfilment of the conditions prescribed in the by-law, is by an action under the provisions of the statutes in force then regulating the proceedings in actions, and not by summary process by motion for the old prerogative writ of *mandamus*, which the writ of *mandamus* obtainable on motion without action still is.

Per *Henry*, J., that if appellants had made out a right to file a bill to enforce the performance of a contract ratified by the Legislature, they would not have the right to ask for the present writ of *mandamus*.

APPEAL from a judgment of the Court of Appeal for *Ontario*, reversing a rule of the Court of Queen's Bench, granting a writ of *mandamus*, commanding the

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corporation of the county of *Peterborough* to issue debentures for $75,000 and interest, in accordance with the terms of a certain by-law respecting the Grand Junction Railway Company and the *Peterborough* and *Haliburton* Railway Company, alleged to have been passed by the county council, and adopted by the ratepayers.

The facts of the case will be found stated in the judgments of *Ritchie*, C.J., and *Gwynne*, J.

Mr. *Robinson*, Q.C., for appellants:

The question which arises on this appeal is whether the appellants are entitled under the by-law in question and the subsequent legislation to a *mandamus* commanding the respondents to issue debentures of the corporation of the county of *Peterborough* for the sum of $75,000, and to deliver the same to trustees. The Court of Appeal decided the case principally upon the ground that there was no company in existence entitled to receive the money.

The most important question in view of the judgment appealed from is as to the incorporation of the Grand Junction Railway Company.

[The learned counsel then referred to the several statutes which relate to the incorporation of this company, and which are referred to in the judgment of *Gwynne*, J., and contended that they clearly recognize and declare the existence of the Grand Junction Railway Company, and make valid and binding the by-law granting a bonus to that company. Citing *Field* on Corporations (1); *McAuley et al* v. *Columbus, Chicago & Indiana Central Ry. Co.* (2); *Thomas* v. *Dakin* (3); *Conservators River Tone* v. *Ash* (4);

(1) P. 33.
(2) 83 Ill. 348.
(3) 22 Wend. 94.
(4) 10 B. & C. 391.

*Stebbins* v. *Jennings* (1); *The Orville and Virginia Railroad Co.* v. *The Supervisors of Plumas County* (2); *Neil* v. *Board of Trustees* (3); *Bow* v. *Allenstown* (4); *Liverpool Ins. Co.* v. *Manchester* (5); *Illinois G. T. Ry. Co.* v. *Cook* (6).]

The by-law is not merely declared legal, valid and binding, as if it had received a third reading, but it is added: "The said by-laws are hereby declared legal, valid and binding upon the corporations respectively, and on all others whomsoever." This is a distinct, independent enactment, complete and effectual in itself, and not affected or qualified by the words preceding, which it is said only declare it legal as if it had received the third reading, or by those succeeding, which it is said only direct the corporation to act upon it as if it had been proposed after the passing of the Act.

The reference to the provisional directors of the *Grand Junction Railway Company* in section 11 of 34 *Vic.*, c. 48, *O.* shews that the company named in the Dominion statute is referred to. It is plain, beyond doubt, from the language of this Act, that the Legislature intended to make the by-law completely, and not only to a limited extent, binding upon the county, and that they regarded and intended to treat and recognize the Grand Junction Railway Company as a corporation to which the bonus could legally be given. This they had full power to do. It is true that a mere erroneous assumption or recital of fact or law in a statute is not conclusive, but it is otherwise if it be clear that the Legislature intended that the law or fact should be as recited, or if to deny the law to be as assumed by the Legislature would, in effect, be to abrogate the statute; and this case is of that character. The statute and the by-law confirmed by it are made

(1) 10 Pick. 187.
(2) 37 Cal. 354.
(3) 31 Ohio 21.
(4) 34 New Hamp. 372.
(5) 10 Wall. 566.
(6) 29 Ill. 237.

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inoperative by holding that there was no corporation or association competent to receive the bonus; *Norton* v. *Spooner* (1); *Postmaster General* v. *Early* (2); *Hardcastle* on Statutes (3).

The 37 *Vic.* ch. 43, passed by the provincial Legislature, in effect grants all the rights intended to be vested in the Grand Junction Railway Company under the statutes of the Dominion or of the Province, to the company under the same corporate name. This includes the right to the bonus in question, which was intended to be granted to the company by the statutes already mentioned.

The 39 *Vic.*, ch. 71, *Ontario*, contains a further recognition of the company as existing before the 39 *Vic.*, and the by-law in question as valid and in force. See sections 1, 6; *Toronto & Lake Huron R. W. Co.* v. *Crookshank* (4); *Smith* v. *Spencer* (5).

The construction placed upon these statutes, it is submitted, defeats the plain intention of the Legislature—an intention which they have clearly expressed, and which it was within their jurisdiction to carry out.

Then as to the question of the trustees, one of the learned judges, Mr. Justice *Cameron*, held that no trustees had been duly appointed to whom the debentures could be delivered. All the judges of the Court of Appeal were of a contrary opinion.

Trustees have been appointed in sufficient compliance with the by-law. It was not necessary that such trustees should have been appointed by name by the Legislature. They were appointed under the provisions made for that purpose by the statute, and were entitled under the terms of the by-law (section 7) to receive the debentures.

(1) 9 Moo. P. C. 103.
(2) P. 244.
(3) 12 Wheat. 136, 148.
(4) 4 U. C. Q. B. 309, 318.
(5) 12 U. C. C. P. 277.

Mr. *Hector Cameron*, Q.C., followed on behalf of the appellants :—

The Legislature of *Ontario*, before passing 34 *Vic.*, ch. 48, which makes valid and binding upon the corporation of *Peterborough* the by-law in question, had all the facts before them, and their intention, as is apparent by the language used, was to make the by-law in question as valid and as binding as if it had been read a third time and all defects were cured.

As to the point taken by respondents, that it is impossible to levy a rate without contravening sec. 10 of the *Ontario* Act, 34 *Vic.*, ch. 48, I submit the allegation is not proved, and that there is no proof that it would have required more than two cents in the dollar to be levied at the time the by-law was passed. It is no answer to say we cannot pay a debt of 1870 because we have incurred debts since, which prevent us from levying more than two cents in the dollar. On this point I refer to Mr. Justice *Patterson's* judgment in the court below.

Then as to laches. The bonus could legally be claimed only when the road was built to *Peterborough*, and only since eighteen months the road has been running as far as *Peterborough*.

The omission to file the plan is not an answer to this application for a mandamus. Such filing is essential only to the legal exercise by the company of their compulsory power to take land; but the question here is, has there been an actual commencement of the work in due time? Such a commencement has been proved, and the corporation cannot set up the non-compliance with the statute as regards the plan, as forming a sufficient ground for their refusal to deliver the debentures. *Stratford and Great Western Co.* v. *County of Perth* (1). Per *Burton* and *Moss*, JJ.

(1) 38 U. C. Q. B. 113.

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[The learned counsel then argued that the Dominion statute 33 *Vic.*, ch. 53 was not *ultra vires*, and that all the legislation which had taken place on this subject was *intra vires*.]

Mr. *Bethune*, Q.C., and Mr. *Edwards*, for respondent: The learned cousel after referring to the different statutes relating to the incorporation of the respondents and arguing that the Dominion Statute 33 *Vic.* ch. 53, was *ultra vires*, and that the legislation of *Ontario*, in so far as it attempted to interfere with the Dominion legislation was and is void, and upon which points the court expressed no opinion, proceeded as follows:

But assuming the validity of these statutes, the appellants are not entitled to have the *mandamus* for which they ask for the delivery of the said debentures.

The legislation hereinbefore referred to has not had the effect of making valid the by-law.

On the 23rd of November, 1870, the by-law was submitted to the electors of the then county of *Peterborough*, and was carried by a small majority of the electors who voted upon it.

At the time of the submission of the said by-law, the said county of *Peterborough* had no power to pass any by-law for granting any bonus to any railway company.

At that time, the county of *Peterborough* consisted of the municipalities which at present compose it, and also of the municipalities which now compose the District of *Haliburton*, which has since been set apart without any provision whatever having been made for any portion of the debt proposed to be created by this by-law being borne by the district of *Haliburton*.

So far as the vote in that part of the former county of *Peterborough*, which now constitutes the county of *Peterborough*, was concerned, the majority of the rate-

payers voted against the granting of the said bonus. The whole vote polled was less than the majority of the entire votes of the ratepayers of the then county of *Peterborough*.

No notice whatever was given of any intention to apply to the legislature to confirm the by-law of the county of *Peterborough*, nor, as the bill was originally introduced, was that object contemplated, so far as appeared on the face of the bill, and the respondents had no notice at all, until after the statute 34 *Vic.*, ch. 48, was passed, that it was intended to affect the by-law which is in question here.

The first section of the statute confirms the by-law of *Belleville ;* the first part of the second section confirms the by-law of *Seymour*, but in the second section there is also introduced a provision respecting the by-law in question.

It will be observed that the number of the by-law in question is not given in the said Act, and it is submitted that the description which is given in the act is not one which is apt to describe the by-law in question. It is not stated to be the by-law of the corporation of the county of *Peterborough* in express words, and the by-law which is thereon assumed to be made valid by the legislature is a by-law which was approved of by a majority of the duly appointed qualified voters in the county of *Peterborough ;* the by-law in question was not approved of by a majority of the duly qualified voters in the county of *Peterborough* on the day named, but was only approved of by the majority of the voters who voted on the by-law. This section of the statute should not be construed so as to make valid the said by-law.

Section 10 of the Act last mentioned provides that nothing contained in that Act should authorize any

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increased rate to be assessed for the purposes thereof beyond the rate limited in the Municipal Act of 1866. It is clear that if this by-law be enforced, that provision of the statute will have to be violated.

37 *Vic.* ch. 43, entitled, "An Act respecting the Grand Junction Railway Company," recited that the appellants had by their petition prayed that all Acts relating to the company should be consolidated, amended and reduced into one Act, and by the first section enacted that all the rights, powers and privileges intended to be vested in the Grand Junction Railway Company under the several statutes passed by the Parliament of the late Province of *Canada*, by the Parliament of the Dominion of *Canada*, and by the Legislature of the Province of *Ontario*, relating to the said company, were thereby declared to be vested in the shareholders of the company under the name of the Grand Junction Railway Company. Section 2 of that statute purported to repeal amongst other Acts the Act 16 *Vic.* ch. 43, already referred to, and the Act of the Parliament of *Canada*, 33 *Vic.* ch. 53. None of the other provisions contained in that statute are *ex post facto* in their operation, or in any wise affect the by-law which is here in question.

39 *Vic*, ch. 71 (*O.*), sec. 6, assumed to confer upon the railway company power to consent to changing the line or route of their railway if requested by the county of *Peterborough*.

This was passed also without notice to the county of *Peterborough*, and has never been acted upon in any manner by the said county.

42 *Vic.* ch. 57, by the 2nd section thereof, extended the time for the completion of the railway to the town of *Peterborough* to the year 1880, so far as a by-law of the town of *Peterborough*, which was provided for in the first section, was concerned; but this statute contains no reference whatever to and does not affect the

county of *Peterborough* or the by-law in question here.

No rate has ever been struck for the levying of any of the sums of money necessary to provide for the payment of debentures referred to in the by-law.

The construction of the railway was not begun within the time limited in the Act of 1870 as the respondents contend, although the appellants allege that some work was done within the period of two years from the passing of the Dominion Act, yet the respondents submit that there could be no commencement of the work because the plan and book of reference containing the location of the railway was not then filed in the office of the clerk of the peace as required by the statute in that behalf.

The railway was certainly not completed to the town of *Peterborough* within six years from the passing of the Act.

On the 27th of June, 1872, the respondents served a notice upon the appellants repudiating the delivery of the debentures.

No demand was made for the said debentures until 29th of October, 1879.

The respondents also rely upon the reasons contained in the judgment of the judges in appeal, and upon the following authorities:—*Stratford & Lake Huron Railway* v. *Corp. of the County of Perth* (1); *Brooks* v. *County of Haldimand* (2); *Fry* on Specific Performance (3); *The People* v. *Seneca, C. P.* (4); *High* on Extraordinary Remedies (5); *Luther* v. *Wood* (6); *re Goodhue*, per *Strong*, J. (7); *Hardcastle* on Statutory Law (8).

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

(1) 38 U. C. Q. B. 112.
(2) 3 Ont. App. R. 73.
(3) P. 321.
(4) 2 Wendell 365.
(5) P. 196.
(6) 19 Grant, 348.
(7) 19 Grant, 449.
(8) P. 240.

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RITCHIE, C. J.:—

Upon application of the Grand Junction Railway the Court of Queen's Bench of *Ontario* made the following order:

Upon reading the rule *nisi* granted herein, before the Honorable Mr. Justice *Osler*, on Friday the twenty-first day of November, A.D. 1879, and the affidavit of service thereof, and upon hearing counsel for all parties, it is ordered that a writ of mandamus do issue out of this honorable court, commanding the said the corporation of the county of *Peterborough*, and *John Burnham* the warden, and *Edgecombe Pearse* the treasurer, and the said corporation and the said treasurer thereof for the time being, forthwith to issue debentures of the said corporation, to be sealed with the corporate seal of the said municipality, and signed by the said warden and treasurer thereof, or the warden and treasurer for the time being, for the sum of seventy-five thousand dollars ($75,000) and interest thereon, in accordance with the terms of a certain by-law, entitled:—"A by-law to provide for the aiding and assisting in the construction of the Grand Junction Railway and the *Peterborough* and *Haliburton* Railway, and for the issuing of debentures therefor to the amount of one hundred thousand dollars, to be given by way of bonus to the said Grand Junction Railway, and the said *Peterborough* and *Haliburton* Railway Company, in the manner and proportion following; that is to say: Seventy-five thousand dollars to the Grand Junction Railway Company, and twenty-five thousand dollars to the *Peterborough* and *Haliburton* Railway Company," and to deliver the said debentures to the trustees respectively appointed for receiving and holding of moneys, or securities for moneys, awarded by way of bonus towards the construction of the Grand Junction Railway. And it is further ordered that the said corporation, and the said *John Burnham* and *Edgecombe Pearse*, or the warden and treasurer thereof for the time being, do pay the costs of and incidental to this application and the said writ of mandamus forthwith after taxation thereof.

From this order the respondents appealed to the Court of Appeal of *Ontario*, which court reversed the judgment of the Queen's Bench and discharged the rule with costs. The present appeal is from this judgment, and, among the grounds of appeal, it is alleged that at the time of the passing of the said by-law there

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was no power on the part of the said municipality to grant the aid in question, and that the statute of *Ontario*, 34 *Vict.*, ch. 48, sec. 1, had not the effect of making valid the said bonus; the respondents in their reasons against the appeal contending that: The Grand Junction Railway Company were and are entitled to the bonus referred to in the by-law in question, and that the municipality had the power to grant the bonus in question, and the Legislature of the Province of *Ontario* have expressly authorized, sanctioned and legalized the said by-law granting the said bonus.

A number of points were raised, but as these are at the very foundation of the relators' right to ask for a *mandamus*, and as I think they must be decided unfavorable to them, and as this disposes of the matter, it seems to me quite unnecessary and useless to discuss the other questions.

As to the right of the municipality to grant a bonus in 1870, it seems clear that the special act of the Grand Junction Railway Company had not provided for giving assistance in that shape, and the general power to do so did not find its way into the municipal law until the passing of the act of 34 *Vict*, ch. 30 on 15th February, 1871.

And as to the by-law, there is no pretence for saying that it has any effect, unless such as it has received from subsequent legislation, and the only legislation with respect to the by-law is the 34 *Vict.* ch. 48, and therefore any efficacy or vitality the by-law has or ever had, must be derived from this act, the 2nd section of which is as follows:

Section 2. That the by-law numbered two hundred and forty-five, passed by the corporation of the township of *Seymour*, and intituled "A by-law to provide for the aiding and assisting in the construction of the Grand Junction Railway, and for the issuing of debentures

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therefor to the amount of thirty-five thousand dollars, to be given by way of bonus to the said Grand Junction Railway Company by the municipality of the township of *Seymour*;" also a certain by-law intituled, "A by-law to provide for the aiding and assisting in the construction of the Grand Junction Railway and the *Peterborough* and *Haliburton* Railway, and for the issuing of debentures therefor to the amount of one hundred thousand dollars, to be given by way of bonus to the said Grand Junction Railway Company and the said the *Peterborough* and *Ha iburton* Railway Company, in the manner and proportion following; that is to say: Seventy-five thousand dollars to the Grand Junction Railway and twenty-five thousand dollars to the *Peterborough* and *Haliburton* Railway Company," and which was approved of by a majority of the duly qualified voters in the county of *Peterborough*, on the twenty-third day of November, in the year of Our Lord, one thousand eight hundred and seventy, be, and the same is hereby declared legal, valid and binding, as if the same had received the third reading of the county council of the said county of *Peterborough*; the said by-laws are hereby declared legal, valid and binding upon the corporations respectively, and on all others whomsoever; and the said several corporations above-mentioned shall respectively proceed to issue debentures and act upon such by-laws in all respects in the same manner as if the said by-laws respectively had been proposed after the passing of this act.

Section 11. A majority of the provisional directors of the Grand Junction Railway Company may at any time, at any meeting of which all the provisional directors shall have had notice by resolution, add to the numbers of said provisional directors such persons as they may think proper, and such persons so added shall have all the rights and powers they would have had, had they been named provisional directors in the act incorporating the said company.

From the language of this statute, I am of opinion that it was passed on the assumption that the by-law intended to be validated had been regularly before the county council, had had two readings, in fact had gone regularly through all its stages before the council, had by them been duly submitted to the qualified voters of the county in the manner and at the time provided for by the by-law, had been voted on at the time and in the manner fixed by the council, and required no further action than to be read a third time and duly

sealed, and the Legislature never intended arbitrarily to impose this bonus on the county of *Peterborough* apart from and independent of the county council and the ratepayers; had such been their intention, a simple enactment to that effect, without reference to any by-law or vote, would have accomplished that object; but, in my opinion, the Legislature intended merely to confirm and complete what they supposed had been acted on by the council, and regularly voted on and assented to by the ratepayers, by supplying the omission to read it a third time by practically dispensing with such reading.

Had, then, this so-called by-law been before the council, read twice, and by them referred to the ratepayers? The evidence on this point is, to my mind, conclusive to the contrary.

First we have the affidavit of *Edgecombe Pearse*:

I *Edgecombe Pearse*, of the town of *Peterborough*, in the county of *Peterborough*, clerk and treasurer of the said county, make oath and say:

1. I am and have been ever since the early part of the year one thousand eight hundred and seventy clerk and treasurer of the said county of *Peterborough*.

2. No by-law such as that mentioned and referred to in the rule *nisi* herein was ever passed by the council of the said county, nor any by-law granting aid to the said railway company, and there is no such by-law among the records of my office.

3. In the month of October, one thousand eight hundred and seventy, a by-law was introduced in the said council, and read first and second time, proposing to aid the said Grand Junction Railway and the *Peterborough* and *Haliburton* Railway Company. The said proposed by-law was not drawn up in regular form, but consisted of a skeleton of a by-law and a number of resolutions and fragmentary parts, and was, according to the best of my recollection and belief, delivered to *James Stratton* in that form for publication in the "Examiner" newspaper, and the same was not returned to my office, to my knowledge, and the same is not now in my office, and is not now in existence to my knowledge.

4. In the by-law as published in the said "Examiner" newspaper,

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on the twentieth day of October, A. D., 1870, and in the notice thereof, the day fixed for taking the votes of the ratepayers thereon, was the 16th day of November, A. D. 1870, such day being, according to the best of my recollection and belief, the day fixed by the council upon the second reading,, and in the said newspaper of the twenty-seventh of October and following issues the same was changed to the twenty-third day of November.

5. Such second reading took place on the fifteenth day of October, A.D. 1870, and on said day the council adjourned, and no meeting of the council was held between the said fifteenth day of October and the fourteenth day of December following, and there was no resolution or motion of the council passed, or any other authority given, to my knowledge, in any way by said council, to enable any person to make any alterations in such proposed by-law.

6. No alterations were made in such proposed by-law by me, nor was I a party in any way to any such alterations, to the best of my recollection and belief.

7. In the month of December, A.D. 1870, and also in January, A.D. 1871, respectively, there were unsuccessful motions in said council for a third reading of what purported to be the by-law in question, but the by-law which had passed the first and second readings was not then before the council, the proposed by-law, the third reading of which was moved, being that published, as I understood, in the "Examiner" newspaper of the twenty-seventh of October and following issues, and which contained, as I verily believe, some material changes from the by-law which passed such second reading.

Then we have the affidavit of *James Stratton* :

I, *James Stratton*, of the town of *Peterborough*, in the county of *Peterborough*, Collector of Customs, make oath and say :

I was in the year one thousand eight hundred and seventy, publisher of the *Peterborough* "Examiner" newspaper, in which newspaper the alleged by-law in question herein to provide for the aiding in the construction of the Grand Junction Railway and the *Peterborough* and *Haliburton* Railway, was published in the month of October in that year.

2. The then warden of the county, *S. S. Peck*, Esquire, the reeve of the township of *Minden*, and who, as a resident of that part of the county through which the *Peterborough* and *Haliburton* Railway was to pass, was interested in and strongly in favor of the proposed by-law, attended at the office of the said newspaper at the time of the first publication thereof, the same having been printed off from what

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was given to me as the original of such proposed by-law, as the same had passed the second reading before the council of said county.

3. The said *S. S. Peck*, then in my presence made several material alterations in the by-law, and the same was printed with such alterations without being again submitted to or approved by the council of said county, and the by-law as published was in several material points different from that which had been furnished to me by the clerk of the council as having passed the second reading.

4. I say that material alterations were made by the said *S. S. Peck* in the seventh, eighth, eleventh and sixteenth paragraphs of such by-law, although I cannot now particularly recall the matter of all of such changes.

5. The proposed by-law was first published in the issue of the same newspapers of the twentieth day of October, the meeting or session of the council at which the by-law had been proposed and passed through its second reading having been closed on the fifteenth day of October, and between the said publication on the twentieth, and the next on the twenty-seventh day of October, the said by-law was further altered in the eleventh and sixteenth paragraphs, and during such interval there was no session of the council to approve of or consent to such alterations.

6. In the issue of said newspaper of the twentieth day of October, in the eleventh paragraph, the last two payments were to be made as follows: "To the further amount of five thousand dollars when a branch of the said road to the village of *Minden* shall have been completely graded; and for the further amount of five thousand dollars whenever such branch of the said road to the said village of *Minden* should have been completed," and in the issue of the said newspaper of the twenty-seventh day of October and following issues, the words "a branch of" and "such branch of" were omitted.

7. In the sixteenth paragraph of such by-law, and in the notice thereof, published with such by-law as first published on the twentieth day of October, it was set out and declared that the votes of the ratepayers of the municipality of the county of *Peterborough* should be taken on the said proposed by-law on Wednesday the sixteenth day of November, and in the issue of said newspaper of the twenty-seventh day of October and following issues, that such votes should be taken on the twenty-third day of November, and in such notice the statement of the date of the first publication was changed from the twentieth to the twenty-seventh day of October, as set out in such notice.

8. According to the best of my recollection and belief, the said changes in the last two paragraphs referred to, were also made by the said *S. S. Peck*.

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9. I believe that such paper constituting the alleged by-law as delivered to me, was destroyed in my office as being no longer of any use.

Then we have the affidavit of *R. D. Rodgers*:

I, *Robert David Rodgers*, of the village of *Ashburnham*, in the county of *Peterborough*, Esquire, make oath and say:

1. I was, in the years one thousand eight hundred and seventy and seventy-one, a member of the council of said county, and in the latter year was warden of said county.

2. The alleged by-law in question herein, was never properly before the council of said county, but on its first and second readings consisted merely of fragmentary and imperfect clauses and resolutions, and owing to the fact that material alterations were made therein after such second readings, and without the knowledge or consent of the council, the said alleged by-law as voted on by the ratepayers was never looked upon or regarded by the council as legal or valid.

3. The council had not, nor had I, as such warden, any notice of the intention of the company to obtain the passing by the legislature of that part of the act thirty-four *Victoria*, chapter forty-eight, declaring such alleged by-law valid and binding, as if the same had received the third reading of the council, and such council were not in any way parties to or petitioners for such legislation.

Two efforts were made to induce the council to read this alleged by-law a third time. 1st on the 14th of December, 1870, when the council resolved that "the by-law having been found to be illegal, &c., be resolved that it be not read but be laid over till the next meeting of the council," at which meeting, on motion that it be now read a third time, passed and numbered, on a vote the motion was declared lost. No more appears to have been heard of this by-law by the council, or of any application to the legislature in reference thereto, till after the passing of the 34 *Vict.*, ch. 48, and no application appears to have been made for the issue of any debentures from 1870 until 1879.

It is true that in answer to *Stratton's* affidavit, *S. S. Peck* states:

The said by-law was drawn by Mr. *W. H. Scott*, the county solicitor, to the best of my recollection and belief, and after being read a

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first time was referred to a committee of the whole council and considered in detail, and certain alterations were then made in it, and after being read a second time as amended, and its publication ordered, it was sent to Mr. *Stratton*, the publisher of the "Examiner," for that purpose; but on seeing it in print, I discovered that it was incorrectly printed in some passages where alterations had been made in the committee of the whole, and I then caused Mr. *Stratton* to correct it so as to make it correspond with the by-law as read a second time by the council, and as there was not then sufficient time for the four weekly publications of the by-law as corrected before the day originally named in the by-law of the council for the voting upon it, after consulting such members of the council as I could communicate with, and with their approval, I altered the date for the taking the votes upon it, postponing it for a week so as to allow the requisite number of publications of the correct by-law to take place before the voting, and after being so published it was voted on and carried by a majority of the ratepayers who voted on it.

4. It is not the fact that I made any material alteration in the said by-law (save that of the date for voting on it) to make it different from the by-law as it passed the second reading by the council, but on the contrary the alterations I made in it as first published were only made to correspond with the by-law as read a second time.

5. When the by-law was brought up for a third reading, I voted against it, though in favor of granting the bonuses, because I preferred to have a new by-law passed rather than have one about which a question could be raised, or which would require an act to legalize it.

I think this unsatisfactory affidavit, which does not show in what particulars the by-law first published was erroneous, nor what alterations he made, nor from what data he made the alterations, and, as he cannot deny having altered the by-law in a most material particular, viz.: the day on which the voting by the taxpayers was to be held, and which the by-law originally before the council named, and which could only be fixed by the council, and as he had no authority whatever to interfere with the by-law, and there is no record of any by-law in the archives of the municipality, I think it is entirely insufficient to negative the affidavit of the clerk and treasurer, whose duty it was to trans-

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mit the documents as they were before the council to the printer (and who says he did so), confirmed as it is by the evidence of Mr. *Rodgers*, a member of the council, who swears that, owing to the fact that material alterations were made therein after such second reading, and without the knowledge and consent of the council, the said alleged by-law, as voted on by the ratepayers, was never looked upon or regarded by the council as legal and valid: and this statement again confirmed by the minutes of the council, which show that the council had voted that the by-law had been found to be illegal; and no attempt being made to contradict in any way these statements, I can come to no other conclusion than that this alleged by-law was never read twice by the council, and was never submitted by them to the ratepayers, and was, in fact, never before the council, nor in any way acted on till it was attempted to have it read a third time as the by-law which had been twice read and submitted to the taxpayers, that the by-law read twice was never submitted to the taxpayers, and neither such by-law nor the altered document was voted on at the time fixed by the council for taking a vote. Can it then be said that under the terms of this section of the 34 *Vict.* ch. 48, the Legislature intended to validate as a by-law of this municipality a document never read before the council and never in any way dealt with or acted on by them? As to this statement Mr. Justice *Burton* says:

> We find that, on a petition of the railway company setting forth that *Belleville* and *Seymour* had each passed by-laws granting a bonus to the company, and that the validity of such by-laws had been questioned for want of power in the municipality to grant it, and praying that those particular by-laws should be ratified, in the enacting part of the bill, founded on such petition, a few words are inserted referring to a by-law of *Peterborough* nowhere before referred to either in the petition, the preamble, or in the published

notices required by the standing orders of the House, and which it is stated was approved of by a majority of the duly qualified voters, and declaring that such by-law shall be legal, valid and binding as if the same had received the third reading of the county council of the said county of *Peterborough*.

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I think this is peculiarly an act as to which, if there is any doubt, a construction most favorable to the public should be adopted. Before going to the Legislature to obtain this substantially private act, and to create this heavy burden on the taxpayers, the promoters should have been careful to see that the information before the Legislature, on which they were asked to legislate, was full and accurate, and should have been cautious to ascertain that all the proceedings before the council and voters had been strictly regular and according to law, or, if there had been irregularities, a curing of the irregularities should have been obtained from the legislature in express terms. The legislature having expressly named the omissions they intended to cure, courts cannot, in my opinion, be asked to extend this curative process by implication to irregularities and matters and things to which, so far as anything appears in this statute, their attention does not appear to have been called.

I think on a fair construction of this act, no intention can be discovered to validate what, under the circumstances detailed in the affidavits, was no by-law at all; but, assuming a by-law to have been before the council, read twice and submitted regularly to the taxpayers, and, having received their assent, the Legislature intended to validate such a by-law by simply dispensing with a third reading and thereby supply that deficiency. But, there being in existence no such by-law, the act could not operate, by reason of the Legislature having acted on a misapprehension of fact. I think, therefore, the ratepayers, through the council, have a right now to

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raise this question in answer to this application for a mandamus, on the ground that it is not such a by-law as the Legislature contemplated making valid, and therefore the act is not applicable to it. It may be all true, if the third reading had taken place and the seal duly attached, that though the irregularities in the proceedings on the by-law might afford ground for a motion to quash, they could not, as Mr. Justice *Patterson* suggests, be successfully urged as reasons for holding the by-law void in any proceedings upon it; but, in my opinion, this is by no means the question before us. This is not a question of quashing an existing by-law, it is a question of the construction of a statute, and dependent thereon the question of the existence of a by-law. The contention is that by virtue of the statute a by-law exists. We are then to construe the statute and to discover what the intention of the Legislature was, and in my opinion that intention was to cure no irregularities, but merely to supply an omission, viz.: assuming everything to have been regular and legal, then and then only to treat it as if it had been read a third time, the very dealing with the third reading involving the absolute necessity of there having been two previous readings, showing clearly that the intention to make the passing of the act equivalent to a third reading was necessarily based on the by-law having had two previous readings.

Again we see in the statute another important and most material fact which no doubt operated largely on the mind of the Legislature. The statute says:

> And which was approved of by a majority of the duly qualified voters of the county of *Peterborough* on the 23rd November, 1870.

Does not the insertion of this most important statement show that the legislation was likewise based on this, viz.: That as the majority of all the ratepayers were willing that this burthen should be imposed on

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the county, it was reasonable that the minority should submit to the will of the majority? While this would be reasonable enough, it would be equally unreasonable that the burthen should be placed on the majority by the vote of a small minority, as was truly the case in this instance. We can only know the intention of the Legislature from the words in which it is expressed, and it would be, to my mind, a most violent construction to say that the Legislature intended to validate a by-law approved of by a small minority of the duly qualified voters, while, on the face of the Act, the Legislature has said the by-law to be validated was a by-law approved of by the majority of the duly qualified voters. Now, what is the true state of the case on this point?

The affidavits show, and it is not disputed, that the number of voters for the year 1870 were at least 3,000, exclusive of the village of *Ashburnham* and township of *Stanhope*.

| | |
|---|---|
| Total votes polled for by-law | 556 |
| Against by-law | 467 |
| Majority | 89 |

That is 1,023 votes out of 3,000, leaving 1,977, so that in fact but a third voted, and of that third there was a bare majority of 89. Can we say in the face of such a statement in the law that it was the intention of the Legislature to validate a by-law not approved of by a majority of the duly qualified voters, but by so slim a majority of so small a minority of the voters?

In view of the uniform legislation of *Ontario* would it not have been most unjust to this municipality to impose on it this burthen without any action on the part of the municipal council, or any assent of the ratepayers? and, unless we are obliged to do so, we must not suppose the legislature intended to do so palpable an injustice (1). This act was obtained at the instance

(1) See *exparte, Corbett*, 14 Ch. Div. 122, 127 per Brett, J.

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of the relators, and must be construed strictly against them. If they have misled the Legislature by a misrepresentation of facts either intentionally or unintentionally, they cannot complain if such misrepresentation frustrates the object they have sought to obtain. It is clear that a statement of fact or law in a statute is not conclusive, but courts are at liberty to consider the fact, or the law to be different And then again in construing this act we are to remember that when an intention to impose a charge is doubtful, that meaning must be adopted which is most beneficial to the public (1).

Under all these considerations I cannot bring my mind to the conclusion that there was any by-law of the county of *Peterborough* made valid by the statute 34 *Vict.*, ch. 48; at any rate this is made sufficiently apparent for the purposes of the application for a mandamus, and therefore I agree with the Court of Appeal in their conclusion, though not for the same reasons, and think this appeal should be dismissed with costs.

Thinking then as I do, there was no valid by-law I feel bound so to decide. To decide the case on such grounds as that the remedy is by suit, and not by mandamus, which can only arise in the event of there being a valid by-law, would be to my mind misleading, and induce further litigation, which, if I have arrived at a correct conclusion, I think should end here.

FOURNIER, J., concurred.

HENRY, J.:

It is unnecessary for me to go into all the particulars connected with the case after the exhaustive judgment delivered by the learned Chief Justice. I must say

(1) 4 App. Cases 187.

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that I had from the beginning a good deal of difficulty in sustaining the by-law that is in question here. In fact, it would be rather against my own inclination that I have arrived at that conclusion, because I think the equities are really with the company. The company did all that the municipal body had any reason to expect, and, although it was not done exactly within the time, still the municipality derived all the contemplated benefit from the opening of the railway; and it would have given me satisfaction if I had been enabled to arrive at the conclusion that the procedure adopted by the company could be sustained. However, I have been reluctantly obliged to come to a different conclusion. Particular reference is made to the fact that the by-law has been sustained and validated by the legislative action as to the third reading Now, it is in evidence that the by-law never was read, never was passed the first or second reading, and it appears to me that the statute only validated the want of the third reading. It does not undertake to validate anything further, and, if the by-law is in other respects irregular, it appears to me the statute does not cover such irregularity. There is no question as to the facts in connection with this matter. They are all pretty much agreed upon. The question arises whether, there being no law at the time to authorize the first submission of this rate to the voters, the statute should not have gone further and have validated that submission, but it is silent on that.

I need not give a very positive opinion in reference to another point which was argued here, and that is as to the power, under our present constitution of the Local Legislature to alter a contract made or in existence between private parties. That the municipality here intended to enter into a contract, but did not, is patent on the face of the cir-

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cumstances which have been produced in evidence. Then the Legislature steps in and completes that contract. It appears to me that, if the Legislature has the power, under our present constitution, which is prescribed by the Imperial act, to complete or affect by legislation any contract entered into between a municipality and a railway company, there is nothing to restrain them from altering and interfering by legislation with a private contract between two individuals. I express no opinion as to the power of the Legislature of *Ontario* as to the act it has passed, but I would require some argument to convince me that the Local Legislatures, or even the Dominion Legislature, has the right to interfere so as to affect contracts entered into, or quasi-contracts entered into, between parties. It is a matter of great importance, and, of course, I give no opinion upon it here, but I may suggest it for the consideration of those who may be affected by legislation of that kind.

I think the equities, as I have said before, are strongly with the company. I regret that, under the circumstances, I am not able to give effect to the legislation that has been passed to carry out the views which the company entertain, but I think I am bound to coincide with the judgment which has been delivered by the learned Chief Justice, and to say that the party is not entitled to the remedy which he claims in this suit—that is, a mandamus. Another difficulty that suggests itself to my mind has not been removed. If the matter became by legislation a subject of contract between the parties, it appears to me that the parties had a legal remedy independent of that afforded by the writ of mandamus, and it is clearly laid down that a writ of mandamus should not lie where the parties had a legal remedy. I am in doubt whether the parties have made out a right to file a bill to enforce the per-

formance of the contract ratified by the Legislature. If he had that right, he had not the right to ask for a mandamus. With the statement of these views, I concur in the judgment of the learned Chief Justice.

TASCHEREAU, J.:—

I concur in the judgment of the court, and am of opinion, for the reasons given by Mr. Justice *Gwynne*, whose notes I had communication of, that this appeal should be dismissed.

I desire, however, to make an exception to what the learned judge says on the right of the Provincial Legislature to pass the act in question. So far I cannot say that I have any doubt on their right to do so, without, of course, thinking it necessary to decide the point at all in this case.

GWYNNE, J.:—

This was a motion made in the month of Nov., 1879, founded on affidavits, for a prerogative writ of mandamus to issue out of the Court of Queen's Bench for the Province of *Ontario*, commanding the corporation of the County of *Peterborough* and the warden and treasurer thereof, for the time being, forthwith to issue debentures of the said corporation to be sealed with the corporate seal of the said municipality, and signed by the said warden and treasurer, or by the warden and treasurer for the time being, for the sum of $75,000 and interest thereon, in accordance with the terms of a certain by-law entitled, "A by-law to provide for the "aiding and assisting in the construction of the Grand "Junction Railway and the *Peterborough* and *Halibur-* "*ton* Railway, and for the issuing of debentures there- "for to the amount of $100,000 to be given by way of "bonus to the said Grand Junction Railway Company "in the manner and proportion following, that is to

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"say, $75,000 to the Grand Junction Railway Company "and $25,000 to the *Peterborough* and *Haliburton* Rail- "way Company," and to deliver the said debentures to the trustees respectively appointed for receiving and holding of moneys or securities for money awarded by way of bonus towards the construction of the Grand Junction Railway. The motion was made under the following circumstances:

The Grand Junction Railroad Company was originally incorporated by an Act of the Legislature of the Province of Old *Canada*, 16 *Vic.*, ch. 43, with power to construct a railway over any part of the country between *Belleville* and *Peterborough*, and from the town of *Peterborough* to the city of *Toronto* to intersect the main trunk line of railway proposed to be constructed, and also from *Peterborough* aforesaid to some point west thereof on *Lake Huron*, as should be decided upon by the company. By a clause of the Railway Consolidation Act, which was incorporated with the special act, it was enacted that if the construction of the railway should not be commenced, and ten per cent of the capital stock should not be expended thereon within three years after the passing of the special act, or if the railway should not be finished and put in operation in ten years from the passing of the special act, the corporate existence and powers of the company should cease. The same legislature by 16 *Vic.* ch. 37 incorporated the Grand Trunk Railway Company.

By 18 *Vic.* ch. 33, the Grand Junction Railway Company, together with certain other railway companies, were united with the Grand Trunk Railway Company, and by this act it was provided that the Governor in Council might, upon such terms and conditions as he should think fit, by Order in Council extend the period allowed by the several special acts

therein recited for the completion of the railways and works thereby respectively authorized.

Nothing appears to have been done towards the construction of the Grand Junction Railway or towards the creation of the capital stock of the company prior to the passing of the Dominion statute 33 *Vic.* ch. 53. By that act, after reciting the incorporation of the Grand Junction Railroad Company by 16 *Vic.* ch. 43, and the amalgamation of that company with the Grand Trunk Railway Company, with the view of securing the construction of the Grand Junction Railroad under the auspices of the Grand Trunk Railway Company, but that the latter company had declined the construction of the Grand Junction Railroad, but were willing that the charter of the Grand Junction Railroad should be re-invested in and restored to those persons and corporations now interested in the construction thereof, and that divers persons named had petitioned Parliament representing the above facts, and had prayed that an act might be passed to revive the charter of the Grand Junction Railroad Company, and to place the said company in the same position as it held before its amalgamation with the Grand Trunk Railway Company, with power to make arrangements with the said Grand Trunk Railway Company for the use of part of their line, and for station and other accommodation at *Belleville*, and for other purposes, and that it was expedient to grant the prayer of such petition, it was enacted that all the powers, rights and privileges, vested in the Grand Junction Railroad Company by the act 16 *Vic.* ch. 43 should be and were thereby restored to and vested in certain persons therein named, and such other persons as should become shareholders in the said company after the passing of the said act, and that the said corporation in the act named should in all respects have, hold and exercise the said power

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as fully as the parties originally named in the said act 16 *Vic.* could and did hold and exercise the same, and all powers in respect of subscribing for and holding stock in the said company, and all other powers whatsoever by the said act granted to municipal corporations and others should be continued by this act, and might be exercised as fully and effectually as they might have been under the said act 16 *Vic.*, and that the name of the said company should be the Grand Junction Railway Company. By the 6th sec. it was enacted that, as soon as one-tenth part of the authorized capital should be subscribed, the directors should have all the powers mentioned in the 10th sec. of the act of 16 *Vic.* By the 7th sec.—that it should be lawful for the company and the Grand Trunk Railway Company to make arrangements for the use of a part of the line of the Grand Trunk Railway Company at or near *Belleville*, and for station accommodation, and for such other purposes connected with the working of the traffic from one line to the other as the said two companies might think for their mutual interest and the public convenience, and for payment of compensation for said accommodation as they might agree upon; and by the 8th sec.—that the company should have power to construct their railway over any part of the country lying between *Belleville* and *Peterborough*, and thence to such point on the *Georgian Bay* as might be decided on, but not to the city of *Toronto*, and that the railway authorized should be commenced within two years and completed to *Peterborough* within six years from the passing of the act which received the royal assent on the 12th May, 1870. In the month of October, 1870, the municipal council of the corporation of *Peterborough*, not having any power to grant aid by way of bonus to this proposed railway, although the act of incorporation of the *Peterborough* and *Haliburton* Railway Company

purported to confer upon them such a power as regards the railway of that company, caused to be prepared an instrument which received two readings in the council, and which professed to be a by-law to provide for aiding and assisting in the construction of the Grand Junction Railway and the *Peterborough* and *Haliburton* Railway, and for the issuing of debentures therefor to the amount of $100,000, viz., $75,000 to the former, and $25,000 to the latter.

This instrument, after reciting that the municipal council of the county of *Peterborough* had determined to give as a bonus the sum of $75,000 to the Grand Junction Railway Company, and the sum of $25,000 to the *Peterborough* and *Haliburton* Railway Company, subject to the provisions thereinafter contained, proceeded to enact, as follows:

1. That a bonus of the sum of $75,000 be granted to the Grand Junction Railway Company, and a bonus of the sum of $25,000 be granted to the *Peterborough and Haliburton*, subject to the conditions hereinafter specified.

2. That in order to procure the said sum of $100,000 the municipal council of the said county of *Peterborough* shall issue debentures of the said corporation to the amount of the said sum of $100,000 to be sealed with the corporation seal of the said municipality, and signed by the warden and treasurer thereof, and no one of the said debentures shall be for a less sum than $100.

3. That the said debentures shall be made payable in 20 years from the day hereinafter appointed for the by-laws to take effect at the office of the treasurer, &c.

4. That they should bear interest at 6 per cent.

5. That for the payments of the said debentures a rate of $4\frac{2.8}{100}$ mills in addition to all other rates should be levied annually.

6. That the said respective sums should be paid to said respective companies in such debentures, so to be issued and taken and received by the said respective companies, in payment of such bonus at par value.

7. That the warden of the said county of *Peterborough* shall pay and deliver such debentures to the amount of $75,000 to the said The Grand Junction Railway Co., or to whomsoever may be appointed by them to receive the same, at the time and in the manner following,

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that is to say, to the amount of $25,000 *whenever* and so soon as the said Grand Junction Railway shall have been completely graded from the eastern limit of the county of *Peterborough* to the town of *Peterborough*, and to the remaining amount of $50,000 whenever and so soon as the iron of the said railway shall have been completely laid from the said eastern limit of the county of *Peterborough* to the said town of *Peterborough*, and then only upon the certificate of the Chief Engineer of the said railway of the performance of the said conditions, and upon the conditions hereinafter next mentioned, that is to say, that such proposed railway shall cross the river *Trent* at or near the village of *Hastings*, and shall thence proceed between the villages of *Allandale* and *Keene* to the town of *Peterborough*, that the gauge of such railway shall not be less than 4 feet 8½ inches.

8. That in the event of any trustee or trustees being hereafter appointed by the Legislature for the receiving and holding of moneys or securities for moneys awarded by way of bonus towards the construction of the said Grand Junction Railway, the said warden shall within six weeks after the final passage of this by-law or within six weeks after the passage of such legislative enactment, which ever shall last occur, hand over and deliver such debentures to the said amount of $75,000 to such trustee or trustees, to be by them held and paid over and delivered to the said company in accordance with and subject to the provisions and conditions of this by-law, and not otherwise.

9. That the warden of the said county should be a director of the said Grand Junction Railway Co.

10. That unless the construction of the Grand Junction Railway as to that portion thereof within the county of *Peterborough* shall have been commenced on or before the first day of May, 1872, this by-law in so far as the same provides for the issue of the said debentures to the said amount of $75,000 shall become and be null and void and of no effect, and such of the said debentures thereupon issued, if any, cancelled.

[The 11th and 12th clauses related exclusively to the *Peterborough and Haliburton* Railway.]

13. That the rolling stock of both railways should have sliding axles, so as to permit to the rolling stock of each to be used upon the other and upon the Grand Trunk Railway.

14. That in the event of any one portion and not the whole of this by-law becoming effete and of none effect under the provisions of the 10th and 12th sections thereof, by reason of one of such proposed railways not having been commenced within the time hereby limited for the purpose, the said rate to be levied as aforesaid shall be sufficient

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only to cover the interest and sinking fund for the redemption of the debentures remaining valid under that portion of this by-law remaining in force and effect.

15. That this by-law shall take effect and come into force on the 16th day of December, 1870.

The 16th section provided for taking the votes of the ratepayers upon the by-law and appointed the time and places for taking the poll of such votes.

This proposed by-law having received two readings the poll of the votes of the ratepayers thereon was taken upon the 23rd November, 1870, at which poll out of a number of freeholders in the county qualified to vote exceeding 3,000 in number, only 1,023 votes in all were cast, of which 556 were for approving of the by-laws and 467 against it

It will be observed here that the time of this poll of votes being taken, assuming it to have been taken at the time authorized by the proposed by-law as voted on in council, a point about which there was a dispute, all that was necessary to perfect the by-law, in so far as it related to the grant of $25,000 to the *Peterborough* and *Haliburton* Railway, was that the by-law should receive its third reading in the council of the municipality. At a meeting of the council held on the 14th December, 1870, for the special purpose of deciding whether the proposed by-law should be confirmed and passed or not, it was moved and seconded that the by-law granting $75,000 to the Grand Junction Railway and $25,000 to the *Peterborough* and *Haliburton* Railway be now read a third time, passed, signed, and the corporate seal of the county attached, and by way of amendment to that motion it was moved, seconded and resolved, that "the by-law granting a bonus to the *Peter-*"*borough* and *Haliburton* Railway Co. and the Grand "Junction Railway Co having been found to be illegal, "and very grave doubts exist as to whether an act can

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"be obtained to legalize the same, owing to a majority of "the municipalities having given an adverse vote there-"on, and as the municipality of *South Monaghan* is not "represented here, owing to the death of its late reeve, "the by-law be not read a third time, but be laid over "until the next meeting of council." At the next meeting of the council held upon the 27th day of January, 1871, it was moved and seconded: "That whereas at the last "session of the municipal corporation of the council of "*Peterborough*, the third reading of the by-law granting "a bonus of $75,000 in aid of the Grand Junction Rail-"way was, by resolution passed by said corporation in "session assembled, postponed until the present session, "and whereas the said by-law was submitted to the rate-"payers of the said County of *Peterborough* in accordance "with the provisions of the Municipal Act, and a majority "of the votes cast having been in favor of the said by-law, "be it therefore resolved that the said by-law be now read "a third time, passed and numbered, and the corporation "seal attached thereto." Upon this motion being made, it was found it was not in order, and upon a motion being thereupon made and seconded to the effect that the decision of the warden in ruling the third reading of the by-law to be out of order be not sustained, being submitted to the council, the council resolved that it should not be sustained, and thereupon the motion for the third reading of the by-law was submitted to the council, and there having been a tie of votes thereon, the warden gave his casting vote against the motion, which was thereby lost, and so the council refused to pass the said proposed by-law, and the same never did become a by-law passed and approved according to law by the council. Prior to the proposed by-law having ever been introduced in the council or read a first time, in the month of September, 1870, the Grand Junction Railway Company caused to be

published in accordance with the provisions of the standing orders of the Legislature of *Ontario*, the following notice of an application to be made to the Legislature at its next sitting, namely:

"Application will be made to the Legislature of the "Province of *Ontario* at its next sittings for an Act to "legalize and confirm any and all by-laws passed by any "of the municipalities through which the line of the "Grand Junction Railway passes, granting bonuses to "the said company to assist in the construction of their "railway. Also, for power to the corporations of the "townships of *Sidney*, *Thurlow*, *Rawdon*, and the village "of *Sterling*, and the corporation of the town of *Belleville* "in the county of *Hastings*; also, the corporations of the "townships of *Seymour* and *Percy* in the county of "*Northumberland*, and the corporations of the townships "of *Asphodel* and *Otonabee* in the county of *Peterborough*; "also the corporations of the county of *Hastings* and "county of *Peterborough* respectively, and any other "municipal corporation whatsoever through which or "near to which the said line of railway will pass, to grant "bonuses to said company to assist in the construction of "the said railway, with power to charge the same on all "or part of the municipality so granting such bonuses, "and for power to part of any of said corporations to "grant such bonus, and to charge the part 'of such corpor-"ations so granting the same with the payment thereof,' "and generally for all the powers in the premises neces-"sary to make the said efficient and effectual and for "other purposes."

Upon this notice having been given and upon the petition of the Grand Junction Railway Co. the Act, 34 *Vic.* ch. 48 was passed. This act recited that:

Whereas the corporation of the town of *Belleville* had passed a by-law granting aid by way of bonus to the Grand Junction Railway Co. to the extent of $100,000, and whereas the corporation of the town-

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ship of *Seymour* had also passed a by-law granting aid by way of bonus to the said railway company to the extent of $35,000, and whereas the validity of the said by-laws is questioned for want of power in said municipalities to grant such aid, and the said railway company have by their petition prayed * * * * for an act authorizing the several municipal corporations along, or contiguous to the line of their railway to grant aid by way of bonus to assist in the construction of the said railway, and it is expedient to grant the prayer of the said petitioners.

Therefore it was enacted:

That the by-law numbered 233 passed by the corporation of the town of *Belleville*, granting $100,000 to the Grand Junction Railway Co., should be and the same was thereby declared legal and binding on the said corporation. And although this by-law, and a by-law of the township of *Seymour*, were the only by-laws particularly mentioned in the petition for the act which the petitioner desired to have made valid, it was, nevertheless, enacted by the 2nd section:

That the by-law numbered 245 passed by the corporation of the township of *Seymour*, and intituled, "a by-law to provide for the aiding and assisting in the construction of the Grand Junction Railway, and for the issuing of debentures therefor to the amount of $35,000, to be given by way of bonus to the said Grand Junction Railway Co., by the municipality of the township of *Seymour;* also a certain by-law, intituled, a by-law to provide for the aiding and assisting in the construction of the Grand Junction Railway and the *Peterborough* and *Haliburton* Railway, and for the issuing of debentures therefor to the amount of $100,000, to be given by way of bonus to the said Grand Junction Railway Co., and the said the *Peterborough* and *Haliburton* Railway Co., in the manner and proportion following; that is to say, $75,000 to the Grand Junction Railway Co., and $25,000 to the *Peterborough* and *Haliburton* Railway Co.", and which was approved of by a majority of the duly qualified voters in the county of *Peterborough*, on the 23rd day of November, in the year of Our Lord 1870, be, and the same is hereby declared legal, valid, and binding, as if the same had received the third reading of the county council of the said county of *Peterborough;* the said by-laws are hereby declared legal, valid, and binding upon the corporations respectively, and on all others whomsoever, and the said several

corporations above-mentioned shall respectively proceed to issue debentures and act upon said by-laws in all respects in the same manner as if the said by-laws respectively had been proposed after the passing of this Act.

By the 43rd section, it was enacted:

That any by-laws passed after the 19th day of December, 1870, and before the passing of this Act by any municipal corporation, along or near the line of the said the Grand Junction Railway Co.'s proposed railway, and which have been voted upon by the people and sanctioned in the manner provided for in the municipal acts in force in this province, granting aid by way of bonus to the said railway company, shall be valid and binding upon the said corporations so passing the same as fully as if the said by-laws had been passed after the passing of this act.

By the 4th sec., power was given to all municipalities along the line of, or near to, the said proposed railway, to grant aid by way of bonuses to the company.

By sec. 5, like power was given as regards portions of municipalities desirous of aiding the company.

By sec. 6 it was enacted that:

Whenever any municipality or portion of a municipality shall grant a bonus to aid the said company in the making, equipping, and completion of the said railway, the debentures therefor may, at the option of the said municipality, within six months after passing of the by-law authorizing the same, be delivered to three trustees, to be named, one by the Lieut. Governor in Council, one by the said company, and one by the heads of the municipalities granting such bonuses, or the majority of them, who shall attend a meeting for that purpose, to be held at such time and place as the said company may appoint for that purpose, notice of which shall be sent to each reeve, mayor or warden by mail, at least fourteen days before the day appointed; all the trustees to be residents of the Province of *Ontario*: Provided that if the said reeves, mayor or warden shall refuse or neglect to name such trustee, or if the Lieutenant Governor in Council shall neglect or refuse to name such trustee within one month after notice in writing to him of the appointment of the other trustees, the company shall be at liberty to name such other trustee or trustees.

By the 7th sec., provision was made for the appointment of new trustees in the case of removal, death, or resignation of a trustee.

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By the 8th sec., it was enacted that:

The said trustees should receive the said debentures in trust; firstly, to convert the same into money; secondly, to deposit the amount realised from the sale of such debentures in some one or more of the chartered banks having an office in the town of *Belleville*, in the name of the Grand Junction Railway Municipal Trust Account. and to pay the sum out to said company, from time to time, on the certificate of the Chief Engineer of the said railway, in the form set out in Schedule A. hereto, or to the like effect, setting out the portion of the railway to which the money to be paid out is applied, and the total amount expended on such portion to the date of the certificate, and such certificate to be attached to the cheque to be drawn by the said trustees.

By the 11th sec., it was enacted that:

A majority of the provisional directors of the Grand Junction Railway Co. may at any time, at any meeting of which all the provisional directors shall have had notice, by resolution, add to the number of said provisional directors such persons as they may think proper, and such persons so added shall have all the rights and powers they would have had had they been named provisional directors in the Act incorporating the said company.

On the 9th November, 1871, the Secretary of the Grand Junction Railway Co. mailed to the address of the then warden of the county of *Peterborough*, a letter in the following terms:

DEAR SIR,

The Board of Trustees appointed under and in accordance with the provisions of Ch. 48, 34 *Vic.*, of *Ontario*, to wit: *John H. Allen*, Esq., of *Picton*, trustee appointed by the Government, *E. W. Holten*, Esq., trustee appointed by this company, and *Robert Cockburn*, Esq., of *Campbellford*, trustee appointed by the heads of municipalities granting bonuses to this company, having met and organized their Board by appointing *E. W. Holten*, Esq., of *Belleville*, chairman thereof, I do hereby, on behalf of the Grand Junction Railway Co., request that you will, with as little delay as possible, forward to the said *E. W. Holten*, Esq., Chairman of said Board, of *Belleville*, the debentures of the county of *Peterborough*, for the sum of $75,000, in pursuance of by-law No. of your municipality, granting aid to this company, intituled a by-law to provide for the aiding and assisting in the construction of the Grand Junction Railway and the *Peter-*

*borough* and *Hailburton* Railway, and for issuing debentures therefor to the amount of $100,000.

* * * * * *

No notice appears to have been taken of this letter, if it was received. On the 27th day of June, 1872, the secretary of the Grand Junction Railway Co. was served with a notice, signed by the warden and county Clerk of the county of *Peterborough*, with the seal of the corporation attached, to the effect following:

*To the Grand Junction Railway Company :—*

This railway company having failed to comply with the conditions contained and set out in a by-law of the County Council of *Peterborough*, entitled a by-law to provide for the aiding and assisting in the construction of the Grand Junction Railway and the *Peterborough* and *Haliburton* Railway, and for the issuing of debentures therefor to the amount of $100,000, to be given by way of bonus to the said Grand Junction Railway Co. and the *Peterborough* and *Haliburton* Railway in the manner and proportions following, that is to say, $75,000 to the Grand Junction Railway Co. and $25,000 to the *Peterborough* and *Haliburton* Railway Co., and for various other reasons, the Municipal Council of the Corporation of the County of *Peterborough* (without admitting that the said by-law ever was binding upon them) hereby gives notice to the said Grand Junction Railway Co. that the said corporation of the county of *Peterborough* claims and holds that the said by-law or so much thereof as relates to the said Grand Junction Railway Co. is effete and no longer binding or obligatory upon this corporation, and upon this and other distinct grounds the municipal corporation of the county of *Peterborough* will resist any action or proceeding on the part or behalf of the said Grand Junction Railway Co. to compel the issue of the debentures mentioned in the said by-law or any of them.

[L. S.]

Dated this 25th day of June, 1872.

(Signed,) JOHN WALTON,
Warden.

EDG. PEARSE,
County Clerk.

By an act passed by the Legislature of the Province of *Ontario* on the 24th March, 1874, 37 *Vic.* ch. 43, after reciting that the Grand Junction Railway Co. have by their petition prayed that all the Acts relating to the

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said company should be consolidated and amended and reduced into one act, and that it was expedient to grant the prayer of such petition, it was enacted among other things that:

1. All the rights, powers and privileges intended to be vested in the Grand Junction Railway Co. under the several Statutes passed by the Parliament of the late Province of *Canada*, by the Parliament of the Dominion of *Canada*, and by the Legislature of the Province of *Ontario* relating to the said company, are hereby declared to be vested in the shareholders of the said company under the name of the Grand Junction Railway Co.

2. The acts passed in the sixteenth year of the reign of Her Majesty Queen *Victoria* and chaptered 43, and the Act passed in the 33rd year of the said reign and chaptered 53, be and the same are hereby repealed, but any act or proceeding taken, done, or had under any of the said Statutes shall remain valid and binding as if said Acts had not been repealed.

3. All the provisions of the Railway Act, being ch. 66 of the Consolidated Statutes of the Province of *Canada* and amendments thereto, shall apply to the said company.

4. All contracts made heretofore, by or with the said company, and which are now legal and subsisting, and all the rights and liabilities of and against the said company, shall continue in all respects binding upon and in favour of the said company, and shall not be altered or affected by any provision of this Act.

5. All purchases made, deeds taken, proceedings had, and acts done in the location and construction of said railway by the said company, shall be held and taken to have been had and done under this act.

By the 7th sec. certain persons therein named as the then directors were declared to be directors until the next annual election to be holden under this act.

By the 19th sec. municipal corporations along the line of, or near to, the railway, were authorized to grant aid by way of bonus to the railway.

Sec. 21 and subsequent sections presented the manner in which the by-laws granting such aid in order to be valid, should be passed.

Sec. 34 provided for the delivery of the debentures to be issued in pursuance of such by-laws to trustees.

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By an act of the Legislature of *Ontario*, passed on the 10th February, 1876, 39 *Vic.* ch. 71, it was enacted that the time for the completion of the Grand Junction Railway Co. should be extended to the 1st day of May, 1881, and that the several by-laws passed by the several municipalities on the line of the said proposed railway, granting aid by way of bonus to the said company, and which have not now lapsed, shall stand and have the same effect as if the time in this act fixed for the completion of said railway had been in the acts now in force respecting the said company named and fixed as the time for completion of the said company's railway, and that none of said by-laws shall lapse by reason of the said extension of time, or the said railway not being completed within the time heretofore fixed for the completion of the same.

On the 4th March, 1879, the secretary of the Grand Junction Railway Co. addressed a letter to *John Burnham*, Esq., warden of the county of *Peterborough*, in the following terms:

DEAR SIR,

I have been instructed to inform you that *E. W. Holten*, Esq., *Belleville, Ont.*, as Chairman of the Board of Trustees, appointed some years ago by the Government, the municipalities and the company, in pursuance of the statute to receive the debentures of the various municipalities granting aid to the Grand Junction Railway, and to pay them out in accordance with the conditions of the various bonus by-laws, some of the municipalities have handed in their debentures to the trustees, and it is very desirable that all should do so at once, so that our new contractors may thus have completed their monetary arrangements for the active prosecution of the work this year. I would therefore ask you, on behalf of your municipality, to have the necessary debentures prepared and forwarded to Mr. *Holten* without delay. If refusal is made to this request or unnecessary delay occurs in complying with it, I am instructed to say that steps will be taken to compel the issue and delivery of such debentures, and this letter will be used on such application. I may add that the other members of the Board of Trustees are, *J. H. Allen*, mayor of *Picton*, and *Robert Cockburn*, Esq., of *Campbellford*, so

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that the municipalities can have every confidence that the various conditions and stipulations of the respective by-laws will have to be fully performed ere a single debenture is handed over.

This letter having been laid before the council was submitted by them to their solicitor for his advice, who, being of opinion that the debentures could not be legally called for, the county clerk informed by letter the secretary of the railway company that no action would be taken towards issuing debentures until the right of the company to the same should be established. Accordingly in November, 1879, the motion for this mandamus was made.

Among the points raised upon the argument of the rule *nisi*, which was issued calling upon the corporation of the county of *Peterborough* to shew cause why the mandamus should not issue was one that the Dominion Act 33 *Vic.* ch. 53 was void; and that the Local Legislature of the province of *Ontario* could alone give to the railway company its corporate existence and powers; another, that the *Ontario* Statute 34 *Vic.* ch. 48 had not the effect of validating the bonus; another, that assuming the bonus by-law to have been made binding, the company had forfeited all claim to the bonus by non-compliance with the terms and conditions upon which the bonus was granted; that there was no legal commencement of the road within the time specified in the by-law; that there could be no legal commencement of the road until the filing of the map and plan required by the Railway Act, which was not done, and, in fact, no right of way upon which to commence had been acquired within the county of *Peterborough* within the time limited by the terms of the by-law, namely, the 1st May, 1872, and that none of the *Ontario* acts had the effect of validating the by-law, and that the Legislature had not, within the provision and terms of the by-law in that behalf, appointed

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any trustees, and that therefore the company could not call for the debentures unless nor until they should become entitled to payment within the terms of the 7th sec. of the by-law.

A majority of the Court of Queen's Bench made the rule absolute for the writ to issue, being of opinion that it was not necessary to decide whether the Dominion Act, 33 *Vic.* ch. 53, was *intra* or *ultra vires*, and that the acts of the *Ontario* Legislature referred to, had the effect of recognizing the existence of the railway company as a corporation, and that the trustees named under the provisions of the *Ontario* statute, 34 *Vic.* ch. 48, were trustees within the contemplation and provision of the 8th sec. of the by-law. Mr. Justice *Cameron*, dissenting upon this latter ground, was of opinion that the *rule nisi* for the mandamus should be discharged. The case having been appealed to the Court of Appeal for *Ontario*, that court was unanimously of opinion that the *rule nisi* for the mandamus should be discharged upon the point upon which the judgment of Mr. Justice *Cameron* was rested in the Court of Queen's Bench, namely, that trustees appointed under *Ontario* statute 34 *Vict.* ch. 48 were not trustees within the terms of section 8 of the by-law. A majority of the court, however, also held, Mr. Justice *Proudfoot* not assenting, that the Dominion Statute 33 *Vict.* ch. 53 was *ultra vires*, and that consequently at the time of the passing of the by-law there was no Grand Junction Railway Co. in existence to whom the proposed bonus could be given, and that the *Ontario* statute 34 *Vict.* ch. 48 only had the effect of making the by-law as valid as if it had been read a third time, and as if there had been power to give a bonus, and did not cure the defect arising from there being no such company then in existence.

I agree with the opinion of Mr. Justice *Cameron* expressed in his judgment in the Court of Queen's

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Bench for *Ontario*, and which has been concurred in by the unanimous judgment of the Court of Appeal in that province, to the effect that the trustees appointed under the provisions of the *Ontario* statute, 34 *Vict.* ch. 48, do not come within the scope of, or supply the place of, trustees referred to in the 8th section of the by-law in question; no enactment such as that referred to in that section, within six weeks after the passing of which the corporation of *Peterboro* undertook by the by-law to deliver the debentures to trustees thereby appointed, has ever been passed. For this reason, and for others, which appear to me to be abundantly sufficient to have justified the Court of Queen's Bench in refusing to grant the prerogative writ of mandamus moved for, it is unnecessary that we should, and I therefore do not, express upon a motion of this character any opinion upon the point raised affecting the validity of the Dominion statute, 33 *Vict.* ch. 53, as unnecessary for the determination of the question before us. Whenever, if ever, that point shall necessarily arise, many cases in the American courts can be usefully referred to (1).

A point was also taken before us which does not appear to have been urged in the courts below, namely, that, as is contended by the corporation of *Peterboro*, the true construction of sec. 92, item 10, in connection with sec. 91, item 29 of the B. N. A. Act is, that the power to incorporate all railway companies, even those for the construction of railways wholly within the limits of any one of the provinces, is vested in the Dominion Parliament, the contention being that "railways" are among the local works, which, by sec. 92, item 10, are excepted from the jurisdiction of the local legislatures, and are by sec. 91, item 29, placed under the Dominion

(1) See 34 New Hamp. 372; 9 Wendell 381; 23 Wendell 193; 7 Blatchf. 391; 29 Ill. 242; 35 Ill. 562; 83 Ill. 348; 10 Pick. 187-8; and 34 Maryd. 503.

Parliament. To this it was answered that the 92nd sec. item 10, only referred to railways "connecting the province with any other or others of the provinces, or extending beyond the limits of the province," but to this it was replied that railways "connecting one province with another or extending beyond the limit of the province" would not be a local work, and that they plainly were local works which were intended; moreover, it was added that "lines of steam or other ships" which were by the section in question placed in the same position as "railways," could not be spoken of as "connecting one province with another or as extending beyond the limits of the province." The section certainly does not seem to be very felicitously expressed, if it was intended to refer only to lines of steam or other ships, or to railways as connecting one province with another, or as extending beyond the limits of a province; such works from their nature not being local, could not be excepted as such. It must be admitted, I think, that there is a point of some difficulty raised by the language of this section, and that it is of such a nature that unless absolutely necessary to the determination of the question before us, it should not be adjudicated upon by us on a motion like the present. When it does necessarily arise for adjudication it will also have to be considered, assuming that the exception as to railways must be read in connection with the words "connecting the province with any other of the provinces or extending beyond the limits of the province," whether the privilege conferred by section 7 of 33 *Vic.*, c. 53, of using the Grand Trunk Railway under arrangements with that company for the purpose of the transport of traffic from one line to the other, be or not a privilege which could be conferred by the local legislature, and whether in effect the company incorporated, or intended so to be, by 33 *Vic.* c. 53,

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is not formed for the construction of a railway in connection with although not part of the Grand Trunk, but in connection with it, so as to be capable of having running powers over the Grand Trunk Railway, and so as not to be a local work within the jurisdiction of the legislature of *Ontario*.

Now, assuming the by-law to have been made legal and binding by 34 *Vic* c. 48, and that the company had a corporate existence and had fulfilled the condition mentioned in the by-law as conditions precedent to the company acquiring a right to receive the bonus, there cannot be a doubt that the company could sue for and recover the bonus in an action of debt on the by-law. In *Hopkins* v. *Mayor of Swansea* (1) it was laid down that an action would lie against a corporation by a person who, by a by-law of the corporation, is intended to take a benefit under it. The by-law has the same effect within its limits and with respect to the persons upon whom it lawfully operates, as an act of Parliament upon the subjects at large; and the dictum of Lord *Holt* (1) that it would be absurd to say an act of Parliament should pass to give a man a benefit, and that he should not have an action for it, is equally applicable to the case of a by-law confining it to the persons on whom it is intended to operate. At the time that this motion was made it is admitted that, although nine years had elapsed, the work had not progressed so as to entitle such company to receive any part of the bonus, but it it is said that now the work entitling the company to the whole is completed. If that be true the company has an action at law by which they can recover the whole amount. Upon the part of the corporation, however, it is contended that the bonus has been wholly forfeited by non-commencement within the prescribed time, a point which will necessarily arise

(1) 4 M. & W. 640, 3. (1) 6 Mod. 27.

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in an action brought by the company to recover the amount which they claim to be now due, and upon which the corporation to be affected should be allowed the opportunity of taking the opinion of a jury in an action instituted in the ordinary manner. Under these circumstances I cannot see what possible object would be served by now ordering the debentures to be delivered to the trustees named under the provisions of the act, even if they came within the description of the trustees referred to in the by-law, while the right of the company to recover at all is contested, and the more especially as the corporation in June, 1872, gave notice to the company that they claimed that the company by non commencement within the time prescribed had forfeited all claim, and the company who had then the same right to call for delivery of the debentures as they had when this motion was made upwards of seven years later, do not appear to have ever questioned the correctness of this view expressed by the corporation of *Peterboro*, who, relying upon their exemption from liability, have never levied any rate under the by-law regarding it as forfeited. But further: by-laws of this description granting bonuses to railway companies, upon the faith of which the companies enter into contracts for completion of their roads, seem to me to be in the nature of contracts made by the corporations expecting benefit from the construction of the roads with the railway companies, that upon certain conditions named in the by-law being fulfilled by the railway company, the corporation will give a certain sum of money to the railway company; regarding the by-law in this light, and assuming the trustees named to be the trustees to whom by the by-law the corporation agreed to hand the debentures authorized to be issued by the by-law in advance of the performance by the company of the contemplated work, there does not appear to me to be any warrant in law for the

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company obtaining specific performance of such a contract by means of the prerogative writ of mandamus. Whether such a remedy in such a case would or not be a convenient mode of obtaining redress is a question with which we are not concerned; it is sufficient that it never has been applied to such a purpose.

In *Rex* v. *The Bank of England* (1), it was held that mandamus would not lie to compel the Bank of *England* to transfer stock. In *Regina* v. *Turnpike Road Trustees* (2), it was held that a mortgagee of tolls and toll houses has only an equitable right to enforce payment of principal and interest, and is therefore not entitled to a mandamus for that purpose. The writ of mandamus was applied to enforce the performance of duties, for the breach of which there was no adequate relief at law, not to enforce obligations arising out of contract in respect of which, by decreeing specific performance of the contract, the Courts of Equity had adequate, and indeed exclusive jurisdiction, until by the administration of justice acts in the Province of *Ontario* the courts of common law had conferred upon them the like equitable jurisdiction as Courts of Equity, to be exercised, however, not upon motion, but in an action brought according to the ordinary practice of the courts.

Although by the *C. L. P.* Act the Legislature has extended the power of the courts in granting writs of mandamus, yet in *Benson* v. *Paul* (3) and in *Morris* v. *Irish Land Co.* (4) it has been held that the writ, as granted under the *C. L P.* Act, does not lie to enforce the specific performance of duties arising out of personal contracts; and in *Bush* v. *Beaven* (5) the court, referring to these cases, says:

(1) 2 Doug. 524.
(2) 17 Jur. 734.
(3) 6 El. & Bl. 273.
(4) 8 El. & Bl. 525.
(5) 1 H. & C. p. 151.

In *Benson* v. *Paul* it was held that the right to a mandamus under *C. L. P.* Act does not extend to the fulfilment of duties arising from personal contracts, and though in the subsequent case of *Morris* v. *Irish Land Co.* it was held that the remedy is not restricted to cases where the old writ of mandamus would have lain, no case seems to have done away with, in respect of the action of mandamus, the doctrine which always applied to the writ of mandamus that it does not apply where there is any other remedy.

True it is, that by force of the administration of justice acts in force in *Ontario*, which enabled the Common Law Courts to enforce an equitable claim equally as a Court of Equity could, specific performance of a contract might possibly perhaps have been obtained in an action for mandamus under the *C. L. P.* Act; but in that case the writ was obtainable only in an action brought for it, and not upon motion as the old writ of mandamus (call it "prerogative" or not signifies little) for which writ the motion in this case is, and as to which there has been no change whatever in the law in this respect. The *Ontario* statute 35 *Vic.* c. 14 provides a more speedy and summary method for procuring the issue of the writ, but it does not extend the area of the field of the application of the writ, or authorize the enforcement of contracts under it, by directing specific performance of them; that remedy can still, as formerly, be obtained only by suit, brought according to the ordinary proceedings of courts established for dispensing equitable relief.

With great deference for the opinion of the late Chief Justice of the Court of Appeal for *Ontario*, I cannot concur in the opinion expressed by him in *Stratford* v. *County of Perth* (1) that the *Ontario* statute 35 *Vic.* c. 14 extends the power of the courts to apply the old writ of mandamus issuable on motion to a purpose to which the writ was not applicable before the passing of that act. It cannot now, any more than before that act, be

(1) 38 U. C. Q. B. 112.

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applied to enforcing specific performance of contracts; and, as it appears to me, that the undertaking entered into by a municipal corporation contained in these by-laws for granting bonuses to railway companies, is in the nature of a contract entered into with the company for the delivery to it of debentures upon conditions stated in the by-law, the only way in which delivery of the debentures to trustees upon behalf of the company, before the company shall have acquired a right to the actual receipt and benefit of them by fulfilment of the conditions prescribed in the by-law, is in the province of *Ontario* by action at law or in equity under the provisions of the statute in force there regulating the proceedings in actions, and not by summary process by motion for the old prerogative writ of mandamus, which the writ of mandamus obtainable upon motion without action still is.

I concur with Mr. Justice *Patterson* in thinking that the effect of the statute, 34 *Vic.* c. 48, apart from any effect it may have of recognising the existence of the railway company, was merely to make the by-law as valid as if it had been read a third time, and as if the municipality had had power to give a bonus to the company. The third section of the Act, I think, strengthens this view, for it shews that the Legislature had no idea of asserting a right to force contracts upon municipal corporations as made by them, unless the by-laws containing the contracts should be legally approved by the ratepayers under the provisions of the Municipal Corporations Act in that behalf. It has been decided in the *United States* that no act of assembly of a sovereign state could make valid a contract which was actually void, for that would be making contracts for individuals without their consent (1). If our Provincial Legislatures have in this respect a power which

(1) *Illinois Grand Junction Ry. Co.* v. *Cook*, 29 Ill. 242.

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the sovereign States of *America* have not the intention to exercise, it should, at least, be expressed in language clear beyond all controversy, I can conceive nothing more to be deprecated in a free State than legislative assumption of a right to interfere with contracts against the will of the contracting parties. If then there be anything in the suggestion that no legal vote was ever taken upon the by-law in question by reason of some unauthorized alteration in the by-law as read in the council as to the time of taking the poll of votes, or as to the advertisement thereof, that, if established by evidence, will be open to consideration in any action which may be brought to recover the amount of the bonus which the railway company alleges has now been completely earned.

For these reasons, without expressing any opinion as to the validity or invalidity of the Act, 33 *Vic.* c. 53, or of the several acts of the Legislature of *Ontario* professing to affect the Grand Junction Railway Company, I think the writ of mandamus applied for in the Court of Queen's Bench should have been refused with costs, and that therefore this appeal should be dismissed with costs.

In the view which I take, I consider it to be premature to express any opinion upon the question, whether by reason of any alteration in the by-law after its first reading, the Act in question did or not make the by-law good, because as I consider the proceeding by writ of mandamus to be, for the reasons I have given, wholly unauthorised, the evidence or matters rather contained in the affidavits cannot conclude either party, nor can the question of fact as to the alleged alteration of the by-law be determined so as to conclude the parties, and to become the foundation of a judicial decision until the matter of fact is found by a competent tribunal

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upon an issue joined between the parties in a duly instituted action or suit at law or in equity.

*Appeal dismissed with costs.*

Solicitors for appellants: *Cameron, Appellbe* and *McPhillips.*

Solicitors for respondent: *Scott* and *Edwards.*

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*Mar. 20,30.

*June 10.

## *CONTROVERTED ELECTION OF THE WEST RIDING OF THE COUNTY OF HURON.*

JAMES MITCHELL.....APPELLANT;

AND

MALCOLM COLIN CAMERON.....RESPONDENT

*Dominion Controverted Election—Ontario Judicature Act,* 1881, *effect of—Presentation of petition.*

The election petition against the election and return of the respondent was entitled in the High Court of Justice, Queen's Bench Division, and was presented to the official in charge of the office of the Queen's Bench Division, and filed and entered in the books of that office. A preliminary objection was taken that the High Court of Justice had no jurisdiction:

*Held,*—[*Henry* and *Taschereau,* JJ., dissenting,] reversing the judgment of *Cameron,* J., (1) that the *Ontario* Judicature Act, 1881, makes the High Court of Justice and its divisions a continuation of the former Courts merged in it, and that those Courts still exist under new names; and that the petition had not been irregularly entitled and filed.

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

(1) 1 Ont. R. 433.

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APPEAL from a judgment of *Cameron*, J., (1) allowing a certain preliminary objection presented by and on behalf of the respondent, to the election petition of the appellant, and for ever staying proceedings under the said petition.

The petition was presented on the 12th day of August, A.D. 1882, and prayed that it might be determined that the respondent was not duly elected or duly returned for the Electoral District of the West Riding of the County of *Huron*, and that the election proceedings were void in consequence of the alleged fact that the respondent, during the election in that behalf, by himself and his agents, was guilty of corrupt practices within the meaning of the various Controverted Elections Acts.

The petition was entitled in the High Court of Justice (Queen's Bench Division), and was presented to and filed with Mr. *Alexander Macdonell*, acting for Mr. *R. P. Stephens*, Registrar of the said Queen's Bench Division of the High Court of Justice, at his office, at *Osgoode Hall*, in the city of *Toronto*.

At the time of the presentation of the said petition, the appellant's agent deposited with Mr. *Macdonell*, at the said office, and acting as aforesaid for Mr. *R. P. Stephens*, a Dominion note for $1,000 as security for the costs of the said petition.

On the 6th day of September, A.D. 1882, the respondent presented to the court certain preliminary objections to the appellant's petition and to any further proceedings being had thereon, and such preliminary objections having come on for disposition in a summary way, the preliminary objection to the jurisdiction of this court, being the respondent's first preliminary objection, was, on the 20th day of October, A.D. 1882,

(1) 1 Ont. R. 43; see also *North York* Election Case, 32 U. C. C. P. 458.

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allowed by the Honorable Mr. Justice *Cameron*, and was adjudged to be a good and sufficient objection and ground of insufficiency against the said petition and against any further proceedings thereon.

On appeal to the Supreme Court of *Canada*, the respondent moved to quash the appeal. 1. On the ground that the appeal should have been taken in accordance with the provisions and rules regulating ordinary appeals to the Supreme Court, and not under the provisions regulating election appeals, which it was contended did not apply to an appeal from a judgment on preliminary objections. 2. Because the deposit of $1,000 had not been made with the proper officer.

The court decided to hear the appeal on the merits.

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

The question which arises on this appeal, is whether the election petition of the present appellant, not having been presented to any of the courts mentioned in the Dominion Controverted Elections Act, 1874, *eo nomine*, the same is before any court having jurisdiction in respect thereof.

When this case was argued, each party claimed the benefit of the judgment of the Privy Council in *Valin* v. *Langlois* (1).

My contention is that the Dominion Parliament, having taken by name certain (then existing Provincial Courts), has conferred upon them and the judges wielding authority in them a jurisdiction to try election petitions over and above the ordinary jurisdiction vested in such courts and judges by virtue of the *British North America Act*. If this contention is correct in law, then the Dominion Parliament, having so made use of existing courts must be taken to have done so with the knowledge that the power of altering the name

(1) 5 App. Cases 115.

of any such courts was lodged in another legislative body, namely, the Legislature of *Ontario*, and must be taken to have conferred such jurisdiction subject to any change in name to be made by such other legislative body.

The effect of the *Ontario* Judicature Act is, so far as regards the trial of election petitions, merely a change in the name of the courts.

The Queen's Bench Division is in fact the Court of Queen's Bench named in the Controverted Elections Act of 1874, and not a new and different court. This is manifest from a consideration of the provisions contained in sec. 3, sub-sec. 3, of the *Ontario* Judicature Act, 1881, which provides that after that act takes effect the Court of Queen's Bench shall be called the Queen's Bench Division of the High Court, &c.; and sec. 9 of the same act which declares that the High Court of Justice shall be a continuation of the said courts. The mere change of name could not take away from the court the power to try election petitions as conferred upon it by the Dominion Parliament.

Sec. 87 of the *Ontario* Judicature Act upon which the learned judge relied so strongly, on the question of jurisdiction, relates only to practice and procedure in matters connected with Dominion Controverted Elections, and can not be construed as an expression of the intention of the Legislature that the Divisional Courts of the High Court of Justice should not retain jurisdiction in Dominion Controverted Election petitions.

Mr. *R. P. Stephens* was, at the time the petition was presented, Clerk of the Crown and Pleas of the Court of Queen's Bench, and the office where the said petition was presented was then the same as had been formerly occupied by the Clerk of the Court of Queen's Bench, and there was not then, nor has there since been, any office of the Clerk of the Queen's Bench, or of the Clerk

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of Crown and Pleas of the Court of Queen's Bench, other than that where the said petition was presented.

Mr. *Robinson*, Q.C., and Mr. *C. Moss*, Q.C., for respondent:—

I think the judgment of the Privy Council in *Valin* v. *Langlois* (1) has made it plain that the Dominion Controverted Elections Act, 1874, is *intra vires* of the Parliament of *Canada*, and that it established and constituted certain pre-existing Courts in the Province of *Ontario*, (the Court of Appeal, the Court of Queen's Bench, the Court of Common Pleas and the Court of Chancery) tribunals for the trial of election petitions; and by the same Act (2) established a system of procedure to be observed by such courts in the matter of controverted elections.

The tribunals so established by the Parliament of *Canada* could not and cannot be abolished, nor could their functions be interfered with, except by the Parliament of *Canada;* and they have never in fact been abolished, nor have their functions been abrogated or taken away by any Act of the Parliament of *Canada.* They are, therefore, still existent, and they still possess full and complete jurisdiction to receive and try Dominion election petitions.

This special jurisdiction of the Provincial Courts named did not and does not in any way result from their establishment or constitution as Provincial Courts by the Provincial Legislature, but is a separate and distinct jurisdiction for which they are solely dependent upon, and of which they can only be deprived by, the the Parliament of *Canada.*

The High Court of Justice, in which the appellant presented his petition, is a creation of the Legislature of the Province of *Ontario*, under the Provincial Act, 44 *Vic.*, ch. 5. (*Ontario* Judicature Act.)

(1) 5 App. Cases. 115. (2) 37 Vic., ch. 10, D.

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The Parliament of *Canada* has not vested in this Provincial Court (the High Court of Justice) the jurisdiction which had been conferred as above mentioned, upon the pre-existing Provincial Courts, with regard to Dominion controverted elections. The High Court of Justice has, therefore, *eo nomine*, no jurisdiction in the matter of Dominion controverted elections. Although the *Ontario* Judicature Act may be said to vest in the High Court of Justice such jurisdiction, powers and functions as were vested in the pre-existing courts by virtue of their establishment, by Provincial legislation, as Provincial Courts, yet that Act could not and did not vest in the High Court such jurisdiction, powers and functions as were vested in the pre-existing courts by virtue of their establishment by Dominion legislation (Controverted Elections Act, 1874), as Dominion Courts for the trial of Dominion controverted elections.

The framers of the *Ontario* Judicature Act did not profess to vest in the High Court of Justice any such powers. (44 *Vic.* ch. 5, sec. 87.)

From these considerations, it follows that petitions in respect of Dominion controverted elections should still be presented in the courts designated by the Controverted Elections Act of 1874, and that their presentation in the High Court of Justice is unauthorized and improper, inasmuch as the latter court has no jurisdiction to entertain such petitions.

The respondent refers to and relies upon the reasoning of Mr. Justice *Cameron*, in the judgment appealed from (1) and in his judgments in the *North York* case, upon the motion to strike out the preliminary objections, and upon the trial of the same objections respectively (2).

The following authorities, among others, were relied upon:

(1) 1 Ont. Rep. 433.

(2) 32 U. C. C. P. at p. 458.

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*Re Niagara Election Case* (1); *Re W Hastings Election Case*; *Re S. Ontario Election Case* (2); *Re Kingston Election Case* (3).

RITCHIE, C.J.:—

If the petition in this case had been entitled in and addressed "To the Court of Queen's Bench, of *Ontario*, "for the trial of Election Petitions, now known as the "Queen's Bench Division of the High Court of Justice of "*Ontario*," this would most certainly have been strictly and literally correct. If this would be sufficiently accurate, can it be said that presenting a petition in the Queen's Bench Division is not substantially a presentation in the Queen's Bench. The effect of the Judicature Act has, so far as Dominion legislation in relation to the Controverted Elections is concerned, done no more than give in *Ontario* another name to the court, leaving the jurisdiction in such cases untouched. The objection raised is so purely technical, that the most that can be said of it is, that if professing to present the petition in the Queen's Bench Division is not strictly and verbally correct, it is unquestionably substantially so, and is no more than a mere irregularity, and an objection which should not be permitted to prevail. But in my opinion it is not even worthy of the name of an irregularity. The local legislature could not take away from the Court of Queen's Bench the jurisdiction conferred on that court by the Dominion Parliament for the trial of controverted elections, nor have they attempted to do so; but, on the contrary, it is abundantly apparent that so far as the local legislature had any legislative power in the matter, their intention and desire was to continue the courts as they originally existed for the trial of Dominion Election Petitions.

(1) 29 U. C. C. P. 26. (2) 29 U. C. C. P. 270.
(3) 39 U. C. Q. B. 139.

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The local legislature had obviously no wish or intention to destroy or put an end to the Court of Queen's Bench, they merely united and consolidated the courts, and enacted that the Court of Queen's Bench should "thereafter be called the Queen's Bench Division of the High Court," clearly showing that the existence of the court was continued, merely its name changed.

A reference to secs. 6, 9 and 89 of the Act 44 *Vic.* ch. 5 (*Ont.*) makes all this abundantly clear:

Sec. 6.—Every existing judge is, as to all matters within the legislative authority of this province, to remain in the same condition as if this Act had not passed, and subject to the provisions of this Act, each of the said existing judges shall be capable of performing and liable to perform all duties which he would have been capable of performing or liable to perform if this Act had not passed.

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Sec. 9.—The High Court of Justice shall be a Superior Court of Record, and subject, as in this Act mentioned, shall have the jurisdiction which, at the commencement of this Act, was vested in or capable of being exercised by the Court of Queen's Bench, the Court of Chancery, the Court of Common Pleas, the Court of Assize, Oyer and Terminer and Goal Delivery (whether created by commission or otherwise) and shall be deemed to be and shall be a continuation of the said courts respectively (subject to the provisions of this Act) under the name of the High Court of Justice aforesaid.

(2) The jurisdiction aforesaid shall include (subject to the exceptions hereinafter contained) the jurisdiction which, at the commencement of this Act, was vested in or capable of being exercised by all or any one or more of the judges of the said courts, respectively sitting in court or chambers, or elsewhere, when acting as judges or a judge in pursuance of any statute or law; and all powers given to any such court, or to any such judges or judge, by any statute; and also all ministerial powers, duties and authorities, incident to any and every part of the jurisdiction.

Sec. 89.—Nothing in this Act, or in the schedule thereto, affects or is intended to affect the practice or procedure in criminal matters, or matters connected with Dominion Controverted Elections, or proceedings on the Crown or Revenue side of the Queen's Bench or Common Pleas division.

It may be all true enough, that so far as the Jurisdiction Act applies, the Queen's Bench Division of the

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High Court discharges its functions as a branch or a division of the High Court, but as regards the Dominion Controverted Elections Act, the Queen's Bench is not abolished; it is continued, exists and discharges its functions as the Court of Queen's Bench for the trial of Dominion Controverted Elections, a Dominion Court capable of discharging all and every function that pertain to it as a Dominion Court, and over and with which the legislature of *Ontario* has no jurisdiction or right to interfere; and therefore, notwithstanding the legislature of *Ontario* has for local purposes changed its name, it is denuded of none of its jurisdiction as a Dominion Court, of which it could alone be deprived by the Dominion Parliament.

The appeal should be allowed with costs and the preliminary objections to the election petition in this case be dismissed with costs.

STRONG, J.:—

Sub-section 3 of section 3 of the *Ontario* Judicature Act of 1881 enacts that

> The Court of Queen's Bench shall thereafter be called the Queen's Bench Division of the High Court.

Mr. *Maclennan*, in his annotated edition of that Act, appends this note to the sub-section in question (1):

> The English Act does not identify the existing courts with the divisions of the High Court bearing the same names; the *Ontario* Act expressly makes the High Court and its several divisions a continuation of the existing courts, under a new name.

It appears to me that this construction is correct, and that there can be no doubt of the identity of the present Queen's Bench Division with the former Court of Queen's Bench. It is true, it may be occasionally composed of different judges, since the other judges of the High Court are made *ex officio* members of the Queen's

(1) P. 3.

Bench division, but this can make no difference, for it never could have been sensibly argued that the jurisdiction conferred by Parliament on the former Court of Queen's Bench could have been affected by the addition to it, under the authority of provincial legislation, of additional permanent or occasional *ex officio* judges. Then the question is reduced to the mere change of name. There can be no doubt now, since it has been decided by this court in *Valin* v. *Langlois* (1), and that decision has been approved by the Privy Council, that Parliament had power to confer jurisdiction in election petitions on provincial courts. Can it then be said that the continuance of this jurisdiction was dependent, not on the continued existence of the court, but also on the conservation of the name by which it was designated in the Act of Parliament originally conferring the jurisdiction? Surely we must hold that the mere name and style of the court is immaterial, and that the intention of Parliament was not to confer the jurisdiction upon the courts because they were known by particular names, but rather because they possessed certain jurisdiction and were composed of judges possessing certain qualifications, and that consequently it was a matter of no moment what change of name might be imposed by the provincial legislature, so long as the new court or division was continued as a judicial body identical in organization and jurisdiction with the old court; and this has been carefully provided for by the section referred to, which expressly conserves the identity of the new division with the former court. I am of opinion that the 87th section has no bearing on the present question. It refers not to judicial organization but to procedure and practice, and does not, in my judgment, keep the old court in existence under its former title for the purpose of the trial of Dominion elections. Had it

(1) 3 Can. S. C. Rep. 1.

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so provided, I should still have been of opinion that the erroneous entitling of the petition was not a fatal preliminary objection, but as the petition had in fact been filed with the proper officer of the proper court, and the deposit paid in accordance with the requirements of the statute, I should have considered that the irregularity might have been remedied by amendment. I need not, however, enter upon any discussion of this point, as I am clear that there was no irregularity. I am of opinion that the appeal must be allowed with costs.

FOURNIER, J.:

I am of opinion that this appeal should be allowed. I believe that the words of the statute are very clear—that the old courts have been continued under a new name.

HENRY, J:

This question is one of some magnitude, not only in regard to the parties in this suit, but in other respects; and it becomes a matter of importance to consider whether the tribunal that has been selected by the petitioners in this instance was the proper one under the Dominion statutes which provide for the trial of controverted elections. It is one of very great nicety, and, I may say, I have had a great deal of difficulty in arriving at any conclusion in regard to it. I was at first of the opinion that the judgment of Justice *Cameron*, who gave his judgment in this case in the court below, was perhaps untenable, inasmuch as there was but little, if any, change in substance in the constitution of the courts beyond the name. I agree that if an amendment had been sought for, within the time allowed for presenting the petition, it should have been allowed, but if the party at fault does not apply to amend, so as

to bring it within the time that is allowed for presenting a petition, I think it would be then too late. The petitioner, however, proceeded to trial on the petition as it is. When the trial was had on the preliminary objections it was competent for him to have moved to make the correct filing within the time allowed by law. That was not done. I think he was bound to do it, or he could not afterwards ask for the amendment. The 87th section which has been referred to, is as follows:

Nothing in this act, or in the schedule thereto, affects or is intended to affect, the practice or procedure in criminal matters, or matters connected with Dominion controverted elections, or proceedings on the crown or revenue side of the Queen's Bench or Common Pleas divisions.

Now, the question arises, does not that except from its operation altogether the Dominion laws providing for the trial of controverted elections? It was clearly the intention of the legislature, that the Judicature Act of *Ontario* was not to interfere in any way with the trial of controverted elections for the Dominion. But it is said, it is only a change of name. I should say, if the controverted election cases could be tried by the same judges it then would be, to all intents and purposes, but a change of name. I do not know that I am right in the decision I have arrived at, but as the majority have reached a different conclusion it will not affect the decision of the case, if I am wrong; but I am of opinion that the trial would be changed by the operation of this act Sec. 29, sub-sec. 4 provides, and sec. 31 says:

(4.) Every judge of the said High Court shall be qualified and empowered to sit in any of such divisional courts.

31. Subject to any rules of court, it shall be the duty of every judge of the High Court who shall not for the time being be occupied in the transaction of any business specially assigned to him, or in the business of any other divisional court, to take part, if required,

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in the sittings of such divisional courts as may from time to time be deemed necessary for the transaction of the business of any of the divisions of the High Court.

Now, under these circumstances, if a petition were presented, before this act was passed, in the Common Pleas, a judge of the Queen's Bench could not sit on the trial. If, again, a petition were presented in the Court of Queen's Bench, a judge of the Common Pleas could not sit, but, by the change that is made by this statute, if a petition is now presented under this act in the Common Pleas division of the High Court, the merits of that petition could be tried by a judge of the Supreme Court or the Court of Queen's Bench, and *vice versâ*. Thus, it appears to me, there is an important change made in the trial of an election petition. When a party selected his court to try his petition, he selected either the Queen's Bench, or the Common Pleas, or the Court of Chancery, and he knew that his case would be tried by the proper judges of the court he selected. Now, a party may present his petition in any one of the divisions of these courts, and one of the judges of another division is not only authorized, but is required to sit and try it, if necessary. Now, there, it appears to me, is not only a change of name, but a change in substance, and if that is really the case, nobody will contend that the legislature of *Ontario* had the power to make a change to that extent in the law of the Dominion, which provides for the trial of election petitions. In fact, the Dominion act says, that a petition presented in the Court of Queen's Bench shall be tried by the judges of that court; if it is presented in the Common Pleas, it must be tried by the judges of that court, and if this act has effect, the very opposite is the result. It appears to me, under these circumstances, that there is an important and fundamental change as to the trial of these petitions. The legis-

lature of *Ontario* had not the power to make that change, and, therefore, if this petition has not been presented in the proper court, I think the petition itself must fail for want of jurisdiction. Now, it must be understood that, in making these remarks, I do not forget that the Court of Common Pleas for the trial of election petitions remains and has jurisdiction. If they can be tried under the old procedure, as established by the Controverted Elections Act, we would then have several tribunals, the Queen's Bench, Common Pleas, and the Court of Chancery, and the several divisions of the High Court of Judicature, equally competent to try the same case. Now, it appears to me, that when the original courts are still maintained, they are the proper courts to try these petitions, and they should be presented in these courts, as originally constituted. I do not express a very decided opinion on this point, and differing, as I do, from the majority of the court, I express it with no great confidence; but as I view the question, I think it is right that this appeal should be dismissed.

TASCHEREAU, J. :—

I am of opinion that the preliminary objections to the election petition should be maintained for the reasons given by Mr. Justice *Cameron* in the court below, and that consequently this appeal should be dismissed with costs.

*Appeal allowed with costs.*

Solicitors for appellant: *McCarthy, Osler, Hoskin* and *Creelman.*

Solicitors for respondent: *Bain, McDougall, Gordon* and *Shepley.*

1882 WILLIAM ALEXANDER FARMER.....APPELLANT;

*Mar. 1, 2.

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*Jan'y 11. WILLIAM GUY LIVINGSTONE.....RESPONDENT.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR MANITOBA.

*Dominion Lands Act*, 35 *Vict., cap.* 23, *sec.* 33, *sub-secs.* 7 *and* 8—*Homestead Patent, validity of Bill—Equitable or statutory title—Demurrer*—39 *Vic., cap.* 23, *sec.* 69.

The plaintiff in his bill of complaint, alleged in the 6th paragraph as follows:—"Prior to the 1st of May, 1875, the plaintiff made application to homestead the said lands in question herein, and procured proper affidavits, according to the statute, whereby he proved to the satisfaction of the Dominion lands agent in that behalf (and the plaintiff charges the same to be true), that the said defendant *Farmer* had never settled on or improved the said lands assumed to be homesteaded by him or the lands herein in question, but had been absent therefrom continuously since his pretended homesteading and pre-emption entries, and thereupon the claim of the defendant *Farmer* under the said entries became and was forthwith forfeited, and any pretended rights of the defendant *Farmer* thereunder ceased, and the plaintiff thereunder, on or about the 8th May, 1875, and then and there with the assent and by the direction of the Dominion Lands Agent, who caused the same to be prepared for the plaintiff, signed an application for a homestead right to the lands in question in this suit, according to Form "A," mentioned in 35 *Vic.*, cap. 23, sec. 33, and did make and swear to an affidavit according to Form "B," mentioned in sec. 33, sub-sec. 7 of the same Act, and did pay to the same agent the homestead fee of $10, who accepted and received the same as the homestead fee, and thereupon the plaintiff was informed that he had done all that was necessary or required for him to do under the statute and the regulations of the Department, and that the statute said: "Upon making this affidavit and filing it

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

and on payment of an office fee of $10 (for which he shall receive a receipt from the agent), he should be permitted to enter the lands specified in the application;) and thereupon and in pursuance thereof, and in good faith, the plaintiff did forthwith enter upon said land and take actual possession thereof, and has ever since remained in actual occupation thereof, and has erected a house and other buildings thereon, cleared a large portion of said lands and fenced and cultivated the same, and made many other valuable improvements thereon, costing in the aggregate $1,000."

On demurrer for want of equity.

*Held*, (reversing the judgment of the Court below, and allowing the demurrer) that the plaintiff had no *locus standi* to attack the validity of the patent issued by the Crown to the defendant, as he had not alleged a sufficient interest or right to the lands therein mentioned, within the meaning of section 69 or of subsections 7 and 8 of section 33 of 35 *Vic.*, cap. 23, there being no allegation that an entry of a homestead right in the lands in question had been made, and that plaintiff had been authorized to take possession of the land by the agent, or by some one having authority to do so on behalf of the Crown, or a sufficient allegation that the Crown was ignorant of the facts of plaintiff's possession and improvements (*Taschereau* and *Gwynne*, J.J., dissenting.)

Per *Strong*, J., that when the Crown has issued the letters patent in view of all the facts, the grant is conclusive, and a party cannot, as it said, set up equities behind the patent.

APPEAL from the Queen's Bench *Manitoba* on a demurrer by appellant to the respondent's bill of complaint.

The facts and pleadings appear in the judgments hereinafter given.

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

Mr. *Dalton McCarthy*, Q.C, for respondent.

The following cases were cited and commented on by counsel:—*McRory* v. *Henderson* (1); *Mutchmor* v. *Davis* (2); *Barnes* v. *Boomer* (3); *Lawrence* v. *Pomeryo*,

(1) 14 Grant 226. (2) 14 Grant 346.
(3) 10 Grant 532.

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(1); *Boulton* v. *Jeffreys* (2); *Cosgrave* v. *Corbett* (3); *Henderson* v. *Westover* (4); *Dougall* v. *Lang* (5); *Proctor* v. *Grant* (6); *Martyn* v. *Kennedy* (7); *Stevens* v. *Cook* (8); and *Attorney-General* v. *McNulty* (9).

RITCHIE, C.J.:—

This is an appeal from a judgment of the Court of Queen's Bench for *Manitoba*. The bill of complaint alleges that *William Guy Livingstone*, of *Boyne River Settlement*:

"1. On the eighteenth day of February, one thousand eight hundred and seventy-nine, the defendant *Farmer* commenced an action of ejectment in this honorable court against the plaintiff to recover possession of the south-west quarter of section thirty in the sixth township in the fourth range west of the principal meridian in the Province of *Manitoba* in the Dominion of *Canada*, containing by admeasurement one hundred and fifty-seven and forty-four one-hundredths acres, be the same more or less, of which the plaintiff was then and still is in lawful possession, and claiming title thereto under and by virtue of a patent from the Crown to the defendant *Farmer*, dated the twelfth day of December, one thousand eight hundred and seventy-eight.

"2. The said action was decided in this honorable court in favor of the plaintiff, but upon an appeal to the Supreme Court of *Canada*, it was there held the defendant *Farmer* had under his patent a legal right to the said land, and that the equities of the defendant hereinafter set forth to displace and invalidate the same, could not be set up by way of defence to the said action of

(1) 9 Grant 475.
(2) 1 Err. and App. Ont. 111.
(3) 14 Grant 117.
(4) 1 Err. and App. Ont. 465.
(5) 5 Grant 292.
(6) 9 Grant 26.
(7) 4 Grant 61.
(8) 10 Grant 416.
(9) 8 Grant 324.

ejectment, but that independent proceedings would have to be taken to assist the said equities.

"3. By reason of the said decision of the Supreme Court, the plaintiff is in danger of being ejected from the said land by the defendant *Farmer*, and will be so ejected unless this honorable court restrains the further prosecution of the said action until the determination of this suit.

And his prayer is: "1. The plaintiff therefore prays that it may be declared that the said defendant *Farmer* is not entitled further to prosecute his said action by reason of his being patentee of the said lands; 2. That it may be declared that the defendant *Farmer* procured the issue of the said patent to himself unconscionably, and in derogation of the plaintiff's right to homestead the said lands, or that it might be declared that the said patent was issued improvidently, and in ignorance of the plaintiff's right in the premises, and that the defendant *Farmer* holds the said lands as trustee for the plaintiff.

The suit then seeks two things: first, that *Farmer* may be restrained from further prosecuting his ejectment suit by reason of being patentee of the lands; secondly, that it may be declared *Farmer* obtained the patent unconscionably and in derogation of plaintiff's right to homestead the lands, and that *Farmer* holds lands as trustee for plaintiff, or that the patent be set aside.

The grounds of demurrer set forth by the defendant are: That the plaintiff hath not in his bill shown any interest in or right to the lands therein mentioned, or any title to attack the patent of the defendant *Farmer*, and therefore he hath not by his said bill made and stated such a case as entitled him in a court of equity to any relief against the defendant *Farmer*, as to the

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matters contained in the said bill or any of the said matters.

As to enjoining the further prosecution of the ejectment suit, we all know that the simplest and most generally accepted test in determining whether one is a proper party complainant to a bill for an injunction, is whether he possesses a legal or equitable interest in the subject-matter in controversy. And it is equally clear that rights arising under Acts of Parliament are legal rights, and must be dealt with by courts according to ordinary rules and principles.

In the bill in this case, I find the plaintiff makes a great many statements impeaching the defendant's rights in the land, and his dealings with the Crown in respect thereof, but he carefully avoids any allegation that in pursuance of the statute 35 *Vict.* ch. 23, he was ever entered or permitted to be entered for the lands in question with a view of securing a homestead right therein, either in the book or records of the local land department of the Government or in any other book, or in any other way or manner whatsoever; but on the contrary, by section 7, the most that can be gathered from plaintiff's allegations is, that his application, affidavit, and office fee of $10 were lying in the office in the hands of the said land agent, with whom the defendant pretends he made the contract of purchase. Until he was so entered or was permitted to enter the land, he had no homestead, interest in, or claim to the land, and until all the provisions of the act had been complied with, he had no legal or equitable title, and the lands remained public lands of the government, and, in my opinion, his bill does not show any legal or equitable status, under the statute, capable of being enforced in a court of law or equity.

The lands until the provisions of the statute had

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been complied with, and such an entry was permitted to be made, were unappropriated Dominion lands, of which, as such, the Crown had the right of disposing, and which they did dispose of, as the bill alleges, to the defendant, for a valuable consideration paid by the defendant and received by the crown; the plaintiff then showing no statutory or other right or interest therein, how is it possible he can be permitted to interfere between the crown and the defendant in respect of such sale?

The learned Chief Justice says:

> The evidence of the plaintiff discloses at least a moral wrong done him, a prejudice, a grievance.

Now courts of law do not sit to redress moral wrongs, unless the moral is accompanied by a legal wrong, such as a court of law or equity can recognize.

Any mere moral wrongs invading no legal or equitable rights recognized by law must be left to be disposed of *in foro conscientiæ*. Before a defendant in an action at law can ask a court of equity to stay the execution on a judgment regularly and properly obtained in a court of law, he must have rights in the legal sense of that term. On this short ground I think the judgment of Mr. Justice *Miller* was right.

To declare this patent void, would be to interfere with and destroy the contract made by and between the Crown and the purchaser of Crown lands, it would in effect be determining that the Crown had no right to dispose of unappropriated Crown lands by permitting parties having no interest in or right to the land to interfere with the Crown dealing with the Crown estate and its grantees, and so destroy a sale, of which neither of the contracting parties complain, the letters patent of the Crown, and the title conveyed by the Crown for valuable consideration, and thus break up an arrangement with which, so far as the bill shows, the Crown is in no

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way dissatisfied and has never impeached, and for reasons of alleged impositions on the Crown, of which the Crown makes no complaint, thus leaving the purchase-money in the hands of the Crown, and at the same time revesting the legal title of the lands sold and paid for in the Crown. If a party has no legal or equitable rights enforceable in a court of law or equity, he cannot, in the eye of the law, be injured by the letters patent. He is a mere volunteer, and if so, not a proper party to seek the relief sought by this bill. He must show a title to the relief asked. This disposes of any right to an injunction.

But the plaintiff invokes the 35 *Vict.*, ch. 23, s. 69, and asks to have this patent declared void.

This section enacts that—

> In all cases wherein patents for lands have issued through fraud or in error or improvidence, any court having competent jurisdiction in cases respecting real property in the Province or place where such are situate, may, upon action, bill or plaint respecting such lands, and upon hearing of the parties interested, or upon default of the said parties after such notice of proceeding as the said court shall order, decree such patent to be void, and upon the registry of such decree in the office of the Registrar-General of the Dominion, such patent shall be void to all intents.

But the same reason that prevents his obtaining an injunction equally applies, in my opinion, to his impeaching the patent. If plaintiff never acquired any interest in the land, what *locus standi* has he to maintain an action, bill or plaint, either in a court of law or equity having competent jurisdiction in cases respecting real property, and if no *locus standi* to sustain an action, what *locus standi* to impeach under this statute the issue of a patent in respect thereof. It is only in an action, bill or plaint respecting such lands that the patent can, under this statute, be impeached. How can a party sustain an action, bill or plaint respecting such lands, unless he has a right or interest therein,

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which a court of law or equity can recognize. If a plaintiff brings a suit, whether at law or equity, and does not show on the face of his declaration or bill a legal or equitable cause of action, he may be met at the outset by a demurrer, and I am at a loss to conceive the practitioner bold enough to urge on the court that though he has no legal or equitable claim that a court of law or equity can recognize, he has a moral claim which he chooses to designate "a grievance" or "a prejudice," and therefore can maintain his action. I am therefore of opinion that to enable a party to take proceedings under this act, he should have some legal or equitable status in connection with the land; that is to say, some interest therein or right thereto enforceable at law or in equity, and that it is only for the protection of such rights or interests, that a party can invoke the aid of a court of justice to repeal, under the statute, letters patent issued by the Crown in reference to Crown property.

I have looked through the cases relied on in the judgment of the court and by the counsel at the bar, but it appears to me that many of them are distinguishable and all can be reconciled with this doctrine, except those which recognize an interest under the established and recognized usage and practice of the lands department of *Ontario*, which apply only to that Province, and do not apply to the Province of *Manitoba*, where no such usage or practice exists.

In this view, it is not necessary to decide how far the court can look at the record in the ejectment suit, but I think it right to say, that while I admit to the fullest extent the principle that by demurring the defendant, for the purposes of the argument, admits all the matters of fact stated in the bill, as at present advised, I am not prepared to admit that, in a case like this, in which the judgment of this court is sought to be enjoined, and the bill refers to that judgment, and

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bases the right to succeed thereon as is set out in the 2nd and 3rd paragraphs of the bill (1): when, in truth and in fact, the court never decided that the defendant had any "equities" nor "that independent proceedings" would have to be taken to assist said equities, a majority of the court having unequivocally decided that the defendant had shown no legal or equitable title to the lands in question, this court is debarred from looking at its own record and judgment, but on the contrary, that by such an allegation it is so far virtually in possession of the suit sought to be enjoined and of its own judgment and proceedings thereon as to take judicial notice of such record and judgment to enable it to say whether or not, the present plaintiff is entitled to the relief he seeks as against such judgment. That when called on to stay the execution of one of its own judgments, it has from necessity the right to take judicial notice of its own records and proceedings, and is officially bound to take notice that the allegations referred to are incorrect and the contrary the fact. But in the view I take of this case, there is no necessity of looking at the record, except to negative the strong observations that have been made with reference to what are called the equities of the plaintiff, and to show that all the statements in his bill are directly at variance with the facts as disclosed by letters and documents under his own hand and the official documents of the land department.

The ejectment suit was brought for the lands in question, plaintiff claiming title under letters patent granting to him said lands, dated 12th December, 1878.

The defendant defended for the whole of the lands in question.

(1) The learned Chief Justice read the 2nd and 3rd paragraphs of the bill.

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In answer to the action of the plaintiff, the defendant, on legal and equitable grounds, says as follows:—

1. The defendant as against the plaintiff is entitled to the possession of the lands in question, under and by virtue of his homestead entry thereof, made in the month of May, 1875, under 35 *Vic.* ch. 23, sec. 33 of the Statutes of *Canada*.

2. The alleged purchase by the plaintiff from the Crown of the lands in question, on or about the fifth day of June, 1875, was directly contrary to the express provisions of 35 *Vic.* ch. 23, sec. 33, and the sub-sections thereof; and the subsequent issue to him from the Crown of the patent for the same lands, in pursuance of the said contract of purchase, was, and is, as against the defendant, fraudulent and void; and the same was issued through fraud, error or improvidence.

3. The plaintiff did not, on the eighth day of April, 1874, or at any other time, in good faith, make a homestead entry of the north west quarter of section thirty, in township six, range four west, "for the purpose of securing a homestead right in respect thereof," and "for his exclusive use and benefit," and "for the purpose of actual settlement" within the true intent and meaning of the Public Lands Act of *Canada*—nor did he on the fifteenth day of February, 1875, or at any time, *bonâ fide* and according to the true intent and meaning of the statute in that behalf, pre-empt the south-west quarter of section thirty, township six, range four west, under and by virtue of the alleged homestead entry aforesaid; and defendant charges that both the said alleged entries were at the time they were made, and were before, and at the time he, the defendant, made his said homestead entry, in the first paragraph of this, his answer mentioned, void, and of no effect, and had, under the operation of 35 *Vic.*, ch. 23, sub-sec. 14, of sec. 33, become, and were forfeited, and the lands in question in this cause had become, and were "unappropriated Dominion lands," and were at the time the defendant so made his homestead entry, as aforesaid, subject, on application, to be entered by any eligible person "for the purpose of securing a homestead right in respect thereof;" and the defendant avers that the said lands so being open to be homesteaded as aforesaid, he duly homesteaded the same accordingly; and immediately went into actual possession and cultivation thereof, and has ever since remained in such actual possession and cultivation thereof, and has made large and extensive improvements thereon, and he is now with his family in such actual possession and cultivation.

4. By way of laying the foundation of cross relief, the defendant, in addition to the grounds mentioned in the preceding three paragraphs, states and shows to the court here that the alleged contract of pur-

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chase of the lands in question between the Crown and the plaintiff, in pursuance of which the patent for the same lands was granted to the plaintiff, and under which the plaintiff seeks in this cause to recover possession of the same from the defendant, was made by the Crown in ignorance and misapprehension of material facts affecting the right of the defendant, and in violation of the statute and contrary to the custom and usage of the Crown Lands Department and in fraud of the defendant, and the defendant submits that the said letters patent should be declared void; and the defendant prays that the said letters patent may, under the provisions of 35 *Vic.*, ch. 23, sec. 89, be decreed to be void, for having been issued through fraud, or in error or improvidence.

The plaintiff took issue on the answer of the defendant, and denied that he was on the facts or in law entitled to the relief he prays.

This case was without objection fully investigated in the court below, and all the facts alleged either as affording a legal or equitable defence fully gone into and adjudicated on without any objection or question being raised as to the mode of procedure, and the court of *Manitoba* decided defendant had made out an equitable defence.

On this case coming before this court on appeal, all the merits of the case were gone into as before the court of first instance, and it was held that the plaintiff had shown no right or title to the land in question, either at law or equity; the right of the plaintiff to the land was sustained, and judgment reversed.

In my opinion no other conclusion could have been arrived at, for the defendant did not show that he had any legal or equitable defence to the action independent of the statute, and he did not show any legal title or equitable interest in the land under any statutory provision. He had never been permitted to enter, was not in possession under the statute, nor had he any statutory right of possession nor any parliamentary title to, interest in or right to the possession, of the land. On the contrary, the facts as they appeared in the first case

showed that the Crown, after fully considering the conflicting claims of plaintiff and defendant, refused to entertain the defendant's (the now plaintiff's) application and to enter him as a homestead claimant on the lot, refused to keep his money and refused to give him a receipt therefor under the provisions of the act, but returned the same to him, and after exercising its judgment and discretion on a full knowledge of all the circumstances, deliberately sold the property to the defendant, received the consideration money, caused the patent to issue to the defendant, and so it was clearly established, to my mind at any rate, that the patent for the lands was not issued through fraud or in error, or improvidence, but on the contrary, on and after the fullest and most deliberate consideration with a full and perfect knowledge of the position of the said lands and the rights of all parties connected therewith or claiming to be interested therein.

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STRONG, J.:—

This appeal, being from an order overruling a demurrer, we are confined entirely to the facts as stated on the face of the bill. The allegations of the bill are sufficient to show that the appellant had forfeited any pre-emption right which he might have had to the lands in question, and that he cannot ascribe his right to the patent to any equitable or statutory title arising at a date earlier than that of the day on which the patent itself was issued. The important question, however, is whether the respondent shows any title to impeach the patent.

The allegations of the bill, material to be considered in this respect, are contained in the 6th paragraph, which is in the following words:

Prior to the 1st of May, one thousand eight hundred and seventy-five, the plaintiff made application to homestead the said lands in

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question herein, and procured proper affidavits according to the statute, whereby he proved to the satisfaction of the Dominion Lands Agent in that behalf (and the plaintiff charges the same to be true), that the said defendant *Farmer* had never settled on or improved the said lands assumed to be homesteaded by him or the land herein in question, but had been absent therefrom continuously since his pretended homesteading and pre emption entries, and thereupon the claim of the defendant *Farmer*, under the said entries, became and were forthwith forfeited, and any pretended rights of the defendant *Farmer* thereunder ceased, and the plaintiff thereupon, on or about the 8th day of May, one thousand eight hundred and seventy-five, and then and there with the assent and by the direction of the Dominion Lands Agent, who caused the same to be prepared for the plaintiff, signed an application for a homestead right to the lands in question in this suit according to Form "A," mentioned in thirty-fifth *Victoria*, chapter twenty-three, section thirty-three, and did make and swear to an affidavit according to Form "B" mentioned in section thirty-three, sub-section seven of the same Act, and did pay to the same agent the homestead fee of ten dollars, who accepted and received the same as the homestead fee, and thereupon the plaintiff was informed that he had done all that was necessary or required for him to do under the statute and the regulations of the department, and that the statute said (thirty-fifth *Victoria*, chapter twenty-three, section thirty-three, sub-section eight): "Upon making this affidavit and filing it, and upon payment of an office fee of ten dollars (for which he shall receive a receipt from the agent) he should be permitted to enter the lands specified in the application," and thereupon and in pursuance thereof, and in good faith the plaintiff did forthwith enter upon said lands and take actual possession thereof, and has ever since remained in actual occupation thereof, and has erected a house and other buildings thereon, cleared a large portion of said lands and fenced and cultivated the same, and made many other valuable improvements thereon, costing in the aggregate one thousand dollars.

By the common law, "if a Crown grant prejudiced or affected the rights of third persons, the king was by law bound on proper petition to him to allow a subject to use his royal name to repeal it, on a *scire facias*, and it is said that in such a case the party may upon enrolment of the grant in Chancery have a *scire facias* to repeal it as well as the king" (1).

(1) Chitty Prer. of the Crown, p. 331.

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The 69th sec. of the Dominion Lands Act, 35 *Vic.*, c. 23, provides a new remedy for the subject prejudiced by a grant from the Crown issued through fraud, error, or improvidence. That section is in these words:

[The learned judge then read section 69 (1).]

It is under this clause of the statute that the bill in the present case has been filed.

It will be observed that this section says nothing as to the title required to authorize a party to institute an action under its provisions. It must, however, be assumed that no one but a person having a title, or being interested in the subject of the grant, is entitled to attack the patent, as it never could have been intended to enable a stranger to take such a proceeding. The statute merely gives a new remedy for the old common law right, and a third person proceeding under it to set aside a patent must therefore show precisely the same title as was required to maintain a *scire facias* in the name of the subject, namely, that he had rights in the subject of the grant which have been prejudiced and affected by the patent. We have therefore to consider whether the plaintiff in the present case shows by his bill that he had any right or title to the land in question. The statements in the bill, showing the plaintiff's title, are to be found in the allegations of the sixth paragraph which I have before extracted.

From this it appears that the only foundation for this suit is the filing of an application for a homestead right in the form prescribed by Schedule A of the Dominion Lands Act, supported by the required affidavit and the payment of the office fee of $10, and the plaintiff's subsequent unauthorized possession of the lands as a squatter and the improvements he has made.

It is not alleged that any entry of a homestead right in the lands in question was ever made in the plain-

(1) Ubi Supra p. 146.

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tiff's name, nor in the words of the statute that he was "permitted to enter the lands specified in the application," nor that he was authorized by the crown or its officers to take possession. The provisions of the act relating to homestead entries, when made by persons applying as the plaintiff did, are contained in sub-secs. 7 and 8 of sec. 33, and are as follows:

A person applying for leave to be entered for lands, with a view of securing a homestead right therein, shall make affidavit before the local agent (Form B) that he is over twenty-one years of age, that he has not previously obtained a homestead under the provisions of this act, that to the best of his knowledge and belief there is no person residing on the land in question, or entitled to enter the same as a homestead, and that the application is made for his exclusive use and benefit and for the purpose of actual settlement.

Upon making this affidavit and filing it with the local agent, and on payment to him of an office fee of ten dollars, for which he shall receive a receipt from the agent, he shall be permitted to enter the land specified in the application.

It must altogether depend on the construction to be given to these provisions, whether or not the plaintiff has shown a sufficient title to maintain his bill. It is contended in support of the bill, that the words "shall be permitted to enter the lands specified in the application," give the party, who files an application and affidavit and pays the fee, an absolute right to be entered on the books of the land office as having a homestead right to the lands applied for, and therefore the want of an actual entry is immaterial, since the agent was bound to make the entry and had no option to refuse to do so. I do not accede to this proposition. Whether the agent was or was not bound to make the entry, the statute clearly confers no right on the homestead applicant until the entry is actually made. Even if the words "shall be permitted to enter" were to be construed as imperative on the agent, so as to leave him no discretion to refuse the entry, I should still be of opinion that no right in the land was required until the entry was

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actually made. The very form of the application which, in the words of the seventh sub-section, is to be "for leave to be entered for lands with a view of securing a homestead right therein," imply that no homestead right is to be acquired until the entry is actually made, and leave to be entered has been accorded by the agent. The words of the eighth sub-section "shall be permitted to enter," also show that the filing the application and affidavit and payment of the fee are not to be considered as sufficient to give a title, but that the assent of the Crown, through the agent, is indispensable for the purpose. If the statute had intended that any person should acquire a homestead right by merely doing what the plaintiff alleges he did, it would have so provided, and the additional requirement of entry would not have been superadded. If it was the duty of the agent to make the entry upon the papers being filed and the fee paid, and nothing appearing to contradict the facts required to be sworn to in the affidavit, it might be that an action would lie for his refusal to complete the entry. I am, however, of opinion that the statute does not exclude all discretion of the agent. An application for leave to be entered implies that leave has to be given—this leave has to be given, by the agent and must involve the exercise of judgment and discretion on the part of the officer. Surely it would be out of the question to say that, if the agent knew that there was a prior application for the lands by a person who had applied, but had not been entered, for a homestead right, but whose application was in suspense, he would merely, on the applicant's affidavit to the contrary, be bound to authorize the entry last applied for; and yet, if the construction contended for on the plaintiff's behalf was to prevail, we should have to hold that, even with such a fact within the knowledge of the agent, he would be bound to make the

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entry. I think the words "shall be permitted to enter" are not to be construed in favor of the applicant as imperative. They are directions to a public officer as to the performance of his duty, and as such, even if that construction was not borne out, as it clearly is by the context, I should construe them as not conferring any right on third parties. A late writer on the principles of statutory construction (1) states the result of decisions which warrant this conclusion in these words:

> When the prescriptions of a statute relate to the performance of a public duty, they seem to be generally understood to be merely instructions for the guidance and government of those on whom the duty is imposed, or directory only. The neglect of them may be punishable indeed, but it does not affect the validity of the act done in disregard of them.

And he adds:

> It is no impediment to this construction that there is no remedy for non-compliance with the direction.

To hold otherwise would be to determine that the effect of the statute would be to enable parties to acquire the lands of the Crown without its assent, and even in direct opposition to the desire of the Crown to retain particular parcels of lands for public uses. To warrant a construction which would thus authorize an expropriation of crown lands adverse to the public interests and requirements nothing short of an explicit enactment by the legislature could possibly be sufficient, and no such express words are to be found in this statute.

There remains to be considered what effect is to be given to the allegation in the 6th section: that the plaintiff, after filing his application, entered into possession and made improvements. It has already been observed that it is not alleged that he was authorized to take possession by the agent, or by any one having

(1) Maxwell on Statutes, pp. 337, 338.

authority so to do on behalf of the Crown. Sub-sec. 5 of the 33 *Vic.* seems, however, to recognize a preferable right on the part of squatters who have made improvements to make a homestead entry; and this is further countenanced by the terms of the affidavit required under sub-sec. 7 for a homestead entry by a non-occupant. I cannot, however, agree that sub-sec. 5 recognizes any actual right or title upon entry in a squatter who has made improvements. Upon the principles already indicated as applicable to the construction of sub-sec. 7, it seems to be very clear, that although sub-sec. 5 does concede a preference to a person who has entered and improved, when claiming a right to a homestead entry in competition with a person who has not been in occupation, yet no right or title to the lands arises until the actual entry is made by the agent, and that the Crown is not so far bound as to exclude all discretion on the part of its officers in granting or withholding a homestead entry to a squatter.

Further, the bill does not show that the patent was issued by the Crown in ignorance of the plaintiff's possession and improvements. It does not therefore show that there was error or improvidence in this respect. It has been well settled by numerous decisions in *Ontario* in suits instituted under a provision similar to that of the statute now in question, that when the Crown has issued the letters patent in view of all the facts, the grant is conclusive, and a party cannot, as it is said, set up equities behind the patent.

Now, in the present case there is no sufficient allegation to show that the patent was issued by the Crown in ignorance of the facts of plaintiff's possession and improvements. It is true it is stated generally in the bill that the patent was issued in ignorance of his rights, but this allegation cannot, on the general rules applicable to equity pleadings, be construed

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as a sufficient allegation that the Crown was ignorant of the facts of the plaintiff's possession and improvements. There is, of course, no pretence for saying that the *Ontario* decisions, which proceed on the practice prevailing in the Crown Lands Department of that Province, and which also prevailed in the late Province of *Canada*, of recognizing a right of pre-emption in squatters, can have any application here. It is not alleged in the bill that any such practice prevails in the Dominion Lands Department, and the *Ontario* cases in which patents have been set aside for non-disclosure of possession and improvements all proceed on the practice referred to, which, it has been expressly decided, must be distinctly averred in the bill.

I am of opinion that the appeal must be allowed, and that the order over-ruling the demurrer must be vacated in the court below, and an order allowing the demurrer entered in lieu thereof, with costs to the appellant in both courts.

FOURNIER, J., concurred.

HENRY, J.:—

I do not consider it absolutely necessary, in the view I take of this case, to determine whether under the bill of the respondent, if it were the original proceeding in this suit, he could seek the relief prayed for. The first paragraph of it refers to the ejectment suit brought against him by the appellant to recover the possession of the land in question herein, which came to this court by appeal and in which this court gave judgment in June, 1880, for the present appellant.

Referring to that action, the respondent, in the second paragraph of his bill, alleges:

> That said action was decided in this honorable court in favor of the plaintiff, but upon an appeal to the Supreme Court of *Canada* it was there held the defendant *Farmer* had under his patent a legal right

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to the said land, and that the equities of the defendant set forth to displace and invalidate the same could not be set up by way of defence to the said action of ejectment, but that independent proceedings would have to be taken to assert the said equities.

In the third paragraph the respondent alleges that he was in danger of being ejected from the land in question in the action of ejectment, and that he would be, unless the court, in which the bill was filed, should restrain the further prosecution of the said action until the determination of the suit.

The identity of the subject matter in dispute in the two suits is shown by the bill, and the fact stated that a judgment was given by this court on the appeal in the first action. This court decided that the appellant was entitled to the land in question, that the judgment below should be reversed, and that a verdict and judgment should be entered for him. To prevent that being done, the plaintiff filed his bill in the present suit, and the Court of Queen's Bench in *Manitoba* failed to give effect to the judgment of this court, and by injunction interposed to stay it. I have considered that course of procedure, and am of opinion that the Court of Queen's Bench exceeded its jurisdiction when interposing to prevent the legal consequences of the judgment of this court. And I am the more astonished when it was known to the Court of Queen's Bench that the respondent in the first case was permitted, rightly or otherwise, to set up and prove as a defence to the action of ejectment all the facts and circumstances upon which his alleged equities rested. On the trial of the action of ejectment, before the late Chief Justice of the Queen's Bench of *Manitoba*, an objection was raised to the equitable defence set up. His lordship dealt with that subject, and having decided against the objection, says, in his judgment—

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Thereupon the defendant went into evidence exhibiting the principal facts and circumstances connected with and surrounding the history of the lands in question, in so far as the plaintiff and the defendant were concerned.

The learned Chief Justice of the Court of Queen's Bench concludes an exhaustive judgment on the facts and circumstances in evidence and the law he alleged as applicable to them, as follows:

In every point of view, as it seems to me, as against the defendant, the purchase of the plaintiff fails, and the issue of the patent to him in pursuance of the purchase cannot be upheld. I think the patent must be declared to be void as having been issued in error and mistake.

An appeal was heard from that verdict and judgment to the Court of Queen's Bench, which appeal was heard by his lordship the Chief Justice and Mr. Justice *Betournay*. Another exhaustive judgment was delivered by his lordship the Chief Justice confirming his previous one, and that was concurred in by Mr. Justice *Betournay*. It was on an appeal from that judgment that it came before our court. On the argument before us the question of the right of the respondent to plead equitable defences was again raised, and the judgment of four out of the five judges of this court who heard the argument shows that the respondent got the full benefit of the equities he alleged as far as the evidence in the whole case warranted. It shows, too, that the allegations in the second paragraph of the bill, and upon which the respondent sought the interposition of the Court of Queen's Bench, were false and unfounded; and I may safely say that the language of the judgment was too plain to create any doubt, and I am free to add that the statement in that paragraph, if made by any intelligent person who read that judgment, must have wilfully misstated it.

Whether such was the case or not, the fact is patent on the face of the judgment, and must have been

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apparent to the learned judges of the Court of Queen's Bench. That this court had reversed their judgment on the equitable defence of the respondent did not, however, prevent the Court of Queen's Bench from reconsidering the case already decided by this court, and our judgment was by the Court of Queen's Bench reversed and the legal effect of it destroyed. It is true that the bill did not refer to the rebutting evidence of the appellant on the first trial, and if the judgment given by this court, and that of the court appealed from, had not been founded on a consideration of the evidence on both sides, the position of the case might have been wholly different. The judgment of this court being referred to in the bill, we are not only privileged but required also to refer to it, and when in doing so we find the whole case on the equitable defence disposed of, I do not consider we would be justified, as the highest court in the Dominion, in permitting a court of inferior jurisdiction in so direct a manner to reverse it.

The judgment of the majority of this court was delivered by our learned Chief Justice, and I will cite from it shortly in proof of the correctness of the position I have taken, as follows (1):

> I think it quite unimportant whether a defendant in *Manitoba* could or could not avail himself of an equitable defence in an ejectment suit, because the plaintiff made out a clear case under a Crown grant, and the defendant did not show that he had any legal or equitable defence to the action; he did not show any grant or conveyance from the Crown, nor any legal title or equitable interest in the land, under any statutory provisions—in other words, he showed no *locus standi* enabling him to attack the letters patent, even if they could be impeached in such a proceeding.

If the bill had truthfully referred, as it should have done, to the judgment of this court, it would have been patent that our judgment disposed of the whole case on the merits, in which case no court of inferior juris-

(1) 5 Can. S. C. R. 221.

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diction would have had any right to reverse it as has been done in this case. When that judgment was referred to as it was in the bill, it was, I think, the duty of the Court of Queen's Bench to have looked at and considered it, and when it was plainly shown by it that the whole of the alleged equities of the respondent were adjudicated on and disposed of, the Court of Queen's Bench should not have, in the most palpable manner as it did, disrespected it. By the judgment lastly appealed from, the two justices of the Queen's Bench have, in the most marked and direct manner, undertaken to reverse the judgment of this court, and virtually made their court an appellate one from the judgment of this court deliberately and clearly given. If such could be done, it would be in direct violation of the statutes under which this court was established, and it would be a precedent in other cases under which courts of inferior jurisdiction might seek to reverse the decisions of this court. I cannot see either what ultimate benefit it would be to the respondent to have the demurrer disallowed. If, instead of appealing to this court, the appellant had submitted to the last judgment of the Court of Queen's Bench, and issues as to the equities alleged in the bill were raised and evidence again taken, and this court were again called upon to decide upon them, the result would certainly be the same. Unless, indeed, the case were materially changed by other evidence as to the *locus standi* of the respondent, which, from the documentary and other evidence in the action of ejectment, I cannot believe to be possible. Not being able to conceive how the respondent could be benefited by such a course, I am strongly of the opinion, that is for the interests of both parties, that the last judgment of the court below should be reversed. If, however, the position I have taken be not tenable, I think our

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judgment should be for the appellant on at least one ground.

The statutes regulating the disposal of Crown Lands in *Manitoba* must be taken to control all matters of title under them. One provision requires that before an applicant can have a *locus standi* which would enable him to obtain a patent, he must pay to the proper departmental office the sum of ten dollars and be entered as such applicant. If he merely pays the required amount of money and he is not so entered, the ground, I take it, remains clear for another applicant to obtain a patent by fully complying with the statutory requirements. I think that is the legal consequence, whether the controlling departmental officer rightly or wrongfully failed to enter an applicant. It would be a grievance, if wrongfully refused, for the government but not a court of law to consider. The first applicant, therefore, failing to comply with such requirements has no sufficient *locus standi*. I consider the bill in this case defective, because it does not allege that the respondent was so entered as an applicant. It is not necessary for me to express any opinion as to the effect of such an entry, and to decide whether even had it been made the Crown would be legally bound to grant a patent in every case where all the requirements of the statutes had been complied with. That, however, is a question not involved in this case and need not be debated.

For the foregoing reasons, I think, the judgment below should be reversed and the demurrer of the appellant allowed with costs.

TASCHEREAU, J.:—

Upon this demurrer we have undoubtedly to take for granted that each and every one of the facts alleged by the plaintiff in his bill of complaint are true; and if they are true, the allegations of the bill seem to suf-

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ficiently warrant the judgment appealed from, which overruled the demurrer. I concur fully in the opinion given by my brother *Gwynne*, and am of opinion with him, and for the reasons given by him, that this appeal should be dismissed.

GWYNNE, J.:—

In giving judgment upon this demurrer we can look at nothing but the allegations contained in the bill in the light of the acts of Parliament therein referred to, and we must not criticise its expressions with too much preciseness. Our simple duty is to determine whether, looking at the substance of it, there are any facts stated in it which call for an answer. We cannot import into the case anything which may have come to our knowledge in the ejectment suit between the same parties for the same lot of land which not long ago came before us on appeal, least of all any matter in apparent or actual contradiction of any of the averments contained in the bill of complaint now before us, all the material averments in which are by the demurrer admitted to be true upon this record, and must therefore, for the purposes of our judgment herein, be conclusively regarded as true. The question which is raised by the demurrer now before us was not, and indeed could not have been in issue, so as to call for judicial decision in that case, which was an action of ejectment brought by the defendant *Farmer*, and which put in issue solely his legal title. Anything, therefore, which may have been said in that case seemingly decisive of the point now raised must, in my opinion, be considered as extra-judicial, and the question now submitted by this demurrer must be regarded as having been first brought *sub judice* by the demurrer, and must be treated as resting wholly upon the sufficiency of the substantial

allegation of material facts contained in the bill of complaint.

Now, the substance of the bill of complaint appears to me to be, that the plaintiff alleges that the defendant *Farmer*, being a resident upon a large farm of his own, distant about forty miles from the land in question in this suit, and without any *bonâ fide* intention of settling on, occupying, or cultivating, the lot adjoining the one in question, or of making it a home for himself and family within the intent and provisions of 35 *Vic.*, ch. 23, but with the view of acquiring it solely for purposes of speculation, made an affidavit as required by the above statute, as if he contemplated occupying the lot as a home, and procured his name to be entered for it as his homestead, but that in total disregard of the intent and provisions of the statute in that behalf he continued to reside upon his farm forty miles off, and never in fact, either by himself or any other person on his behalf, entered into possession or occupation of, or caused any other person to settle upon, cultivate, or improve such lot or any part thereof, but that the same remained wholly unoccupied and unimproved, whereby, according to the provisions of the statute in that behalf, all claim of the said *Farmer* to such lot upon which he had so fraudulently procured his name to be entered, or to have it treated as his homestead, became lost and forfeited. That after the passing of 37 *Vic*, ch. 19, the defendant, with the like fraudulent intent of acquiring lands of the Crown in the Province of *Manitoba* for purposes of speculation, under color and pretence of acquiring them for purposes of settlement within the provisions of the statute in that behalf, in the month of February, 1875, procured his name to be entered for the lot in question in this suit as what is called an interim pre-emption entry, but the plaintiff submits that under the provisions of the statute in that behalf such interim

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pre-emption entry was not one authorized by the statute, by reason of the defendant having so as aforesaid procured his name to have been entered for the adjoining lot as a homestead, without any intention of occuping it as such, and of his never having been, as the plaintiff alleges he never was, in the actual or constructive possession thereof, and that he never had made any cultivation or improvement thereon. The bill then proceeds to allege, that under these circumstances, and while the lot adjoining to the lot in question in this suit, for which the defendant had procured his name to be entered as and for a homestead, as well as the lot in question in this suit, remained wholly unoccupied, the plaintiff procured proper affidavits to be made in accordance with the provisions of the statute in that behalf, whereby he proved to the satisfaction of the Dominion Lands Agent in that behalf that the defendant never had in fact settled on or improved the said lands, which he had procured to be entered to him for a homestead, nor upon the land in question in this suit, and that he had, under the circumstances, lost all claim to the said lot entered for a homestead, and also to the said lot now in question in this suit; and thereupon and on the 8th May, 1875, the plaintiff, with the consent and by the direction of the Dominion Land's Agent, made an application in writing which the agent himself prepared for the plaintiff to sign, whereby the plaintiff applied for the lot now in question, as a homestead for his family under the provisions of the statute in that behalf, and paid to the said agent the homestead fee of ten dollars, which the said agent accepted and received from the plaintiff *as such homestead fee*, and thereupon that the plaintiff, having done all that was required by the statute to be done by him in order to acquire the said lot, as a homestead for himself and family, did forthwith in good faith enter upon the said

land, and took actual possession thereof, and erected a house and other buildings thereon, cleared a large portion of said land, and fenced and cultivated the same, and made many other valuable improvements thereon, costing in the aggregate $1,000, and that he has ever since remained in actual occupation thereof; that while the plaintiff was so in occupation of the said land, and after he had made large improvements on the same, of which the defendant *Farmer* had full knowledge, the defendant procured letters patent to be issued, bearing date the 12th December, 1878, granting to him in fee the said lands so occupied by plaintiff as his homestead, and had brought an action of ejectment therein to evict the plaintiff from the possession thereof; and the bill concludes with the allegation that the Crown issued the said patent to the defendant *Farmer* improvidently and through error in not being advised of the true facts as hereinbefore set forth—in not being advised of the facts and circumstances surrounding the defendant *Farmer's* pretended homesteading the one lot, and his making the pretended interim pre-emption entry of the lands in question, and in not being informed that the plaintiff had given up another homestead claim he had, as he alleges the fact is that he did, in order to homestead the lands in question herein, and that the defendant *Farmer*, although he well knew all and singular the premises and matters aforesaid, caused, procured and induced the Crown, in ignorance of the plaintiff's rights and position in regard to the lands in question in this suit, to issue to him, the defendant *Farmer*, the said letters patent; and the bill prays, among other things, that it may be declared that the said patent was issued improvidently and in ignorance of the plaintiff's right in the premises, and that the said patent may be set aside and be declared to be absolutely null and void and of no effect.

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Now, assuming the facts alleged in this bill to be true, as by the demurrer they are admitted to be, I must say that I cannot see how a doubt can be entertained that under the provisions of the Act 35 *Vic.*, ch. 23, sec. 33 and its sub-sections relating to homestead rights, the plaintiff, when he made his application for the lot in question, and paid his homestead fee and satisfied the local agent that the entry of the defendant on the books of the land office was in effect a fraud upon the provisions of the Act, was a person who, in the words of the Act, was entitled to be entered on the books of the land office for the lot as his homestead, and that having in good faith entered upon the lot as his homestead, which, upon the allegations in the bill admitted by the demurrer, I consider myself bound to regard him as having done, and that having, as is also admitted, made in good faith such improvements on the lot while he occupied it as a homestead and which he thought was secured to him by the statute, he is a person having such an interest in procuring the letters patent which have been issued to the defendant *Farmer* for the lot in question to be set aside, as having been issued either through fraud, or in error, or improvidence, as entitles the plaintiff to maintain this suit under the provisions of the 69th sec. of the Act, which enacts that

in all cases wherein patents for lands have issued through fraud, or in error or improvidence, any court, having competent jurisdiction in cases respecting real property in the province or place where such lands are situate, may upon action, bill, or plaint respecting such lands, and upon hearing of the parties interested, or upon default of the said parties after such notice of proceedings as the said court shall order, decree such patent to be void, and upon the registry of such decree in the office of the Registrar General of the Dominion, such patent shall be void to all intents.

If the allegations contained in this bill, admitted as they are to be true, are not sufficient within the provisions of this section to give to

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the plaintiff a *locus standi* as a party interested in having the letters patent issued, as is admitted, in fraud of the provisions of the act, and by error upon part of the government, and in ignorance of such facts, and through improvidence set aside, I am, I confess, unable to conceive any case wherein a *locus standi* in maintenance of a bill to set aside letters patent, as issued through fraud, or in error, or improvidence, can be accorded to any complainant.

I am of opinion, therefore, that the defendant's demurrer was rightly disallowed in the court below, and that this appeal should be dismissed with costs.

*Appeal allowed with costs.*

Solicitors for appellant: *Ross, Killam & Haggart.*

Solicitors for respondent: *McKenzie & Rankin.*

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## *THE DOMINION CONTROVERTED ELECTIONS ACT*, 1874.

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*Nov. 14.

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*Jan. 12.

## *CONTROVERTED ELECTION OF THE COUNTY OF MEGANTIC, PROVINCE OF QUEBEC.*

LOUIS ISRAEL FRÉCHETTE.....APPELLANT;

AND.

J. F. GOULET, *et al*.....RESPONDENTS.

ON APPEAL FROM THE SUPERIOR COURT PROVINCE OF QUEBEC.

*Election petition—Preliminary objections—Onus probandi.*

The election petition in this case complained of the return of the respondent as member elect for the County of *Megantic*, (*P Q.*,) for the House of Commons. The petition was met by preliminary ob-

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

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jections, in which the sitting member alleged, *inter alia*, that the petitioners were not electors, nor qualified to vote at the election in question, &c. A day having been fixed for the hearing of these preliminary objections, no evidence was given upon them, and they were dismissed by *Plamondon*, J., who held, following the practice adopted by the Superior Court of *Quebec*, sitting as an Election Court in the *L'Islet* case, *Duval* v. *Casgrain* (1), that the *onus probandi* was on the respondent to support such objections.

On appeal to the Supreme Co. rt of *Canada*, *Fournier*, *Henry* and *Gwynne*, JJ., were of opinion that the *onus probandi* was on the appellant, who by his preliminary objections had affirmed the disqualification of the petitioner.

*Contra*, *Ritchie*, C. J., and *Strong* and *Taschereau*, JJ.

The Court being equally divided, the judgment of the Court below stood affirmed without costs.

APPEAL from a judgment of the Election Court of the province of *Quebec* dismissing the preliminary objections filed by the present appellant to the election petition of the respondents.

In this case a petition was presented by the present respondents complaining of an undue election and return for the county of *Megantic* at the last general election for the House of Commons. The petition was met by preliminary objections, the first of which was that the petitioners were not electors, nor qualified to vote at the election in question A day having been fixed for the trial and hearing of these preliminary objections, no evidence was given upon them either by respondent or petitioners, and the court dismissed them.

The principal question which arose on this appeal was, on whom was the *onus probandi* of the facts set up by the preliminary objections ?

Mr. *Crepeau*, Q.C., and Mr. *Gormully*, for appellant.

Mr. *Irvine*, Q.C., for respondents.

The authorities relied on by counsel are referred to in the judgments hereinafter given.

(1) 19 L. C. Jur. 16.

RITCHIE, C.J.:—

This is an appeal from the decision of Mr. Justice *Plamondon*, dismissing the preliminary objections of the appellant to the petition of the respondents.

The main objection on which the appeal turns is:

"Because at the time of the election mentioned in the said petition, the said petitioners were not, and have not since been, electors according to the legal interpretation of the word, duly qualified to vote at the said election held in the month of June last."

On the 25th August the petitioners filed a notice to the respondent to have a day fixed for evidence and hearing on the merits of the preliminary objections; and, on the judge's order, it was continued to the 31st August. The record states that on that day "the court asks the defendant's attorney if he is ready to proceed with his *enquête* upon preliminary objections, the defendant's attorney being requested so to do, does not proceed. The parties are heard on preliminary objections and cause taken *en délibéré*," and the court adjourned until the 4th September, on which day judgment was rendered on these preliminary objections, as follows:

Les objections préliminaires produits par le défendeur à l'encontre de la pétition d'élection en cette cause sont au nombre de quinze. Les objections première, deuxième, quatrième, cinquième et treizième s'appuient sur l'affirmation de faits dont la preuve incombait au défendeur excipant.

Il n'a pas fait d'enquête au sujet de ces faits. La cour ne peut donc s'en occuper.

This was upon the ground that the burden of proof on the issues raised was upon the defendant and not on the petitioners. The question on this appeal is, therefore, on whom the burden rests?

The petitioners make the first assertion, an assertion essential to their case,—

That your petitioners were duly qualified electors at said election

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and had a right to vote thereat, and did vote thereat, and your petitioners are now duly qualified electors of said electoral district.

To this respondent pleads by way of "*objections preliminaires*" a denial of petitioners' assertion. Surely here is a perfect issue on a substantial and most material allegation, and unless substantiated, the petition, on which the petitioners' case rests, must fail, and therefore, it is no question of practice at all, nor matter of discretion as to who shall begin, as at *nisi prius*, nor is it a material question whether the party is benefited or injured by being required to commence, and all cases in reference thereto have, in my opinion, no bearing whatever on this case; it is a case of failure of proof on the part of the petitioners, and without which proof they cannot recover. Whenever a party sues in a representative character, such as executors, administrators, trustees, and the right to do so is disputed and put in issue, the party averring the right is always bound to establish it; in other words, the burden of proof is on him, because, if no proof is offered, he has failed to establish his right to sue, and again the affirmative is with him, and the evidence of his right to sue is within his own knowledge and is part of his case, which, when challenged, he must maintain. The question of a petitioner's status seems to me to be peculiarly a preliminary objection, which it is in the interest of all parties to have disposed of before costs are incurred on the issues on the merits, and indeed, where the status of the petitioner is put in issue, this must necessarily be first determined, because, if the petitioner has not the necessary qualification to enable him to petition, there can be no trial on the merits at all, because the ineligibility or disqualification of the petitioner being shewn, no further proceedings thereon should be had. That this is a preliminary objection contemplated by the statute, there

can be no doubt, because the statute expressly provides that when an objection is taken to the status of a petitioner, that is a preliminary objection, and then provides that these preliminary objections shall be tried within certain specified times under another provision.

In my opinion, when the statute provided that preliminary objections should be tried in the first instance, it did not in any way, directly or indirectly, expressly or by implication, intend to relieve the petitioner from the burthen of showing, when he complained of the election return, that he was a person duly qualified by law to do so, if this was disputed. There has then been no hearing of the objections, the Court, acting on the assumption that the burthen of proof was on the defendant, called on him to proceed to proof; it being my opinion, that the burthen of proof was on the petitioners, the judge should have so ruled, and should have called on them to proceed with their *enquête* and not on the respondent and if they then fail to do so, the judge should have sustained the objection and dismissed the petition. The course, however, the judge pursued was quite excusable, being in accordance with the case of *Duval* v. *Casgrain* (1), by which he considered himself bound. There was therefore a mis-trial, and we ought now to give the judgment the court below should have given, and declare that it is for the petitioner in the first instance to sustain his allegation of being an elector, and not on the defendant in the first instance to offer evidence to disprove his being so. I think the judgment of this court should be that the appeal should be allowed, but as the learned judge was guided by a procedure previously pursued in the province of *Quebec*, I should be disposed to remit the case back to the Superior Court, to call upon the party to proceed to his proof, and not to impose any

(1) 19 L. C. Jur. 16.

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costs in the case. I think the practice which is pursued in the province of *Quebec* should not affect us in this case, because the Dominion Election Act is applicable to all the provinces, and there should be uniformity upon a decision of this kind.

STRONG, J.:—

I concur with the Chief Justice in the view taken by him.

FOURNIER, J.:—

Je suis en faveur de renvoyer l'appel parceque cette cause doit être décidée par la cause de *Duval* v. *Casgrain* (1). Dans cette cause on a décidé que puisque le défendeur voulait changer l'ordre de l'issue et de la contestation, en produisant une objection préliminaire à la qualité du pétitionnaire, c'était au défendeur, qui par ses objections préliminaires affirmait la déqualification du pétitionnaire d'en faire la preuve.

Les raisons données en faveur de cette pratique par l'honorable juge qui a rendu jugement dans la cause de *Duval* v. *Casgrain* justifient le jugement dont est appel.

Je suis en conséquence d'opinion que le jugement de l'honorable juge *Plamondon* doit être confirmé.

HENRY, J.:—

The question for our decision is as to the correctness of the ruling of the learned judge before whom the petition in this case came for trial. The preliminary objections having been filed and having been denied, an issue was raised, and the one consideration—the only one indeed—is as to who should prove that issue. In the ordinary case of trials, he who alleges, even negatively, an affirmative matter, has thrown upon him by

(1) 19 L. C. Jur. 16.

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the allegation the necessity of proving it. This is one of the first principles of pleading, and, although the matter may be stated negatively, still it is he who raises the issue, even in a negative form, that is required to prove it. In this case the petitioners, no doubt on the trial of the petition, would have been required to show their status and give evidence of it. This is an allegation contained in the petition, and, as soon as it is denied, the issue was thrown upon the petitioners to prove their position, viz.: "That your petitioners were duly qualified electors at the election, and had the right to vote thereat, and did vote thereat, and your petitioners are duly qualified electors of the said electoral district." When issue is taken on these allegations, the parties are no doubt required to prove them. It becomes necessary, however, to consider what the object of preliminary objections is, and the course of procedure which has been followed in regard to them. The object is clearly, in taking an objection, either that the petitioners are not qualified, or that it was too late, or any other objection to ascertain and show whether the parties are correctly before the court. This is no doubt a matter for a preliminary objection. The question is who is to prove the position? Is it the party who takes it in the first place as a preliminary objection? The respondent says: "I undertake to allege;" and, in my opinion, if he alleges, the onus of proving the allegation is upon him for the purpose of determining that question as a preliminary question. That is the beginning. That is the first allegation, and we must keep it separate altogether from the petition, because that same issue is raised on the petition, and, if the objection were not taken as a preliminary one, it would come up to be tried in its ordinary way. The respondent, however, says virtually to the court: "I allege and will be prepared to show that these parties are not eligible as peti-

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tioners." That is the undertaking, and the object of filing a preliminary objection is for the purpose of enabling the respondent to show that the petitioners had no right to file the petition against him. That being the case, we have the right to look at the pleading which creates that issue. It is as follows: "That the said preliminary objections and each of them is false and unfounded in fact and in law, and expressly denies the same." There is the issue. Who raised it? Who made the first allegation? The respondent. It has been decided by the whole court in *Montreal* that the onus of proof is on the party who alleges facts which, if proved, would go to prevent the petition from being heard. The learned judge here followed that decision of the *Quebec* court. I take it, that is a matter of procedure, and I think the authorities go to show very strongly the position that, in a matter of procedure, there ought to be no appeal at all. It is discouraged, and the practice is said to be now almost done away with in *England*. It is true that that procedure has been adopted only in *Quebec*, and I am not at all sure it is not the correct one to be applied to all the provinces and all petitions. I think it tends to prevent those preliminary objections being taken unless the party is prepared to offer some proof. What would be the use of a party filing a preliminary objection unless he is prepared to prove it? The respondent, holding the seat, is induced to file preliminary objections for the delay consequent upon them, and until very recently it was a stay of the whole proceedings. By recent legislation, the trial of the election petition nevertheless may go on. If the party himself does not give the evidence which is necessary to stay the proceedings, the trial is going on, and I suppose that now the petition is before the judge for the very purpose of taking this evidence under the original petition, showing clearly

that it was the duty of the respondent, if he desired a decision that would avoid the petition, to allege and give evidence of what he did allege for the purpose of avoiding it.

Under these circumstances, I think the practice in the province of *Quebec* is the correct one, and will tend to prevent these preliminary objections being taken unless the party is prepared to give some evidence of them, because there is very little use in making preliminary objections on allegations which the respondent cannot sustain. The fact of these parties not being electors or having a right to vote, he could have proved as easily as the other parties. All he had to do was to produce the regular lists and show that they were not on them. It is alleged that, if they were on the lists, they were so fraudulently. Surely the party who alleges fraud is bound to prove it? He says: "You fraudulently got yourself put on that list." It is the duty of the party who alleges fraud, to prove it. I think that the learned judge was right, that it is the true principle, that it is for the furtherance of the ends of justice that that should be the rule, and I therefore think the appeal should be dismissed.

TASCHEREAU, J.:—

This petition contains the usual allegation that the petitioners were duly qualified electors and had a right to vote, and did vote at the election in question. To this allegation, the respondent in the court below, (present appellant,) pleaded as a preliminary objection, that the petitioners were not duly qualified electors at the said election, as they alleged. Is this not in substance a plea of general issue to this part of the petition? The petitioners say "we were duly qualified electors;" the respondent says "you were not duly qualified electors." Why, in such a case, the burden of

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proof is not to be on the petitioners, I cannot understand. There is no legal presumption in their favor, there is no *primâ facie* evidence in support of their allegation that I can see, the voters' list is not produced, and moreover the facts to be proved lie peculiarly within their own knowledge. It is not denied that in *England*, and with us formerly before the parliamentary committees, the *onus probandi* of these facts lies and did lie on the petitioners. Why it should lie with us on the respondent, because under our statute he pleads the petitioners want of qualification by preliminary objections, I cannot see. As held by Mr. Justice *Johnson*, in the *Montreal Centre* case (1), if the respondent does not contest the petitioner's right to petition by preliminary objection, the petition is at issue, and the respondent must be held to have admitted the petitioner's *locus standi*. Our statute allows him to deny the petitioner's *locus standi* by preliminary objection, and to have the issue on this decided before the trial; but the burden of proof still lies on the petitioner upon that issue, and this is not as a mere matter of procedure, but as a fundamental principle of law. I am of opinion to allow the appeal and to render the judgment that the court below ought to have rendered, following the rule *actore non probante, reus absolvitus*, and that is to say, dismiss the petition.

GWYNNE, J.:—

This is an appeal from a decision of Mr. Justice *Plamondon* in an election case. Certain preliminary objections had been filed in the matter of the contested election for the county of *Megantic*, wherein the above respondents were petitioners, and the above appellant was respondent in an election court in the district of *Arthabaska* and province of *Quebec*. It is only with

(1) 18 L. C. Jur. 323.

the first three objections that it is at all necessary for us to deal.

In and by his preliminary objections the above appellant insisted, by way of opposition to the status of the petitioners, that he ought not to be called upon to answer the substance and merits of the election petition of the petitioners, but that on the contrary, the said election petition should be dismissed with costs for the following reasons:

"1st. Because at the time of the election mentioned in the said petition, the said petitioners were not, and have not since been, electors according to the legal interpretation of the word duly qualified to vote at the said election held in the month of June last.

"2nd. Because neither of them is a subject of Her Majesty of full age possessing the qualities and qualifications of proprietor, tenant or occupant as required by law, and that if the names of the said petitioners or any of them are entered on the voter's lists of their respective municipalities such entry was made illegally by fraud and collusion on their part.

"3rd. Because there exists no legal voters lists duly homologated in the township where petitioner (*McCurdy*) resides, nor in the parish of *Ste Julie de Somerset*, where the other two petitioners reside."

The petitioners filed their answer to these preliminary objections and say that the same are and each and every of them is false and unfounded in fact and in law, and the petitioners expressly deny the same and the sufficiency thereof, wherefore the said petitioners pray for the dismissal of the said preliminary objections with costs.

The 31st day of August, 1882, having been appointed for taking evidence upon the matter alleged in the preliminary objections, a court was held for that purpose, at which counsel for the sitting member (the above

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appellant) and the petitioners attended, and the counsel for the above appellant did not, nor did the appellant himself offer any evidence in support of any of the allegations contained in his preliminary objections, and the learned judge, having been of opinion that the burthen of proving these allegations lay upon the appellant, dismissed the preliminary objections for the want of any evidence to support them. It is from his order dismissing the objections that this appeal is taken, and in my opinion the appeal should be dismissed, whether the learned judge was right or wrong in the opinion which he formed as to the party upon whom the burthen of proof lay.

The enquiry—upon whom does the burthen of proof rest when an issue between two parties is before a court—is practically the same as the inquiry—which party has the privilege, or incurs the duty, of beginning? The general rule upon the subject is that the issue must be proved by the party who states an affirmative, that is to say, he must begin, and not the party who states the negative; but a legal affirmative is not necessarily a grammatical affirmative, nor a legal negative a grammatical negative; on the contrary, a legal affirmative frequently assumes the shape of a grammatical negative, and a legal negative that of a grammatical affirmative, consequently a rule subsidiary to the above has been established, namely, that the issue must be proved by the party who states the affirmative in substance, that is the legal affirmative, not merely the affirmative; in form or the grammatical affirmative; that is to say, he incurs the duty to begin, but this duty to begin carrying with it the burthen of proving the issue, and which is expressed in the maxim *probandi necessitas illi incumbit qui agit*, raises only a mere question of practice and not of law.

In *Mills* v. *Barber* (1), to an action by an indorsee against the acceptor of a bill of exchange, the defendant pleaded that the bill of exchange was given without consideration and for the accommodation of the drawer and endorsed to the plaintiff without value, to which the plaintiff replied that it was endorsed to him for valuable consideration. At the trial a question arose whether the plaintiff was bound to prove consideration for the bill which he had by his replication affirmed he had given, or whether the defendant, who had in his plea affirmed the grammatical negative that the plaintiff took the bill without consideration, was not bound to show the want of consideration. *Alderson*, B., who tried the cause, held that the *onus probandi* lay on the defendant who had affirmed the grammatical negative, and the defendant, not being prepared to prove the want of consideration, the verdict passed for the plaintiff. The correctness of this ruling having been questioned upon a motion for a new trial, Lord *Abinger*, delivering the judgment of the court after a very full argument of the case, said: "It is rather a question of practice than of law," and after referring to cases in which a different practice had prevailed, he stated that after consultation with the judges of all the courts the general opinion which prevailed among them was that in such a case the *onus probandi* lay upon the defendant, and thenceforth the practice has been to require the defendant to prove the want of consideration in such a case. That it is a mere rule of practice further appears from the fact that the judges of all the courts have assumed to vary the practice in certain cases, as in libel, slander, criminal conversation, and indeed in all cases where the plaintiff goes for substantial unascertained damages, by giving to the plaintiff the right to begin, although the sole issue upon the record be

(1) 1 M. & W. 430.

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upon an affirmative plea the burthen of proving which the defendant has assumed. In *Mercer* v. *Whall* (1), where the circumstances under which the practice became established are stated, the matter is spoken of as merely a rule of practice, and where a wrong party is made to begin by the erroneous ruling of a judge at *nisi prius*, the only mode of rectifying that error is by a rule for a new trial, which in practice is never granted, unless it be made manifestly to appear that substantial injustice has resulted from that ruling (2). An appeal in such a case has never been heard of. Between cases arising before committees of the House of Commons and the present, there is this difference, that upon petitions before the House the whole case is at issue upon the averments in the petition, whereas in the case of preliminary objections, under our statute, there is no issue whatever upon the averments in the petition, but on the contrary the respondent below, the now appellant, propounds those objections which he affirms and relies upon as reasons why he should not be compelled to make any answer to, or to come to any issue upon the matters alleged in the petition. However, the contradictory decisions of Election Committees upon the point are, I think, in some measure capable of explanation upon the ground that these tribunals, also considered the point one of practice merely. In the *North Cheshire* case to which we have been referred (3), the committee was of opinion that, the petitioners' qualification and status as petitioners being disputed, they should prove the allegation of qualification averred in their petition before proceeding further. In the *Harwich* case (4) counsel for the sitting member objected to the qualification and status of the petitioner and pro-

(1) 5 Q. B. 462.

(2) *Edwards* v. *Matthews*, 11 Jur. 398; and *Bramford* v. *Freeman*, 5 Ex. 734.

(3) 1 P. R. & D. 215.

(4) 1 P. R. & D. 73.

posed to offer evidence in support of his objection, but the committee in that case without calling on the other side resolved that the petitioner, having claimed to vote, and having actually voted at the election, the committee are of opinion they must proceed with the case. From the *Dundalk* case (1) it appears to me to be clear that the committee in that case thought that the burthen of proving that a person averred not to be a natural born British subject lay upon the person making the averment; for the resolution of the committee was, that it has not been proved that the sitting member is disqualified as an alien.

In *Duval* v. *Casgrain* (2) the Court of Review, sitting as an Election Court for the district of *Quebec*, in which district the county of *Megantic* is situate, held, that upon a preliminary objection calling in question the status and qualification of a petitioner, the burthen of proof lay upon the party who, by his preliminary objection, had affirmed the disqualification. Without at present enquiring whether that was a right or a wrong decision, it seems to me to be sufficient to say that it was the decision of an election court, which was at the time the ultimate court for deciding all questions arising upon election cases within the district in which the county of *Megantic* is situate, and of a court competent to establish its own practice upon the point, and the learned judge, before whom the question in the present case arose, having that case before him, cannot surely, with any degree of propriety, be said to have erred in following the decision of a full court of which he is only a single member. *Stare decisis* is a good rule in all cases, but especially in points of practice involving no substance or merit whatever. To countenance an appeal in such a case as the present—involving no question of law, of substance or of merit,

(1) 1 P. R. & D. 89. (2) 19 L. C. Jur. 16.

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and where no injury whatever is or can be suggested as having been done to the appellant, would be, as it appears to me, not only unprecedented, but calculated to encourage the setting up of frivolous and vexatious objections made for the purpose of defeating or retarding the investigation of a subject in which not the mere interests of a private suitor but those of the public are involved, of frustrating the ends of justice and harrassing petitioners with unnecessary costs.

The respondent below (the now appellant) had the same facility of access as the petitioners had to the voter's list. That was a public document no more in the possession of the one party than of the other, but equally accessible to both, and if the above appellant did not choose to produce it or to offer any evidence of the assertions propounded by him in his preliminary objections, the natural and reasonable conclusion appears to be that it would not have supported his case, for if produced, it must have afforded *primâ facie* evidence of the truth or falsity of his assertions. The appeal which is given to this court from a judgment upon preliminary objections is, as it appears to me, only from a decision affecting the substance and merit of a case, either on some point of law or upon some fact established in evidence, and not upon such a mere point of practice as the question upon whom rests the duty to begin to offer evidence of the matter in issue—a point which is not the subject of appeal when arising in any other court, and which, however erroneous the decision given upon it by the judge trying the issue may be, does not constitute foundation even for a rule for a new trial, unless it be manifestly made to appear that substantial injustice has been the result.

But I am of opinion that the decision appealed from in this case, as well as that of the Court of Review in *Duval* v. *Casgrain*, is in every respect correct. I have

already noticed the fact that these preliminary objections to the status of petitioners are not to be regarded as taking issue upon any averment in the petition. They are not negations of any averments in the petition. They are on the contrary reasons first propounded by the sitting member as reasons why he should not be called upon to give any answer to, or to come to any issue upon, anything contained in the petition; the averments in the preliminary objections are in fact legal affirmations, however negative in form they may be; and in truth, as appears by the answer to them which raises the only issue that is raised upon them, such answer is not even affirmative in form. The answer is, that the preliminary objections are and each of them is untrue and without foundation, and the petitioners expressly deny the same, treating the objections as affirming the legal or substantial affirmative, to which (in order to risk an issue) the petitioners supply the negative.

The contents of the election petition do not, as it appears to me, constitute any part of the issue which is raised by the preliminary objections and the answer thereto. The issue is made up of the preliminary objections affirming the disqualification of the persons who are petitioners in the election petition, and their answer denying the truth of the matters affirmed in the preliminary objections. An election court or judge trying that issue has not, as it seems to me, any occasion, or indeed right, to refer to the election petition to see what averments are made in it. The issue is raised upon the legal affirmative of a grammatical negative contained in the preliminary objections and the denial of such legal affirmative contained in the answer filed to the preliminary objections. Now, in *Amos* v. *Hughes* (1) the plaintiff, in his declaration,

(1) 1 Mood. & Rob. 464.

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alleged as a breach of contract that the defendant did not emboss certain calico in a workmanlike manner, the defendant pleaded that he did emboss the calico in a workmanlike manner. It was held that the *onus probandi* lay on the plaintiff; his was the legal affirmative although the defendant's was the grammatical one.

*Mills* v. *Barber*, to which I have already alluded, was a similar case. So in *Soward* v. *Leggatt* (1), in an action for breach of covenant to repair, the declaration alleged that the premises were not kept in repair, to which the defendant pleaded that they were kept in repair, it was held that the *onus probandi* lay on the plaintiff as the asserter of the legal affirmative. So in *Ashby* v. *Bates* (2), in an action by executors on a life policy, the plaintiffs in their declaration averred that the assured was not afflicted with rupture or any other disease at the time of the assurance, to this the defendant pleaded that the assured was suffering from rupture at the time and had concealed the fact. The court held that the declaration involved the substantial or legal affirmative, although it was the plea which was affirmative in form, and the *onus probandi* was held to lie upon the plaintiffs, whose duty therefore it was to begin. *Rolfe*, B., in this case, said that he considered it a sort of scandal to the administration of justice that this question should ever be made *per se* a ground for a new trial; he says that he should have thought it much better if the courts had laid down some general rule that the discretion of the judge trying a case should, upon such a point, be conclusive. He therefore, it is plain, considered the question one of practice merely, but the observations of *Alderson*, B., are quite appropriate to the present case. He says (3):

> The first assertion [upon which the issue arose,] was made by

(1) 7 C. & P. 613. (2) 15 M. & W. 589.
(3) P. 595.

the plaintiffs. The defendant has contradicted what the plaintiffs affirmed, and the real issue is whether what they affirmed is true—if true it is for the plaintiffs to prove its truth.

Now in the case of these preliminary objections in election cases, there being, as I have shown, no issue upon the averments in the petition, but the record of the issue consisting of the averments propounded in the preliminary objections, and of the answer filed thereto, contradicting what was so affirmed, it is plain that the real issue is whether what is affirmed in those objections be true, and the *onus probandi* therefore lies upon the sitting member, the affirmant therein. He plainly is the person who, if no evidence at all were offered, must fail, as having failed to support what he had affirmed, and which the petitioners had only contradicted, so putting him upon proof of what he had asserted. The propriety of this conclusion appears to me to be established beyond question when we consider the formalities prescribed by statute to be observed in the construction of the voters list and its object.

By the 40th sec. of Dominion statute, 37 *Vic.*, ch. 9, it is enacted that, subject to certain exceptions:

> All persons qualified to vote at the election of representatives in the House of Assembly of the several provinces composing the Dominion of *Canada*, and no others shall, be entitled to vote at the election of members of the House of Commons of *Canada* for the several electoral districts comprised within such provinces respectively: and all lists of voters made and prepared, and which would according to the laws in force in the said several provinces be used if the election were that of a representative to the House of Assembly of the Province in which the election is held, where such lists are required to be made, shall be the lists of voters which shall be used at the election of members of the House of Commons to be held under the provi ions of this Act.

Now by "*Quebec* Election Act," 38 *Vic.*, ch. 7, sec. 7, it is enacted that no person shall be entitled to vote at the election of a member of the Legislative Assembly of that province unless at the time of

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voting he be an elector entered as owner, tenant or occupant upon the list of electors in force. Then the most stringent provisions are enacted so as to ensure perfect accuracy in the preparation of the lists.

By section 8 it is enacted, that no person shall be entered upon the list unless he be of the male sex, of full age, and a subject of Her Majesty by birth or naturalization, and not otherwise legally incapacitated, and actually and in good faith owner or occupant of real estate of the estimated value on the valuation roll in force, at the sum of at least $300 in any city municipality, and at $200 in real value, or $20 in annual value, in any other municipality, or be a tenant in good faith, paying an annual rent for real estate of at least $30 in any city municipality, or of at least $20 in any other municipality.

Sec. 11 defines the persons who are disqualified from being on the list.

Sec. 12 to 26 inclusive provide most stringent regulalations for the preparation of the list, among these, by section 19, it is enacted that the secretary-treasurer, whose duty it is to prepare the list, shall certify in duplicate the correctness of the list (when prepared) by his oath to the effect that to the best of his knowledge and belief the list is correct, and that nothing has been inserted therein or omitted therefrom unduly or by fraud, and by sec. 20 it is enacted that one of the duplicates of the list so attested shall be kept in the office of the secretary treasurer at the disposal of and for the information of all persons interested, of which, by sec. 21, public notice shall be given and published in the same manner as notices for municipal purposes in the municipality for which the list has been prepared. Sec. 27 to 40, inclusive, provide for the examination and putting into force of the list. The examination is, by sec. 27, to be made by the council of

the municipality even in the absence of any complaint. By secs. 28 and 29 any person who deems himself aggrieved by being wrongly inserted upon or omitted from the list may complain, or any person on the list may complain of the insertion upon the list of any unqualified person or the omission therefrom of any qualified person, and after investigation of the list and of the complaints relating to it, the council of the municipality may confirm or correct each duplicate of the list; and by section 35 it is enacted that the list shall come into force at the expiration of 30 days following the notice given in virtue of sec. 21, and shall remain in force until the month of March then next, and thereafter until a new list is made and put in force under the authority of the Act, so that when the first list should be made under the Act the municipality could never be without a correct list; and by sec. 37 it is enacted that it should be the duty of the secretary treasurer as as soon as the list should come into force to certify to its correctness and to the time when it came into force, byhis certificate at the end of the list,in a form prescribed by the Act; and by the 38th section that one of the duplicates of the list should be kept of record in the archives of the municipality, and the other transmitted to the registrar of the registration division in which the municipality is situate, to be preserved by such officer and remain of record in his office (sec. 40.) Then by sec. 41, as amended by 43 and 44 *Vic.*, ch. 15, it was enacted that: any elector of the electoral division might appeal from any decision of the council confirming, correcting, or amending the list to the judge of the Superior Court of the district within fifteen days following such decision, by means of a petition in which should be briefly set forth the reasons of appeal, and by sec. 48 that the decision of the judge upon any such appeal should be final.

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Now, after all these formalities prescribed by statute for the preparation of the list by a public officer obliged to swear to its correctness have been complied with, and after the examination of the list by the council of the municipality, and the opportunity given to every elector to complain of the improper insertion upon, or omission from, the list of any person, and to appeal if dissatisfied with the decision of the council to the judge of the Superior Court, it is impossible to arrive at any other conclusion than that the list so prepared, when finally completed and filed of record in the offices appointed for that purpose, is *primâ facie* (if not conclusive) evidence of every thing contained in it; it affords therefore at least *primâ facie* evidence that every person inserted upon it as an elector is in every respect qualified, both as a subject of Her Majesty, and of full age, and having the necessary property qualification, and not otherwise disqualified, for none but such duly qualified persons are permitted to be inserted upon it, and its correctness is guaranteed by the oath of the public officer entrusted with the preparation of it. The maxim *omnia presumuntur rite esse acta* must apply, any other conclusion would make all the stringent regulations enacted by the statute to be observed in the preparation of the list as a useless, solemn farce, and a great waste of time, care, diligence, legal investigation and circumspection. The list, therefore, being *primâ facie* evidence of the due qualification as an elector of every person inserted upon it, the burthen of proving it to be incorrect, after its final completion and becoming matter of record (if it is then at all open to further investigation), must clearly rest upon the person alleging its inaccuracy, and insisting that a person inserted upon it as duly qualified is, for any reason, not qualified and was wrongly placed upon it.

If the allegation be that a petitioner is not qualified

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by reason of his name not being on the list, that is clearly a legal affirmative, the burthen of proving which, upon the authority of all the cases, rests upon the party making the allegation, and as the evidence in such a case is the list itself, which is a public document and matter of record, and accessible to the sitting member who makes the allegation equally as to the petitioners who deny it, if the party making the allegation should decline or neglect to produce the only evidence capable of being produced in the given case, he is the party who must fail as neglecting or declining to produce evidence of an allegation made by himself. Here, however, the averment is not that the petitioners are not upon the list, but the averment is put hypothetically, that, if upon it, they are so by fraud, though no fraud is alleged or suggested, and if there had been any fraud alleged, the party alleging it was the party to prove it—of that there can be no doubt. I cannot, therefore, doubt the correctness of the judgment of the learned judge whose decision is appealed from, namely, that the *onus probandi* lay upon the sitting member who had filed the preliminary objections; indeed he might, in my judgment, have well gone further and pronounced the objections to be insufficiently pleaded as vague, uncertain, indefinite, devoid of all the essentials of good, and possessed of many of the vices of bad pleading; but it is not necessary in the view which I have taken to dwell upon this point.

The appeal in my judgment should be dismissed with costs.

*Appeal dismissed without costs.*

Solicitor for appellant: *Eugene Crepeau.*

Solicitors for respondents: *Irvine* and *Pemberton.*

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*Feb'y.20,22.

## *THE DOMINION CONTROVERTED ELECTIONS ACT*, 1874.

## *ELECTION PETITION FOR THE COUNTY OF KING'S COUNTY, PROVINCE OF NOVA SCOTIA.*

DAVID M. DICKIE.....APPELLANT;

AND

DOUGLAS B. WOODWORTH.....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

*Election appeal—Exparte order by Judge extending time for service of petition—Rule rescinding the same—Right of appeal from—* 42 *Vic., ch.* 39, *The Supreme Court Amendment Act of* 1879, *sec.* 10.

On the 16th August, 1882, upon the *exparte* application of the solicitor for petitioner, *Rigby*, J., granted an order extending for twenty days the time of the service of the petition and of the notice of presentation thereof, and of the security having being filed and the copy of the receipt for said security. On the 25th August, 1882, the respondent obtained from *Rigby*, J., a rule *nisi* to set aside the order of the 16th August.

On the 27th September, 1882, this rule *nisi* was made absolute with costs on the ground that the order of the 16th August was improvidently granted and without sufficient cause shown.

On the 30th September, 1882, on the application of the petitioner, supported by affidavits, *Rigby*, J., made another order extending to the 15th of October then next the time for service of notice of presentation of petition and of security with a copy of petition.

On the 16th of October, *Rigby*, J., granted a rule *nisi* (returnable before the Supreme Court of *Halifax*,) to set aside the

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

petition, the presentation thereof, the order made on the 30th September preceding the service of petition, &c., and all further proceedings.

On the 15th January, 1883, this rule *nisi* was made absolute, without costs, by the Supreme Court of *Nova Scotia*, on the principal ground that the affidavits on which the *exparte* order of the 30th September was granted disclosed no facts unknown to the petitioner when the order of the 16th August was obtained. The petitioner thereupon appealed to the Supreme Court of *Canada*.

*Held*,—(*Fournier* and *Henry*, JJ., dissenting), that the rule appealed from was not "a judgment, rule, order, or decision on a preliminary objection" from which an appeal would lie under section 10, 42 *Vic.*, *ch.* 39—(The Supreme Court Amendment Act of 1879.)

APPEAL from a judgment of the Supreme Court of *Nova Scotia* making absolute without costs a rule *nisi* to set aside a previous order of *Rigby*, J., made in the matter of the election for *King's* county, on the 30th September, 1882, and the service of the copy of the petition, together with the presentation thereof, and the other papers served under the authority of the said order.

On the 5th day of August, 1882, the petition herein was presented at the office of the clerk of the court at *Halifax*.

The respondent was not within five days served with a copy of the petition.

On the 16th day of August, 1882, an order extending the time for service of the petition, &c., was granted by *Rigby*, J., upon the affidavits of the sheriff of *King's* county and of the petitioner. On the 31st day of August, 1882, the respondent herein was under the last-mentioned order duly served with a copy of the said petition.

On the 25th day of August, 1882, an order *nisi* was granted by *Rigby*, J., to set aside the last-mentioned order and the service of the said copy of the said petition.

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On the 27th September, 1882, the last-mentioned order was made absolute, on the ground, as appears by the judgment of the learned judge, that his *exparte* order of the 16th August extending the time for service was improvidently granted

On the 30th of September, 1882, *Rigby*, J, granted a new order extending the time for service to the 15th October, on affidavits of the said petitioner, the said sheriff, and of the agent of the said petitioner, and on other papers on file in the said petition.

On the 12th of October, 1882, the said respondent was, under the last-mentioned order, duly served with a copy of the said petition.

On the 16th of October, 1882, *Rigby*, J., granted an order *nisi*, returnable before the Supreme Court of *Nova Scotia in banco*, to set aside the second service of the said petition, on the grounds, amongst others, that the said last-mentioned order was obtained on a second application and on a state of facts known to the petitioner and his counsel at the time when the first order for extension of the time for service was applied for.

On the 15th day of January, 1883, the said last-mentioned order *nisi* was made absolute by the court *in banco* on the last-mentioned ground solely, and the present appeal is from the rule making that order absolute.

On motion to quash the appeal for want of jurisdiction, it was contended that the judgment appealed from was not a "judgment, decision, rule or order" which comes within the meaning of the 10th section of the Supreme Court and Exchequer Court Amendment Act of 1879.

*H. McD. Henry*, Q.C. for appellant.

Mr. *Hector Cameron*, Q.C. for respondent.

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RITCHIE, C J.:—

The petitioner in this case allowed the time prescribed by the statute to pass; he then applied *exparte* to the judge for an extension of time within which to serve the petitioner, which the judge granted, but subsequently, on the *exparte* application of the respondent on cause shown, rescinded the order granting the extension, on the ground that the order was made improvidently. The petitioner made a new application to the judge seeking to have this last order rescinded and further time granted; the judge granted a rule *nisi* returnable before the full court; on cause shewn the court refused to interfere, on the ground that, inasmuch as all the facts set forth, and materials on which this second application was based, were in the knowledge or possession of the petitioner at the time he made his first application, a second application was not open to him.

The judge having in the first instance made an *exparte* order, it was quite competent for him to rescind that order, on its being shown to him that it ought not to have been granted, and when rescinded it was as if it had never been granted, and the petitioner, though served in fact before its rescission, on its rescission ceased to be served in law, such service being of no force or effect, the rescission simply amounting to a refusal to extend the time. I do not think it can be for a moment contended that from such a refusal there was any appeal to this court.

Again, when the petitioner made his second application for the extension and the Court refused to make the order *nisi*, this too was nothing more than a refusal to extend the time. It appears to me, as at present advised, that the ground on which the Court refused to entertain the application, if called on to decide the question, was amply sufficient to justify such refusal,

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and I am quite at a loss to understand how this refusal can be appealed from any more than if the judge had refused to entertain the application in the first instance. In *Brassard* v. *Langevin* (1), it was decided that there could only be an appeal on the merits not on preliminary objections, and subsequently the statute was passed allowing an appeal from a judgment upon preliminary objections. I cannot look upon this as an objection in the nature of a preliminary objection such as the statute contemplates, and therefore the motion to quash should be granted with costs.

STRONG, J.:

I concur with the Chief Justice. I think this question ought to be looked upon as *res judicata*. Before the statute of 1878 there was no appeal from any decision on an election petition, except on the merits, and it was so held by this court in the second *Charlevoix* case. By the Act of 1879 an appeal is given from any decision on a preliminary objection which, if allowed, is final and conclusive and puts an end to the petition. By the context of the statute it is clear that what is meant is a judgment upon a substantial objection raised by the sitting member against the petition and not a decision on a mere point of practice or procedure. This is clearly not such a preliminary objection as comes within the statutory provision, and if we were to entertain this appeal we should be opening the door to appeals from every incidental order made during the pendency of a petition. I am, therefore, of opinion that this appeal is without any statutory authority to warrant it.

FOURNIER, J.:—

In this case there was a service of the petition, and

(1) 2 Can. S. C. Rep. 319.

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Fournier, J.

whether good or bad there was a service. Now the usual way to take objection to an irregular service is by preliminary objection, and in this case the respondent instead of doing this, took out a rule *nisi* to set aside this service as irregular, and have the petition dismissed. In my opinion there is no difference whatever as to the result; the difference, if any, is in words. The statute has not defined what shall be considered a preliminary objection. In this case, as in the case of *Brassard* v. *Langevin*, the objection taken is to the irregularity of the service, and such objection could be taken as a preliminary objection. I think, therefore, that the Supreme Court, after the judge had granted an extension of time for making service, could not set aside that service or revise his order. There is no power given by the statute to the Supreme Court of *Nova Scotia* to set aside a service and put an end to a petition on appeal.

HENRY, J.:—

I have fully considered this case in regard to the whole question of election trials provided for by the Legislature, and the question in the case of *Brassard* v. *Langevin*. This court decided that the objections taken in that case were preliminary objections, and that under the statute which gave an appeal to this court in election petitions there was no appeal, except from a decision after the trial of the merits. Then the Legislature steps in and provides in the Act of 1879 for an appeal from an order, rule, or decision on preliminary objections. The statute says:

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; Provided always that an appeal in the last

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mentioned case shall not operate as a stay of proceedings, or to delay the trial of the petition, unless the court, or a judge of the court appealed from, shall so order; and provided also that no appeals shall be allowed under this section in cases in litigation and now pending, except cases where the appeal has been allowed and duly filed.

Now, what are the preliminary objections here, and for what object was this rule *nisi* taken out?

I will first refer to the position of the case as it stood when the learned judge granted the second order to allow the service to be made, and extended the time for making it. He had before him the affidavits and he decided that the first order he granted should be rescinded. Whether he was right or wrong in coming to that conclusion, it is not necessary for us now to say, nor whether he had the right to pass the second order or not. However he made the order granting an extension of time for serving the petition, and having done so, he was *functus officio*. If the respondent was dissatisfied with that order the statute provided an appeal to this court; he did not appeal, but applied to the judge to set aside his own order. I have looked at the rule and it reads as follows:

Upon hearing read the affidavit of *Douglas B. Woodworth*, sworn herein the 23rd day of August last past, the affidavit of *Simon H. Holmes*, sworn herein the 23rd day of August last past, the affidavit of the said *Douglas B. Woodworth*, sworn herein the 16th day of October instant, and the exhibits thereto annexed, the second affidavit of *Douglas B. Woodworth*, sworn herein the 16th day of October instant, without exhibits, the affidavit of *Watson Bishop*, sworn herein on the 14th day of October, instant, and the exhibits thereto annexed, the affidavit of *John Redden*, sworn herein the 14th day of October instant, the affidavit of *Stephen Belcher*, sworn herein the 13th day of October instant, the affidavit of *Stephen Belcher*, sworn herein the 28th day of September last past, the affidavit of *Stephen Belcher*, sworn herein the 15th day of August last past, the affidavit of *David M. Dickie*, sworn herein the 28th day of September, last past, the affidavit of *David M. Dickie*, sworn herein the 14th day of August last past, the affidavit of *Hugh McD. Henry*, sworn herein

the 29th day of September, last past, the affidavit of *James P. Cunningham*, sworn herein the 13th day of October instant, the order of his Lordship Mr. Justice *Rigby*, made herein on the 16th day of August, last past, and the affidavits and papers on which the same was granted, the order *nisi* to set aside the said order granted by his Lordship Mr. Justice *Rigby*, the 25th day of August last past, the judgment or decision of his Lordship Mr. Justice *Rigby*, filed herein on the 26th day of September, A.D. 1872, the order absolute thereon, dated the 27th day of September last past, and order of his Lordship Mr. Justice *Rigby* granted herein the 30th day of September last past, and the affidavits and papers on which the same was granted, the affidavits and papers on file herein, and on motion.

I do order that the petition on file herein, the presentation thereof, and all proceedings now outstanding had on the said petition, or in virtue thereof, the order of his Lordship Mr. Justice *Rigby*, made herein the 30th day of September last past, the service of the said order and all proceedings had thereon, the service of the said petition, notice of presentation and of the security made, had and effected under and in virtue of the said order on the said 30th of September, the deposit receipt, and the service of the same served on the respondent herein, be set aside and all further proceedings on the said petition stayed on the following grounds [giving the grounds].

Unless cause to the contrary be shewn before the Supreme Court at *Halifax*, on the first day of the ensuing term thereof, in December.

This rule the learned judge made returnable before the full court, which court I find make this rule absolute upon the ground that the judge had no power to pass the second order.

In the first place, I do not recognize the jurisdiction of the Supreme Court of *Nova Scotia* to deal with such a case, nor that the judge has the power to create such a jurisdiction by making his order returnable to the court. In my opinion what the learned judge should have said is, "I have exercised my discretion, and if I have erred, you have a right of appeal."

I am perfectly aware that there are some cases where a judge can rescind his own order, but this is not such a case. As it is said in *Chitty's* Practice of the Law (1):

(1) Vol. 3, p. 35.

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Unless a judge's order has been made under the authority of a statute and thereby deemed to be final, or it has been previously agreed by the parties that it shall be final, either party dissatisfied with his decision may, if he apply in a reasonable time, move the full court "to set aside" or "rescind such order," and all proceedings taken thereupon. 'When an order has been made under an express power given by statute, it is sometimes conclusive, and is not subject to review, unless an appeal to the court be expressly or impliedly given.

In the case before us the learned judge has given his decision based on the authority of a statute, and the present appellant was by his decision given a statutory right to serve his petition. Can it be said that a week after the judge can take away that right? If the judge had even no right to make that second order, he had not the right to, or power to, set it aside. The proceeding here is not an appeal from a mere matter of procedure, but from an order putting an end to the petition, and if the court below had no right to rescind the judge's order this court has the right to reverse their decision. Now I maintain, taking the whole election law together, that this court alone could rescind the judge's order. By holding the contrary, we decide that a judge can give judgment in favor of one of the parties and subsequently reverse his own judgment—a power which no judge possesses. I think that the judge in this case having once granted the order, neither he nor the Supreme Court of *Nova Scotia* could set it aside; certainly not because it was considered he had come to a wrong conclusion.

Now, let us look at the preliminary objections.

*Douglas B Woodworth*, the respondent or person against whose election and return a petition of *David M. Dickie* has been filed, objects to any further proceedings herein on or in virtue of the said petition on the following grounds which he presents as preliminary objections or grounds of insufficiency against the said petition or any further proceedings thereon.

1. Because the said petition was never presented.

2. Because the said petition was never presented by a duly quali-

fied person as required by the provisions of the Dominion Controverted Elections Act, 1874.

3. Because the said petition was not left at the office of the prothonotary of the Supreme Court at *Halifax*.

4. Because the said petition was not presented within thirty days after the publication, in the *Canada Gazatte*, of the receipt of the return to the writ of election of a member for the County of *King's* County aforesaid, by the Clerk of the Crown in Chancery, and it does not specifically allege any act of bribery to have been committed since the time of such return.

5. Because the said petition was not delivered at the office of the clerk of this court during office hours as prescribed by the said Act.

6. Because the said petition was not delivered at the office of the clerk of this court, or left at the office of the prothonotary, at *Halifax*, by a person duly qualified, within thirty days after the publication in the *Canada Gazette* of the receipt of and return to the writ of election of a member for the County of *King's* County, by the Clerk of the Crown in Chancery, and it does not specially allege any Act of bribery to have been committed since the time of said return.

7. Because the said petition was not presented by a person duly qualified to do so under the provisions of the Dominion Controverted Elections Act, 1874.

8. Because the said petition was not presented by a person who had a right to vote at the election to which the petition relates, or by a candidate at such election.

9. Because the said petition was not presented by a person who had a right to vote at the election to which the petition relates, or a candidate at such election, within thirty days after the publication in the *Canada Gazette* of the receipt of the return to the writ of election of a member for the said County of *King's* County by the Clerk of the Crown in Chancery, and it does not specifically allege any act of bribery to have been committed since the time of such return.

10. Because notice of the presentation of the petition and of the security, accompanied with a copy of the petition, was not served on the respondent within five days after the day on which the petition was presented, or within any prescribed time, or within any longer time allowed by the court or any judge thereof.

11. Because notice of the presentation of the petition and of the security, accompanied with a copy of the petition, was not served by petitioner on the respondent, as required by the provisions of the Dominion Controverted Elections Act, 1874.

12. Because the said petition and notice of the date of the pre-

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sentation thereof and a copy of the deposit receipt were not served on the respondent, as required by the provisions of the Dominion Controverted Elections Act, 1874.

13. Because the notice of the presentation of the petition and of the security accompanied with a copy of the petition was not served on the respondent within five days after the day on which the petition was presented, or within the prescribed time, and, if a longer time for service was allowed by the court or a judge thereof, the said allowance was not made until after the time prescribed for said service had expired, and the said allowance on that account was irregular and void, and the said court or judge had then no power or authority to allow any longer time for such service.

14. Because the order of Mr. Justice *Rigby*, dated at *Halifax* the thirtieth day of September, A.D. 1882, extending the time for the service of the said petition, notice of presentation thereof, and of the security, and by virtue of which the same were served, is *ultra vires* and was not granted until the prescribed time for the service thereof had expired, and after the power and authority of the court or a judge thereof to make any such order had ceased to exist.

15. Because notice of the presentation of the said petition and of the security, accompanied with a copy of the said petition, was not served on the respondent within five days after the day on which the petition was presented, or within the prescribed time, and no longer time for such service was allowed by the court or a judge thereof.

16. Because the deposit receipt, a copy of which was served on the respondent, was not signed by the clerk of the court as required by the provisions of the Dominion Controverted Elections Act, 1874.

17. Because an order extending the time for the service of the said petition and notice had been previously granted by a judge of this court and afterwards discharged on the merits before the said order, dated at *Halifax* the thirtieth day of September, A.D. 1882, was obtained, and the said last-mentioned order was obtained on a second application and on a state of facts fully known to the petitioner and his counsel at the time the first order was applied for.

18. Because the said order of the thirtieth of September, aforesaid, extends the time for the service of the said petition and notice, until the fifteenth day of October, 1882, and allows the said petitioner to serve respondent therewith on the said fifteenth day of October, which day was Sunday, and the said order is therefore illegal and void.

19. Because an order had been granted under the said act, extending the time for the service of the petition, and notices herein pre-

viously to the said order of the thirtieth of September, and the statute could not be a second time invoked to secure an extension of time for the service of the said petition and notice.

20. Because an order extending the time for the service of the said petition and notice had been previously granted by a judge of this court, and afterwards discharged, because the same had been granted without sufficient cause shown, previously to the said order of the thirtieth of September being granted, and no new facts have arisen or transpired since the granting of the first of said orders on account of which the said order of the thirtieth of September should be granted.

21. And because the said order of the thirtieth of September was improvidently granted, and without any sufficient cause or reason.

22. And the respondent prays that this honorable court, or a judge thereof, may hear the petitioner and respondent on and as to the foregoing preliminary objections and grounds of insufficiency, and decide the same in a summary manner.

Dated at *Halifax*, in the county of *Halifax*, this seventeenth day of October, A.D 1882.

*DOUGLAS B. WOODWORTH.*

Surely these are all legal questions. There is here no question of fraud or misrepresentation in obtaining the order upon which the respondent would be entitled to move to have the order rescinded in the first instance by the judge of the Election Court, and afterwards if unsuccessful by appeal to this court.

Looking at the case, of *Brassard* v. *Langevin* (1) which we decided here, [the learned Judge then read the head note in that case,] are not these the same objections that are taken in this rule *nisi*. A majority of the court in that case held that they were preliminary objections, and therefore not appealable under the law as it then stood. I can see no difference in the objection taken here. For these reasons I think this motion to quash should not be allowed to prevail.

TASCHEREAU, J.:—

I am of opinion that the appeal should be quashed

(1) 2 Can. S. C. R. 319.

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for the reasons given by the Chief Justice and Mr. Justice *Strong*.

GWYNNE, J.:—

I am also of opinion that the judgment of the Supreme Court, making a rule *nisi* to set aside a previous order granted by Mr. Justice *Rigby ex parte* absolute, is not appealable under the Supreme and Exchequer Court Amendment Act of 1879.

*Appeal quashed with costs.*

Solicitors for appellant: *Henry & Weston.*

Solicitor for respondent: *J. N. Ritchie.*

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*Oct. 24.

## *DOMINION CONTROVERTED ELECTIONS ACT*, 1874.

## *ELECTION PETITION FOR THE COUNTY OF GLOUCESTER, PROVINCE OF NEW BRUNSWICK.*

DENNIS COMMEAU.....APPELLANT;

AND

KENNEDY BURNS.....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

*Appeal on Election Petition—42 Vic., ch 39 (The Supreme and Exchequer Court Amendment Act of 1879), sec. 10, construction of—Rule absolute by Court in banc to rescind order of a Judge in Chambers—Preliminary objection.*

A petition was duly filed and presented by appellant on the 5th of August, 1883, under the "Dominion Controverted Elections Act, 1874," against the return of respondent. Preliminary objections

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

were filed by respondent, and before the same came on for hearing the attorney and agent of respondent obtained on the 3th October from Mr. Justice *Weldon* an order authorizing the withdrawal of the deposit money and removal of the petition off the files The money was withdrawn, but shortly afterwards, in January, 1883, the appellant, alleging he had had no knowledge of the proceedings taken by his agent and attorney, obtained upon summons a second order from Mr. Justice *Weldon* rescinding his prior order of 13th October, 1882, and directing that upon the appellant re-paying to the clerk of the Court, the amount of the security the petition be restored, and that the appellant be at liberty to proceed. Against this order of January, 1883, the respondent appealed to the Supreme Court of *New Brunswick*, and the Court gave judgment, rescinding it. Thereupon petitioner appealed to the Supreme Court of *Canada*.

*Held*,—That the judgment appealed from is not a judgment on a preliminary objection within the meaning of 42 *Vic.*, ch. 39, sec. 10, (The Supreme Court Amendment Act, 1879), and therefore not appealable.

*Dickie* v. *Woodworth* (1) followed.

APPEAL from a judgment of the Supreme Court of *New Brunswick* making absolute a rule *nisi* calling upon the petitioner to show cause why an order of Mr. Justice *Weldon*, made on the seventeenth January, 1883, in the matter of the Dominion Controverted Election for the County of *Gloucester*, Province of *New Brunswick*, whereby he rescinded a previous order which he had made on the 13th October, 1882, should not be rescinded.

This was an application to rescind an order of Mr. Justice *Weldon*, made on the seventeenth January last, whereby he rescinded a previous order which he had made in this matter on the 13th October, 1882. It appeared that a petition had been filed by the appellant under the "Dominion Controverted Elections Act, 1874," against the return of the respondent as a member for the County of *Gloucester* in the Dominion Parliament, that certain preliminary objections to the

(1) 8 Can. S. C. R. 192.

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petition had been filed and a time appointed for hearing these objections, and after several adjournments the following order was made by Mr. Justice *Weldon* on the 13th October last.

"Upon application made to me by Mr. *Rand*, of "counsel for the respondent, and with and by consent "of the petitioner, and upon hearing read the affidavits "of *Burton S. Reed*, the attorney and agent of the peti- "tioner, of *Stephen Rand*, and of the above named re- "spondent, I do order that the said petition may be "taken off the files of the court, and that the sum of "one thousand dollars deposited as security in the "matter be paid to the petitioner or his agent, or to "such other person as may be duly authorized to "receive the same."

In consequence of this order, the deposit of $1,000 was paid by the Clerk of the Election Court to Mr. *Reed*, the petitioner's attorney, but the petition was not in fact withdrawn from the office. No further proceedings were taken in the matter until January, 1883, when, on the application of the petitioner, and on his affidavit that the withdrawal of the petition and discontinuance of the proceedings therein, and the withdrawal of the deposit were done by his attorney without his (petitioner's) consent, and that he was desirous that proceedings in the petition should be continued, a summons was granted calling on the respondent to show cause why the order of the 13th October should not be rescinded, and the petition proceeded with. At the hearing of this summons on the 17th January last, the following order was made:

"Upon reading the summons granted by me, etc, I "do order that upon the petitioner's repaying or caus- "ing to be repaid to the clerk of this court the amount "of the deposit money paid into court upon the filing "and presentation of the petition, drawn out by his the

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"petitioner's agent or attorney under my said order of "the thirteenth day of October aforesaid, that my said "order be rescinded, and that the said parties be restored "to their original status and rights the same as if "such order of the said thirteenth day of October last "had not been made."

Against this order the respondent appealed to the Supreme Court of *New Brunswick*, which court gave judgment rescinding Mr. Justice *Weldon's* order, made in January, 1883.

On appeal to the Supreme Court of *Canada*, a motion to quash the appeal for want of jurisdiction was made.

Mr. *Blair*, Attorney General of *New Brunswick*, for appellant.

Mr. *Harrison* for respondent.

RITCHIE, C. J.:—

I cannot entertain any doubt that this is not an appealable case. It is not an appeal from a judgment on a preliminary objection, and I fail to be able to bring myself to the conclusion, upon any ground whatever, that this is a preliminary objection such as is contemplated by the terms of the Controverted Elections Act of 1874, or which can come under the express terms of the statute giving us the right to hear appeals from judgments on preliminary objections. And it is very clear we must have express authority by statute in order to hear election appeals

STRONG, J.:—

I am of the same opinion. I think it is quite clear that under the Controverted Elections Act of 1874, and under the statute of 1879 (Supreme Court Amendment Act) enlarging our jurisdiction to hear appeals from judgments, deciding preliminary objctions to an election petition, we have only jurisdiction provided the pre-

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Strong, J.

liminary objection is one of the kind which originally and before this jurisdiction in appeal was conferred was authorized by the statute to be filed. It must be an objection emanating from the respondent himself and of a particular class, such as for instance an objection taken by the respondent to the *status* of the petitioner. But here there is no objection of this kind. This is a much stronger case than the case of *Dickie* v. *Woodworth*, by which I consider the point now raised to have been finally settled. In my judgment, the appeal should be quashed.

FOURNIER, J.:—

I am also of opinion that an appeal will only lie from a decision on a preliminary objection—which must be fyled within the time prescribed by the statute, and if not fyled within the specified time, it cannot be treated as a preliminary objection. I do not think the decision in this case is appealable.

HENRY, J.:—

We have to place ourselves in the place of the Legislature in order to ascertain what was meant by the words "preliminary objections." I think the preliminary objections referred to are those which are to be fyled by the respondent The question is whether we have jurisdiction in an appeal when these objections have not been adjudicated. Now, I take it, it must be limited to such preliminary objections But in this case the petitioner says: "I have not got to that stage of the proceedings when the preliminary objections can be adjudicated upon. I only want to show I am entitled to have my petition tried, but somebody went to the judge and represented to him that he had authority to withdraw the money, and he was not so authorized."

This clearly shows that this is not such a preliminary objection as was contemplated by the Legislature.

I feel, though reluctantly, that I must agree with the decision arrived at by this court. It is not an appeal from a decision on the merits of a preliminary objection.

I may add that it might be said that the money has been improperly withdrawn. If Judge *Weldon* was right in his conclusion, the parties may be said to be still in court, and contend that Judge *Weldon* had a perfect right to order the money illegally withdrawn to be returned, and having given his decision on a question of fact, not of law, the full court had no power to rescind his order. I only regret this court has no power to revise that order.

GWYNNE, J.:—

It appears to me the case is very plain. The appeal is not against any decision upon a preliminary objection to the petition at all, but against a judgment of the court rescinding an order of Mr. Justice *Weldon* which rescinded a prior order of his own, upon the ground that the court found that the first order was made and acted upon by the withdrawal of petition and of the deposit filed by the petitioner as security for costs, by and with the consent of the petitioner himself, who had thereby put himself out of court, and that therefore, the second order made by Mr. Justice *Weldon*, which order the judgment of the court now appealed from rescinded, was improperly made. Against such a judgment of the court rescinding an order of a single Judge in Chambers the statute gives no appeal.

*Appeal quashed with costs.*

Solicitors for appellant: *Gregory & Blair.*

Solicitor for respondent: *L. H. Harrison*

1881
*April 27.
1882
*Jan. 12.
*June 19.

THE QUEEN ..... APPELLANT;

AND

ALEXANDER MACLEAN AND JOHN CHARLES ROGER ..... RESPONDENTS.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

*Petition of right—Non-liability of the Crown on Parliamentary Printing Contract—Departmental Printing contract—Mutuality.*

*H.*, in his capacity of "clerk of the Joint Committee of both Houses on Printing," advertized for tenders for the printing, furnishing the printing paper and the binding required for the Parliament of the Dominion of *Canada*. The tender of the suppliants was accepted by the Joint Committee and by both Houses of Parliament by adoption of the committee's report, and a contract was executed between the suppliants and *H.* in his said capacity.

The suppliants, by their petition, contended that the tender and acceptance constituted a contract between them and Her Majesty, and that they were entitled to do the whole of the printing required for the Parliament of *Canada*, but had not been given the same, and they claimed compensation by way of damages.

*Held*, (reversing the judgment of *Henry*, J., in the Exchequer Court) that the Parliamentary printing was a matter connected with the internal economy of the Senate and House of Commons over which the Executive Government had no control; and that the Crown was no party to the contract with the suppliants and could not be held responsible for a breach of it.

Under 32 & 33 *Vic.*, ch 7, which provides that the printing, binding and other like work required for the several departments of the Government shall be done and furnished under contracts to be entered into under authority of the Governor in Council after advertisement for tenders, the Under Secretary of State advertized for tenders for the printing "required by the several departments of the Government." The suppliants tendered for such printing, the specifications annexed to the tender,

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

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which were supplied by the Government, containing various provisions as to the manner of performing the work and giving of security. The tenders were accepted by the Governor in Council, and an indenture was executed between the suppliants and Her Majesty by which the suppliants agreed to perform and execute, &c., "all jobs or lots of printing for the several departments of the Government of *Canada* of reports, &c, of every description and kind soever coming within the denomination of Departmental printing, and all the work and services connected therewith and appertaining thereto, as set forth in the said specificaton hereunto annexed, in such numbers and quantities as may be specified in the several requisitions which may be made upon them for that purpose from time to time by and on behalf of said several respective departments." Part of the Departmental printing having been given to others, the suppliants, by their petition, claimed compensation by way of damages, contending that they were entitled to the whole of said printing.

*Held* (affirming the judgment of *Henry*, J., in the Exchequer Court,) that having regard to the whole scope and nature of the transaction, the statute, the advertisement, the tender, the acceptance and the contract, there was a clear intention shown that the contractors should have all the printing that should be required by the several departments of the Government, and that the contract was not a unilateral contract but a binding mutual agreement. (*Taschereau* and *Gwynne*, JJ., dissenting).

APPEAL from a judgment of *Henry*, J., in the Exchequer Court of *Canada* on a demurrer.

The contracts for breach of which the respondents filed a petition of right, and the pleadings are fully set out in the judgment of *Henry*, J., in the Exchequer Court and in the judgments on this appeal.

The Crown was represented in the Exchequer Court and in the Supreme Court by Mr. *Lash*, Q.C., and the suppliants by Mr. *Bethune*, Q.C., and Mr. *Gormully*.

The following authorities were relied on by counsel in addition to those cited in the judgments hereinafter given:—*Kilbourne* v. *Thompson* (1); *Chesterfield & Mid.*

(1) Albany Law Journal, 9th March, 1881.

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*Coll. Co.* v. *Hawkin* (1); *L. Southampton* v. *Brown* (2); *Aspdin* v. *Austin* (3); *Dunn* v. *Sayles* (4); *Great N. R. Co.* v. *Witham* (5); *Burton* v. *Great Northern Ry. Co.* (6); *Price* v. *Moulton* (7); *Morgan* v. *Pike* (8); *Broom's* Constitutional Law (9); *Macbath* v. *Haldimand* (10); *Beckham* v. *Drake* (11); *Edmunds* v. *Bushell* (12); and *Clifford* v. *Watts* (13).

The following is the judgment of—

HENRY, J.:—

This suit was commenced by a petition of right in which the suppliants set out two agreements by which they became contractors with the Government, the first for the printing, furnishing the printing paper, and the binding required for the Parliament for the period of five years from the 1st day of January, 1875—the second for 'the printing of the *Canada Gazette*, the statutes, orders in council and other books, pamphlets, blank books, forms, blanks and other printing required by the several departments of the Government and for which the tenders on the printed form issued by the Government and required to be used are headed "Departmental Printing, &c.' The first agreement is dated on the 7th July, 1874, and was executed by the suppliants of the one part, and by *Henry Hartney* of the other part, and in it he is alleged to execute it in his capacity as clerk of the joint committee of both Houses of Parliament of *Canada*. The petition shows that the agreement was prepared by the officers of the said joint committee, by whom the tender of the suppliants was

(1) 3 H. & C. 667.
(2) 6 B. & C. 718.
(3) 5 Q. B. 671.
(4) 5 Q. B. 685.
(5) L. R. 9 C. P. 16.
(6) 9 Ex. 507.
(7) 10 C. B. 561.
(8) 14 C. B. 473.
(9) Pp. 617, 713.
(10) 1 T. R. 172.
(11) 9 M. & W. 79.
(12) L. R. 1 Q. B. 97.
(13) L. R. 3 C. P. 577.

accepted and which acceptance was ratified by both Houses of Parliament, and that the advertisement for tenders was signed by *Henry Hartney* as "clerk joint committee of both houses on printing by order," and is dated: "Department of Printing of Parliament, *Ottawa*, April, 15th, 1874." The agreement is with *Henry Hartney* in his representative or subordinate character as such clerk and his successors in office. By it, the suppliants became "bound to perform in a workmanlike manner all the work and furnish all the materials for the service of both Houses of the Parliament of the Dominion of *Canada* mentioned in the annexed specification as being to be performed and furnished by them (the suppliants, called the party of the first part), at the places and times, and within the period and upon the terms and conditions therein specified." The agreement sets forth that the suppliants instead of giving the ordinary security for the fulfilment of their contract had paid $5,000 to *Henry Hartney* to deposit in his name in the Bank of *Montreal*, on account of the suppliants, under the condition, that if they performed their contract, the same, at the end of five years would be returned to them "otherwise the "same shall belong to Her Majesty the Queen and be "paid over to the Receiver-General by the said *Henry* "*Hartney* for the public uses of the Dominion, the inter- "est to be paid to suppliants, provided they perform- "their contract."

"The suppliants, in their petition, complain that although they, expecting to have all the work of the printing provided for in the agreement and specification given them to perform, and which they had become bound to execute "expended large sums of money in procuring the men and in purchasing and in setting up the printing presses, ruling and cutting machines, type and other plant and materials necessary and re-

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quisite for the punctual and prompt execution of the said printing services," and which they were always willing and ready and prepared to execute, large portions of the same were not given to them but to others to execute, by which they have lost, to that extent, the benefits and profits of their contract, and pray that they may be awarded such reasonable compensation in damages as they may be shewn to be entitled to. To this claim set forth more fully in the petition, the Attorney-General demurred and assigns for causes of demurrer.

1st. That the petition "discloses no claim against Her Majesty capable of enforcement by petition of right."

2nd. Substantially that Her Majesty is not accountable for the agreement signed by *Hartney* as clerk of the committee "on the printing of Parliament."

3rd. That there is no liability under the agreement for any loss sustained by the suppliants because of the giving of parts of the work contracted for by the suppliants to others.

Taking together the three causes of demurrer, they amount to two propositions:

1st. That under the agreement a petition of right cannot be maintained, because it purports to have been entered into by the two houses of Parliament as principals, and therefore the only redress, if any, in case of a breach, is by an application to those bodies, and

2nd. That even if a Petition of Right could be maintained for a breach of the agreement, there was none in this case, for the giving of portions of the work to others did not constitute a breach.

As to the first of these two propositions I have already and very recently given a decision. In the case of *McFarlane et al.* v. *Queen* (1), I held that in all cases of contract with the Government of

(1) 7 Can. S. C. R. 216.

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*Canada* an action by petition of right was maintainable where an action for the same cause would lie against a private party. My judgment was founded on the law in *England*. and I cited for the position taken *Feathers* v. *The Queen* (1), and I have not since had any reason to change my opinion.

I will next consider whether it was in reality a contract by and with the government?

The agreement, as already stated, was entered into by *Henry Hartney* as clerk of the joint committee of both houses of parliament, by the direction and under the authority of that committee, representing as they did the Senate and House of Commons jointly, by whom they were appointed and authorized for that purpose, and the whole proceeding was done with the sanction and approval of the government It was founded on the estimates, moved in the House of Commons at the instance of the government by its proper officer, the Minister of Finance. The agreement provides that in case of the failure by the suppliants to perform the contract, the five thousand dollars, to be lodged in the Bank of *Montreal* as security, should belong to Her Majesty the Queen and be paid to the Receiver General for the public uses of the dominion. By the arrangement, at the instance of the government and the annual appropriation acts, the payments for the service were provided to come out of the public funds of the dominion. It was wholly in the public interest, and the amount to be forfeited by the suppliants, in case of failure in their contract, was to be paid to the proper officer and form part of the same public funds from which the payment for the service was provided to be drawn.

I think for these and other reasons not necessary to be stated that *Henry Hartney*, acting as clerk of the joint committee, had sufficient authority to bind the

(1) 6 B. & S. 294.

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government as fully as if the agreement had been executed for the government by one of its members.

The remaining one of the two propositions I will now consider.

Admitting the agreement to have been binding as a government contract, for which an action by petition of right is maintainable, it is still contended the suppliants have no cause of action as, under it, the government was not obliged to give the whole or any particular part or portion of it to the suppliants. That contention necessarily includes the proposition that although the contract should, as it in fact did, involve the payment of some fifty or sixty thousand dollars for the service it provided for, and the necessity of the expenditure of thousands of dollars in the procuring the appliances and means to perform it, the Government was not bound to give the work agreed for to the suppliants beyond such part of it as it might from time to time think proper to give.

I cannot conclude that such was the intention of the Government, or of the two Houses of Parliament, or of those acting under them, when provision was made for the service, and the agreement entered into. If such was the intention, I must say that some intimation of it should be given to the public who were asked to tender for and provide the means for performing the service, or notice of it given to the party or parties whose tender or tenders was or were accepted, before being asked to sign an agreement "for the printing, furnishing the printing paper and the binding required for the Parliament of the Dominion of *Canada*."

Under an agreement founded on the acceptance of a tender, the contractor would be bound to perform the whole work under the three classes named that was or should "be required for the Parliament of the Dominion of *Canada*." It is not only in the advertisement calling

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for tenders, but in the tender of the suppliants and the agreement that the service is stated to be for the three classes of work named "required" for the Parliament. It is therefore for all the work necessary for or needed by the two Houses. The word must be so construed and not to mean only work to be done on their requisition. It means not a part or portion of it, but the whole of it, as fully as if it had been expressly stated. But it is quite unnecessary to depend upon that construction, for in the printed tender of the suppliants, which was required to be on the blank form furnished them, as provided in the advertisement for the tenders under the heading "Conditions of the contract for printing," it is provided, that "the whole of the printing will be given to one contractor and tenders will be calculated upon the whole work to be done and not in portions;" and the agreement provides that the suppliants should perform "all the work and furnish all the materials for the service of both Houses" mentioned in the specification annexed thereto. The latter covers in the detail the whole of the work for the service provided for in the general terms of the agreement. It is in my opinion too palpable and plain that the agreement binding on both parties was not for a part but for the whole of the service, and that the one party was as fully bound to employ the other to perform the whole of it, as the latter were bound to perform it. If it was intended not to give the whole to the suppliants, why should we find as we do such provisions, as I have quoted, in the tender and agreement? If such was the intention, we should on the contrary require to find, as we fail to do in any of the documents referred to, express provision to give effect to it.

Between private parties this conclusion is irresistible, and when we are dealing with the matter of a con-

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tract I know of no law or reason why a different rule should be applied to a contract of the Government which in my opinion should be considered as fully binding.

To the remaining portion of the petition, the same causes of demurrer are assigned as the first and third grounds to the previous part of the petition, and with which I have just dealt. I need not repeat therefore, the views I have expressed.

The suppliants' claim, under the second contract, is, in my opinion, fully as strong, if not stronger, than that founded on the first, as to the causes of demurrer now under consideration, in every respect but in one, to which I will hereafter refer. The agreement secondly set out in the petition is for what is known as and was styled in the schedule annexed to it "Departmental Printing," and it is alleged in it to have been entered into under the provisions of the Act 32 and 33 *Vic.* c. 7, which amongst other things provides "that the printing, binding and other work to "be done under the superintendence of the Queen's "Printer, except as is hereinafter mentioned, be done "and furnished under contracts to be entered into under "the authority of the Governor in Council, in such "form and for such time as he shall appoint."

The agreement recites the fact of the acceptance of the suppliants' tender by the Governor in Council.

It is alleged in the petition that no Order in Council was passed under the provision of that section, and if that be the fact, the giving out of the portions of the work to others as complained of was to all intents and purposes a violation of the Act; but although it was so, the suppliants cannot, for that reason alone, complain. If they, however, had the right under their agreement to claim that the whole of the work should have been given to them, it will not help the case on the other

side, if the breach of the agreement is found also to be a violation of the law.

For the reasons given in regard to the issues of law, as to the first agreement referred to, with those I have added, I think the suppliants were entitled under the second, now under consideration, to claim that the contract was for the whole of the work referred to in the schedule attached to it, unless the wording of the first paragraph requires a construction that would vary it.

That paragraph provides that the suppliants shall from time to time and at all times during the prescribed five years

> Will faithfully and promptly do, perform or execute, or cause to be done, performed or executed, all jobs or lots of printing for the several departments of the government of *Canada*, of reports, pamphlets, circulars and blank forms of every description and kind soever coming within the denomination of Departmental Printing and all the work and services connected therewith and appertaining thereto, as set forth in the specification hereunto annexed, in such numbers and quantities *as may be specified in the several requisitions which may be made upon them for that purpose from time to time, by and on behalf of the said several departments.*

The question is, do the words I have italicized qualify and limit the general contract shown by the preceding general statement of the service, so as to limit the contract to such parts or portions of it for which requisitions were provided to be made? I cannot put that construction on the contract, when taking into consideration the object in view of either party in entering into it. We must in construing contracts at all doubtful, by taking the objects in view, and looking at the surrounding circumstances and the bearing of the whole contract, ascertain the intention of the contracting parties.

The Act referred to provided that work should be let by tender, and we find that provision was made for

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the whole service and included in one tender, made and accepted for the performance of it, by the Governor in Council, without any reservation or qualification. I feel bound to conclude that the government as well as the suppliants intended the contract to cover and include the whole service; and that the words I have italicized were inserted to bind the contractors to furnish the "numbers" and "quantities" called for by the requisitions. There was in my opinion no necessity for adding those words, as I think the departments were the judges of what was required, but they may have been added for greater caution to prevent any question as to the *numbers* and *quantities* to be furnished.

I am of opinion that these added words do not limit the contract, and therefore that the suppliants were entitled to claim that the whole work should have been given to them.

It is generally understood that there is often private and confidential printing required by a government which might not be considered expedient to submit to a contractor for the general service, but in giving the general contract the agreement should provide for such an exception. Otherwise I cannot see how it could be taken from the general contractor without compensation for its loss, as the same rules are applicable to a government as to a private contract, although we find it sometimes not so considered.

Entertaining the views I do, my judgment must be for the suppliants and the demurrer will be overruled with costs."

In the Supreme Court of *Canada* the following judgments were delivered :—

RITCHIE, C. J. :

This is an appeal on behalf of Her Majesty the Queen, from the judgment of Mr. Justice *Henry* in the

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Exchequer Court, in the matter of the petition of right of *MacLean, Roger & Co.* against Her Majesty, in which the suppliants claimed damages for the breach of two contracts: one with respect to "the printing, furnishing the printing paper and the binding required for the Parliament of the Dominion of *Canada*," the other with respect to printing required by the several departments of the Government. These contracts are entirely distinct and separate, one from the other. As to the first, the petition alleges that:

1. On or about the 15th day of April, A.D. 1874, there appeared and was published in several newspapers printed and published in the Dominion of *Canada* an advertisement in the words and figures following:

"Tenders addressed to the undersigned in a sealed envelope, "marked Tenders for Printing, Paper or Binding (as the case "may be), will be received until Monday, the 11th day of May "next, after which day no Tender will be received, for the "Printing, furnishing the Printing Paper, and the Binding "required for the Parliament of the Dominion of *Canada*.

"No Tender will be received except on the blank form, "which can be had on application to the undersigned, and "from whom all information may be obtained.

"The committee do not bind themselves to accept the "lowest or any Tender.

"By order,

HENRY HARTNEY,

"Clerk, Joint Committee of both Houses on Printing.

"Department of Printing of Parliament,
"*Ottawa*, April 15th, 1874."

That in pursuance of such notice, suppliants tendered for the said printing in the manner prescribed; one of the conditions being that, "*The whole of the Printing will be given to one Contractor, and tenders will be calculated upon the whole work to be done, and not in portions.*" That such tender was duly accepted by the Joint Committee of both Houses of the Parliament of *Canada* on the printing of Parliament, and was afterwards duly accepted by both Houses of Parliament, by

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the adoption of the report of said committee, and the said tender and acceptance thereof suppliants submit thereby created a valid contract between Her Majesty and the suppliants; that at the request of the officers of the said Joint Committee acting on behalf of the said Joint Committee, suppliants executed an agreement with respect to said printing which is set out at length and is an

Agreement made on the 7th day of July, A.D. 1874, Between *MacLean, Roger & Co.*, that is to say, *Alexander MacLean* and *John Charles Roger*, both of the city of *Ottawa*, county of *Carleton*, province of *Ontario*, and Dominion of *Canada*, and doing business in the said city as printers, under the said name and firm as co-partners, of the first part and *Henry Hartney* of the said city of *Ottawa*, Esquire, in his capacity as Clerk of the Jo'nt Committee of both Houses of the Parliament of *Canada*, on the printing of Parliament, of the second part:

And witnesseth that the the said party of the first part, hath agreed, and doth hereby agree with the said party of the second part, and his successors in office respectively, to perform in a workmanlike manner, all the work and furnish all the materials for the service of both Houses of the Parliament of the Dominion of *Canada*, mentioned in the annexed specification as being to be performed and furnished by him at the places and times, and within the periods, and upon the terms and conditions therein specified for and during the space and term of five years, to be computed from the 1st day of January, 1875, and fully to be completed and ended on the 31st day of December, 1879, with the right nevertheless to the said party of the second part, and his successors in office, at the option and by the direction of the two "Houses of Parliament" of *Canada*, to continue the contract during the further period of five years from the last day aforesaid; and in all things to conform to, fulfil and abide by the said specification to the full and entire satisfaction of the party of the second part, and his successors in office, and that the said party of the second part in his capacity aforesaid, and for his successors in office, has promised and agreed and does hereby promise and agree to pay the said party of the first part for the said work and materials performed for and furnished to the respective Houses of Parliament at the prices, and in the manner, and at the times, and according to the terms and conditions in the said specification mentioned, and in all things to conform to, fulfil, and abide by the said specification.

The agreement then recites that in lieu of finding

sureties for the due performance of the contract, the suppliants deposited in hands of *Hartney* $5,000 to be made a special deposit in Bank of *Montreal* as security for faithful performance of conditions of contract, and on completion of same at end of five years, such sum to be returned to suppliants, otherwise the same shall belong to Her Majesty the Queen and be paid over to the Receiver General by said *Hartney* for the public uses of the Dominion; in meantime, unless suppliants shall fail to perform contract, the interest allowed by the bank on said deposit to be paid over to them as received by *Hartney*;—and it was further agreed that should suppliants fail to perform contract "to the satisfaction of the joint committee of both Houses of the Parliament of *Canada* on the printing of Parliament, such joint committee may cancel this contract, and their resolution to that effect shall cancel the same without prejudice to the forfeit of the $5,000, &c."

This agreement was signed and sealed by the suppliants and *Hartney*. The specification provided that:

> Payments to be made, as the work progresses, by the Clerk of the Joint Committee on Printing, but, in all cases, 20 per cent. of the amount due the contractors will be retained by the clerk of the committee till the whole of the work pertaining to each session is satisfactorily completed.

And that "the printer to be subject on all points to the "Clerk of the Joint Committee on Printing."

The suppliants contend that the tender and acceptance constituted a contract between them and Her Majesty, under which they claim that they were entitled to do the whole of the printing required for the Parliament of *Canada*, and allege that this obligation was broken and Parliamentary printing given out to be done by others, whereby they were unjustly deprived of the profits they would have derived from the execution thereof by themselves, that moneys necessary for

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the payment of the whole of said printing, works and services required for the Parliament of *Canada* were from time to time duly voted by Parliament, and they claim compensation by way of damages. To this petition the Attorney-General demurred on the following grounds:

1. Because the same discloses no claim against Her Majesty capable of enforcement by petition of right.

2. Because it appears that such contract was made with one *Henry Hartney* in his capacity as clerk of the joint committee of both Houses of the Parliament of *Canada* on the printing of Parliament, and no action upon such contract can be enforced against Her Majesty by petition of right.

3. Because it does not appear that Her Majesty contracted with the suppliants that they should do all the Parliamentary printing which might be required by Parliament, or that Her Majesty incurred any liability towards the suppliants because Parliamentary printing was done by others than the suppliants.

And as to all the remaining portion of the suppliants' petition Her Majesty's said Attorney General doth demur in law thereto.

1. Because it discloses no claim against Her Majesty capable of enforcement by petition of right.

2. Because it does not appear that Her Majesty contracted with the suppliants that they should do all the Departmental printing which might be required or that Her Majesty incurred any liability towards the suppliants because Departmental printing was done by others than the suppliants.

On behalf of Her Majesty, I submit that the suppliants' petition should be dismissed with costs.

This demurrer was argued before Mr. Justice *Henry*, who overruled the same. From this judgment the present appeal was taken.

It is in my opinion quite impossible to sustain the judgment appealed from. Her Majesty is no party to this agreement directly or indirectly. The Parliamentary printing was matter connected with the internal economy of the Senate and House of Commons over which the Executive Government had no control. The Crown could neither dictate to the joint committee

of both Houses, nor interfere, nor deal with any contract entered into by them or by their clerk under their authority. The Crown neither authorized the execution of any contract for the work contemplated, nor in any way authorized the doing of the work to be performed under this contract. The Crown neither employed the suppliants to do this work nor entered into any contract in reference thereto. The suppliants were in no way bound to the Crown or, in respect to this contract, subject to its control. The Crown could neither put an end to the contract, nor enforce it, nor in any way interfere with its execution. This contract gave the Crown no right of action against the suppliants, nor the suppliants against the Crown; in other words, the Crown was no party to the contract, and, therefore, cannot possibly on any principle I can conceive, be held responsible for a breach of it. I have examined 27 *Vic.*, ch. 27, "An Act respecting the internal economy of the House of Commons and for other purposes," to which we were referred, but I can find nothing in that Act to bind the Crown by a contract such as this or to render the Crown in any way liable for its breach.

As to the other contract it is of a very different character. The 32 and 33 *Vic.* ch. 7, provides by sec. 1 for the appointment of a Queen's printer. Sec 2 prescribes his duties. Sec. 3, what documents shall be printed in the *Canada Gazette*. Sec. 4, in what cases copies of the *Gazette* shall be *primâ facie* evidence. Sec. 5 defines the powers of the Governor in Council, as to the *Gazette*, and secs. 6 and 7 provide for the printing, and are as follows:

Whereas it is by "An Act respecting the office of Queen's Printer and the Public Printing," passed by the parliament of *Canada* in its session held in the 32nd and 33rd years of Her Majesty's reign, amongst other things in effect enacted that the printing, binding and other like work to be done under the superintendence of the Queen's Printer shall, except as is thereinafter mentioned, be done and furn-

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ished under contracts to be entered into under the authority of the Governor in Council in such form, and for such time as he shall appoint after such public notice or advertisement for tenders as he may deem advisable, and the lowest tenders received from parties of whose skill, resources, and of the sufficiency of whose sureties for the due performance of the contracts the Governor in Council shall be satisfied, shall be accepted.

The 7th sec. of the Act provides that "the Governor in Council may from time to time by Order in Council authorize for reasons to be stated in such orders, cause printing and binding for the public service to be done without tender, and such orders in Council and the expenditure under them shall be laid at its then next session."

The petition alleges that:

4. On or about the said 15th day of April, A.D. 1874, there appeared and was published in several newspapers printed and published in the Dominion of *Canada*, an advertisement in the words and figures following:

TENDERS FOR PRINTING, &c.

Sealed tenders addressed to the Secretary of State, *Ottawa*, and endorsed respectively "Tenders for Printing Paper," "Tenders for Printing," and "Tenders for Binding," will be received until noon of Monday, the 11th day of May next, for the performance during a term of five years from the 1st day of October next, of the following services.

(1). Furnishing Printing Paper for the printing of the *Canada Gazette*, the Statutes and Orders in Council; and for Pamphlets and other Jobs required by the several Departments of the Government.

(2). Printing the *Canada Gazette*, the Statutes and Orders in Council, and other Books, Pamphlets, Blank Books, Forms, Blanks, and other Printing required by the several Departments of the Government.

(3). Binding the Statutes and Orders in Council, and such other Books, or Blank Books, and such other Binding, Map Mounting, &c., as may be required by the several Departments of the Government.

Blank Forms of Tender and Specifications will be furnished on application to the undersigned on and after the 20th April, instant.

*Edouard J. Langevin*,
Under Secretary of State.

Department Secretary of State,
*Ottawa*, 15th April, 1874.

5. In pursuance of the said notices in the fourth paragraph hereof set forth your suppliants tendered for the printing of the *Canada Gazette*, the Statutes and Orders in Council, and other Books, Pamph-

lets, Blank Books, Forms, Blanks and other printing required by the several Departments of the Government, the tenders of your suppliants for the said printing being in the words and figures following:

The first for departmental printing, which, after a schedule of prices, contained a specification in which *inter alia* it is provided that:

The contractor must be prepared to deliver work at short notice, as may be frequently required.

He will be expected to use the newest styles of type, and keep the work up to the standard of first-class workmanship.

Good and sufficient security in the sum of five thousand dollars by a bond of a guarantee company, approved by the Government, will be required from the contractor for the due fulfilment of his contract.

The second for printing of the Statutes and Orders in Council, with a schedule of prices and a specification which contained *inter alia* these stipulations:

The Statutes must be delivered by the printer at the rate of, at least, six sheets, or 96 pages per week from the date of delivery of copy therefor.

The contractor will be required to provide safe storage room for the law paper, and will be responsible therefor while in his keeping.

Two per cent. will be allowed for waste and proofs on the number of sheets ordered to be printed.

Good and sufficient security, in the sum of five thousand dollars (by bond of a guarantee company to be approved by the Government), will be required from the contractor, for the due fulfilment of his contract.

The third, for printing the *Canada Gazette*, with a schedule of prices and a specification containing *inter alia*:

A complete classified list of persons receiving the *Gazette* will be made and kept by the contractor under instructions from time to time furnished by the Queen's Printer; and he will be held responsible for the loss of any number through insufficient address or fastening.

The contractors must be in a position to complete the *Gazette* whatever may be its size, and have it delivered or posted on the day of its issue.

Two-and-a-half per cent. will be allowed for waste on the number of sheets of the *Gazette* ordered to be printed.

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The contractor will furnish safe storage for at least two months' supply of *Gazette* paper, for which he will be responsible to the Government.

Good and sufficient security, in the sum of five thousand dollars by bond of a guarantee company, approved by the Government, will be required from the contractors for the due fulfilment of their contract.

The petition then alleges that—

The said tenders of your suppliants were duly accepted by His Excellency the then Governor-in-Council as prescribed by the statutes in that behalf, and on or about the 5th day of August, A. D. 1874, due notice of such acceptance was given by the officers of Your Majesty acting on behalf of Your Majesty to your suppliants, and thereby the said tenders of your suppliants in this paragraph set forth, and the acceptance thereof as aforesaid your suppliants submit constituted a valid contract binding on your Majesty and your suppliants.

6. At the request of the officers of Your Majesty acting on Your Majesty's behalf, your suppliants executed an indenture with respect to said printing.

In the words and figures set out in petition.

This purports to be an indenture made the 1st day of October, A.D. 1874, between *Alexander MacLean* and *John C. Roger*, both of the city of *Ottawa*, printers, thereafter called the contractors of the first part and Her Majesty the Queen, of the second part, after reciting the 6th sec. of the 32 and 33 *Vic.* ch. 7, and after reciting that, "whereas in pursuance thereof tenders were advertized for amongst other things the printing for the several Departments of the Government of *Canada* (commonly called the Departmental Printing,) for the term of five years to be reckoned and computed from the 1st day of Oct, 1874, and the Governor in Council has seen fit to accept a certain tender made for the performance of such service and work by the contractors." The indenture witnessed that

In consideration of the sums and prices for the several different descriptions of work, and services embraced in the said tender, to be done and performed by the "Contractors,"

in accordance with, and at the respective rates and prices mentioned and expressed in the printed schedulé and specification thereof hereunto annexed and marked A, and which is to be read and construed as part and parcel of these presents, as if the same were embodied therein, they, the "Contractors," do hereby convenant, promise and agree to and with Her Majesty in manner, following, that is to say:

1. That "the Contractors" shall, and will, from time to time, and at all times during the said term of five years, so to be computed as aforesaid, well, truly, faithfully and promptly do, perform and execute, or cause, or procure to be done, performed or executed all jobs or lots of printing for the several Departments of the Government of *Canada*, of Reports, Pamphlets, Circulars and Blank Forms of every description and kind soever coming within the denomination of Departmental Printing, and all the work and services connected therewith, and appertaining thereto, as set forth in the said specification hereunto annexed, in such numbers and quantities as may be specified in the several requisitions which may be made upon them for that purpose from time to time by and on behalf of the said several respective Departments. "The Contractors" being in all cases furnished the necessary supplies of paper and they furnishing the necessary inks for the purpose; such jobs or lots of work to be executed and performed in a good and workmanlike manner, in strict accordance with the terms of the said schedule and specification in every respect, and to the entire satisfaction of the Queen's Printer, and to be delivered by the said "Contractors" to the said several departments or the Queen's Printer on their behalf, as he or they may direct, within a reasonable period after receipt of the requisitions therefor respectively.

The next paragraph provided that if it should appear that the execution of the work under this contract was not carried out in a satisfactory manner, the Secretary of State might authorize the Queen's Printer to judge whether work is being done in a workmanlike manner, and in a proportionally forward state of progress,&c., and if Queen's Printer should come to a conclusion it is not, power is given him to require contractors to put on additional workmen, &c.

Paragraph 3 provides:

That in the event of any portion of the said work (contemplated by this contract) not being delivered and performed in a perfectly

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workmanlike manner, 'the contractors' shall on a requisition for that purpose from the department of the Government which shall have required such job of work to be done, or of the Queen's Printer on its behalf, cause the same to be re-executed and delivered within such period to the satisfaction of the Queen's Printer; the department so requiring the work to be done shall be at liberty if it shall be thought the exigencies of the public service require it, to employ other parties to do such work, and 'The contractors' shall pay to or for the use of Her Majesty, as well the amount which the paper shall have been used in such rejected work shall have cost Her Majesty (such amount to be ascertained and stated by the Queen's Printer), as also any sum which shall have been paid to such other parties for such work in excess of the respective prices therefor, embraced in the said schedule, and any such sums shall be recoverable against 'The contractors' as and in the nature of liquidated damages.

4 Provides that the contractors shall not assign or sublet without assent of Governor in Council.

5 Provides where notices on contractors may be served, and section 6 provides where and how the Governor in Council may require that the Departmental Printing may be taken out of the hands of the contractors and given to others, and that the Governor in Council may in such case declare contract rescinded, and the same shall be from thenceforth treated as null and void. To the contract is annexed schedule A as to prices, and a specification which requires *inter alia* that

The contractor must be prepared to deliver work at short notice as may be frequently required. He will be expected to use the newest styles of type, and keep the work up to the standard of first-class workmanship.

Good and sufficient security in the sum of 5,000 dollars by bond of a guarantee company approved by the Government, will be required from the contractor for the due fulfilment of his contract.

That the indenture was prepared by the officers of Her Majesty and was presented by said officers for execution. That from inquiries at the several departments of the government and from a perusal of public accounts, the suppliants believed there would be printing, works and services of great magnitude, and in

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order to execute same punctually and promptly expended large sums of money in procuring men and purchasing and setting up the printing presses, ruling and cutting machines, type and other plant and material necessary and requisite for the punctual and prompt execution of such printing services and works.

The suppliants readiness and willingness to do all Departmental printing and punctually and properly perform their part of the contract, and were always ready and willing to perform—

The said contracts and agreements on their part, yet the officers of your Majesty, acting on behalf of your Majesty, did not and would not observe or perform the said contracts and agroements, and broke the said contracts and agreements in this, that they did not and would not allow or permit your suppliants to do, execute and perform the whole of the printing required by the Parliament of *Canada*, and the whole of the printing of the said other Books, Pamphlets, Blank Books, Forms, Blanks, and other printing required by the several Departments of the Government of *Canada* during the periods embraced in the said respective tenders; but on the contrary, the said officers employed other persons and companies to do, execute and perform, and other persons and companies did execute and perform portions of the said printing works and services without the consent of your suppliants and without any public tender for the said works and services, and without authority of any order of His Excellency the Governor in Council, and thereby your suppliants were prevented from earning and were deprived of the moneys, gains and profits which they would have derived and acquired from doing and executing the printing works and services done and executed by the said other persons and companies, and suffered divers other great losses and damages.

That no complaint whatever was ever made to suppliants that work required to be done was unsatisfactory; but on contrary, the work executed by suppliants was satisfactory to departments. Suppliants never directly or indirectly intimated that they were unwilling to do and perform work, but were ready and willing, &c.

That so soon as suppliants had notice that other persons

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and companies were executing departmental printing, they notified the Secretary of State in writing that giving such printing to others than your suppliants was a breach of the contract, and suppliants protested against a continuance of such a breach; notwithstanding such notice, large quantities of printing were given to several individuals, newspaper offices and companies which they submit should have been done and performed by them, by reason whereof they were unjustly deprived of the profits they would have derived therefrom. That the monies necessary for payment of whole of the said printing work has been duly voted by Parliament.

Suppliants therefore prayed:

1. That it may be declared that your suppliants were under and by virtue of the contracts and agreements aforesaid, entitled to do, execute and perform all the Parliamentary and Departmental Printing required to be done during the periods embraced in the said respective tenders, save and excepting such printing as was by Orders in Council and for the reasons stated in such orders authorized by the Governor in Council to be done without tender.

2. That the sum of $200,000 or such sum as may be reasonable may be paid to your suppliants in compensation and by way of damages for the losses which have been occasioned to them by the breach of the contracts and agreements aforesaid, and the failure of Her Majesty the Queen to have all the Parliamentary and Departmental Printing, except as aforesaid, done and performed by your suppliants between the periods aforesaid.

3. That an account may be taken of the quantity and amount of printing done by others than your suppliants and not authorized to be done as aforesaid by an Order of the Governor in Council as aforesaid.

4. That the cost of the material provided for such printing may be ascertained, and that the cost of doing and performing such printing may be ascertained upon the scale, schedule or terms specified in the contracts aforesaid.

5. That every excess over and above the cost of the material for such printing, and of doing and performing such printing as aforesaid may be regarded as profit and as the amount to be paid by Her Majesty the Queen to your suppliants as and for the estimated profits

they would have derived from the printing aforesaid if it had been done and performed by them.

6. That an account may be taken of the damages and loss sustained by your suppliants in preparing for and supplying the room, machinery and plant in expectation of having to do all the Parliamentary and Departmental Printing.

7. That your suppliants may have such further and other relief in the premises as may seem meet.

8. That your suppliants may be paid the cost of this petition.

To so much of the suppliants' petition as relates to the Departmental printing Her Majesty's Attorney General demurred upon the following grounds:

1. Because it discloses no claim against Her Majesty capable of enforcement by petition of right.

2. Because it does not appear that Her Majesty contracted with the suppliants that they should do all the Departmental printing which might be required, or that Her Majesty incurred any liability towards the suppliants because Departmental printing was done by others than the suppliants.

The demurrer was argued with the previous one before Mr. Justice *Henry*, who gave judgment overruling the demurrer.

From this judgment Her Majesty appeals.

In construing this agreement I freely admit that we have no right to introduce any stipulation into the contract which the parties may have either from design or inadvertently omitted. I should not venture to add to the contract covenants or stipulations which have been purposely, unintentionally or inadvertently omitted, merely because I may deem them necessary to carry out what I may suppose to have been the intention of the parties, but I think I am bound to apply such a rule of construction to the circumstances of the case, and what has been written, as will carry out the law and effectuate that intention so far as the parties have, though imperfectly, expressed themselves. Where words of recital or reference manifest a clear intention that the parties should do certain acts, the Court should infer

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from them an agreement to do such acts just as if the instrument had contained an express agreement to that effect.

Having regard, then, to the whole scope and nature of this transaction, the statute, the advertisement, the tender, the acceptance and the contract, I am of opinion that there is a clear intention shown that what the Government advertised for, what the suppliants tendered for, what the Governor-General in Council, in accepting the tender, intended, and what the contract, prepared by the officers of the Crown, contemplated and agreed the contractors should have, was all the printing that should be required for the several departments of the Government. This, in my opinion, is not a unilateral contract, but a binding mutual agreement solicited by the Crown, responded to by the suppliants, and that response accepted by the Crown, all which, I think, amount in law to mutual binding promises which sustain and uphold each other.

In order to ascertain the intention of the parties, we must take notice of the statute and what was done under and by virtue of it in reference to this matter. This contract having been entered into under a statutory authority, stands in a very different position from an ordinary contract between private individuals; in the latter case we have nothing to look to but the contract itself, here we have the statute and what it authorized to be done and what was done by virtue thereof to guide and aid us, and to which, I think, we are bound to refer to ascertain what the law authorized, and from thence, and from the language used by the parties to discover what it was intended to stipulate should be done, bearing always in mind this most important consideration, that this is not Government work which the executive, still less any department, could deal with at its pleasure; that the matter is not under

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the control of the several departments, nor indeed is it left to the discretion of the executive, but must be dealt with under the statutory provisions, and can be given only after tender, except as provided by sec. 7, which enacts that:

> The Governor may, from time to time, by Orders in Council authorize for reasons to be stated in such orders, cause printing and binding for the public service to be done without tender; and such Orders in Council and the expenditure under them shall be laid before parliament at its then next session.

It is not necessary to discuss whether this section would apply when tenders had been already received and accepted; the suppliants seem to assume it would; at any rate they have only asked to be declared entitled to perform the departmental printing, "save and excepting such printing as was by Orders in Council and for the reasons stated in such orders, authorized by the Governor in Council to be done without tender," and only pray "that an account may be taken of the quantity and amount of printing done by others than your suppliants and not authorized to be done by an order of the Governor in Council."

In view then of the law and of the tender, acceptance and contract, I think irresistible implications arise. Can it for a moment be presumed that the Crown could have contemplated that the work tendered and contracted for might be given, as the petition alleges was done in this case, by the departments to others than the contractors, when it could only be so given in violation of law? Is it not an irresistible inference that the contrary was intended? And as to the agreement, must it not be treated as containing the words of both parties, and to those words must there not be given such a reasonable construction as will effectuate the intention of the parties? And while there is a clear obligation on the part of the contractors to do all the departmental printing, is there not implied a corresponding obligation on the

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part of the Crown to give them the work? I think the agreement itself clearly indicates something to be done on both sides, and that there is on the part of the Crown an obligation to give all the departmental printing, and that this results by legal implication from the terms of the agreement to be gathered from a fair construction of the tender, acceptance, and contract read in the light of the statute by virtue of which alone the work could be done.

No doubt there may be contracts by which parties agree to do work when called on, or to carry such goods as may be presented, or to supply stores such as might be ordered from time to time, where there may be no corresponding obligation to furnish work to be done, or goods to be carried, or to order goods to be supplied, and these are the class of cases relied on by the counsel for the Crown in this case, but they are clearly distinguishable from this that we are dealing with.

The Government did not ask tenders for such printing as they might think fit to order for five years, but tenders were asked for the performance of certain specific work, viz., for printing the *Canada Gazette*, the Statutes, Orders in Council, other books or blank books, forms, blanks and other printing required by the several departments of the Government.

There might be some analogy to the cases referred to, if it turned out that during the five years the contract had to run the Government had little or no departmental printing; in such an event, if the contractors claimed the Crown was bound to find printing for them to do, it might well be contended that had the contractors desired to protect themselves against such a contingency they should have required a provision to be inserted in reference thereto, and not having done so, they took the risk of such an event happening, and therefore had no right to complain, and the Crown might, in such a

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case, contend, with some show of reason, and possibly support their contention by the cases referred to, that though they undertook to give the contractors all the departmental printing, they did not undertake to make printing for them, that the only printing they agreed contractors should have was what was required by the departments, and if they required none they could claim none; that is, that in the event of the Government discontinuing all departmental printing, it may be that against such a risk the contractors have not provided and could not complain. But as to the possibility of there being no work to do, of this practically there was no risk at all, because the Laws and Gazette had beyond question to be printed, and the work of the departments absolutely required a certain amount of printing which, in the exigencies of the public service, could not be dispensed with. However, no such question arises here, for the petition shows that there was departmental printing which the contractors agreed to do, but instead of the contractors being permitted to do it, the departments, contrary to the statute, gave the work to others. The observations of *Pollock*, C.B, in *Knight* v. *Water Works Co.* (1), are worthy of notice as very applicable to this case; he says:

> It is admitted that there is no covenant in express terms contained in the deed, but wherever it is manifest from expressions in a deed that the parties must have intended to stipulate that a particular thing should be done by either of them, there is an implied covenant to do it. * * * But, in fact, every case where a covenant is implied must stand upon its own foundation, and there is great difficulty in arguing from the analogy of other cases; the question always is, what is the reasonable conclusion to be drawn from all the matters to which the courts are entitled to look.

The Master of the Rolls, in *Thom* v. *Commissioner of Public Works* (2), says:

> The third question is, what the offer was which was so accepted.

(1) 2 H. & N. 810. (2) 32 Beav. p. 494.

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This depends on the construction to be put on the original advertisement and the tender of the plaintiffs following it, by the acceptance of which by the defendants through their agents Mr. *Price* and *Mr. Harris*, without the imposition of any conditions or limitations whatsoever, the contract is created. The plaintiffs contend that this means the whole of the stone of the kinds mentioned in their offer; the defendants contend that it means only so much stone as they may think fit to let them have.

This point, I am also of opinion, must be decided in favour of the plaintiffs. In the first place, the words of the advertisement are general: "Offers will be received for the old *Portland* stone, &c."; that is offers will be received for all or any part of the *Portland* stone, &c. It would, no doubt, have been open to any person making a tender to offer to take a portion of what was offered only, specifying what portion he desired to take; and accordingly the plaintiffs offered to take the arch stone, the spandril stone and the *Bramley Fall* stone only, and made no offer to take the rough rubble. But their offer, which follows the advertisement in the generality of its terms, is to take *Westminster* bridge stone of the description and at the prices I have already mentioned. I think this means the whole of such stone. If it does not, it is plainly no contract at all for anything; for the vendors could immediately afterwards have said: "Our contract means that we accept your offer only for as much as we choose to let you have," though the plaintiffs might, as the fact is, have been put to great expense to enable them to perform the contract, in the belief that their offer to take the entirety of the stone had been accepted, the delivery of one ton, or even one cwt. of stone, would have satisfied the contract. And again, on the other hand, unless the plaintiffs had contracted to take the whole, it is plain that the converse objection would apply, and that the vendors might say: "on the faith of your taking the whole, we have accepted your "offers and rejected others which would have enabled us to dispose "of it, and now, when you have taken a ton of each sort, and when "the price of this sort of stone has fallen, you refuse to take any "more." I think neither of these contentions could be supported. I think it also impossible that any one would hold the contract to be wholly one-sided, and that it meant: "You, the plaintiffs, must take "the whole, if we, defendants, choose to require it; but you are not "entitled to require us to let you have any more than we desire." Such a contract, which gives to one party all the advantage of a rise in the price of the articles sold, and none of the disadvantages of a fall in the price of it, obviously could not be supported without express words, and would certainly make most persons very reluc-

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tant to enter into any dealings with a Government board. It follows, therefore, that in my opinion, the true construction of the contract is an offer to take the whole of such stone, and an acceptance of that offer which compels the defendants to deliver the whole of that stone. Unless it means this, it means nothing, and the contract is merely idle and illusory. In that case, the advertisement is a mere delusion, and the acceptance by the defendants of the plaintiff's offer amounts to nothing.

* * * * * *

But that meaning must include the whole, as no limit can be placed upon it, nor can any line be drawn that would not be plainly arbitrary between the whole and what amounts practically to nothing.

I cannot think any business man with the statute before him tendering in response to such an advertisement as was put forward in this case, and having his tender accepted could for a moment suppose that he was not to have the whole work, but that, on the contrary, while he should be at all times ready and bound to do all he should be required to do, at the same time no obligation existed on the part of the Crown to give him anything whatever to do. I cannot think it consistent either with ordinary business notions or with common sense to suppose that any sane man would tender under such an idea, in view of the extent of the work a contractor might be required at any moment to do, the number of men he must always have in readiness, the amount of capital that must be invested, material that must necessarily be kept constantly on hand for the performance of the work, for the contract says the contractor must be prepared to deliver work at short notice, and he will be expected to use the newest styles of types and to keep the work up to the standard of first-class workmanship, and in addition to this he is required to give good and sufficient security in the sums of $5,000 by a bond of a guarantee company approved by the Government for the due fulfilment of his contract, and all to extend over a period of five years; and if the present

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contention should prevail, with no obligation to secure to them the work, but that the contractors with their men, capital, printing presses, materials, may remain for five years ready for work at a moment's notice, and yet, during all that time, not be in a position to require that a dollar's amount of the work advertised to be done should be given them, but they must keep up such a large establishment of expensive machinery and skilled workmen and be compelled to stand by and see their neighbor employed, without tender, to do the very work for which their tender had been accepted, no such an utterly absurd state of things could possibly, in my opinion, have been present to their minds or intended by any of the parties; the idea of such a contract being sought by the Government or entered into by any sane man is opposed not only to every principle on which business transactions are based, but to reason and common sense. This would of itself be sufficient to negative the contention, but there is to be found in the contract itself abundant evidence that nothing so unnatural and absurd was contemplated. I think the length of time (five years) for which tenders were asked suggests very strongly the inference that as the work was of a nature and magnitude involving the expenditure of so large an amount no contractor would be found to make such an outlay unless not only the certainty of the work but the certainty of the work for a lengthened period was secured to him, and therefore it may be fairly inferred the Government contemplated the contractor would be entitled to all the work for which he tendered. By the sixth paragraph of the contract it is

> Provided always, and it is the true intent and meaning of this contract and of the parties hereto, that if the contractors at any time during the subsistence thereof fail, in the opinion of the Queen's Printer, in the performance of any, or either, of the covenants or agreements herein contained in any respect; and if the Governor in Council should consider that the exigencies of the public service

require that the Departmental Printing should be, by reason of such default, taken out of the hands of "The contractors" and given to others, the Governor General in Council may, in such case, at any time thereafter, declare this contract rescinded, and the same shall be thenceforth treated as null and void. "The contractors," nevertheless, being and continuing liable for all damages and expenses consequent upon their default.

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Does this not establish that this contract was not intended to be unilateral? And is not the contention on the part of the Crown that the suppliants were only entitled to have so much of the Departmental printing as by requisition might be made on them by and on behalf of the several respective departments, and that all or any portion of the printing might be given to other parties by the departments inconsistent with this clause? Have we not here a clear declaration that the intent and meaning of the contract and of the parties thereto was, that it was only on failure, in the opinion of the Queen's Printer, by the contractors to fulfil the agreement on their part, and on the Governor in Council considering that the public service required that the printing should be taken from them and given to others, that such was to happen? What other meaning can be attached to the provision, that in the events spoken of—

> The departmental printing should be by reason of such default taken out of the hands of the contractors and given to others, that the Governor in Council may in such case at any time thereafter, declare this contract rescinded, and the same shall be thenceforth treated as null and void?

Why this power to rescind the contract if no obligation on the Crown to give the printing to the suppliants, or if they had not a right to require it? On the hypothesis now set up the Crown could have ceased to give the suppliants any departmental printing, and that would, so far as the Crown was concerned, have terminated the contract; but this clause saves the contractors

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from any such termination, and secures to them the protection of the opinion of the Queen's Printer, and the consideration and determination of the Governor-in-Council, that the exigencies of the public service required that they should be deprived of the departmental printing, before it could be taken from them and given to others, or in language of the contract "taken out of the hands of 'the contractors' and given to others." The language of this paragraph is the language of both parties, for it is inserted by way of proviso in an agreement prepared by the Government officials, and declares:

> Provided, and it is the true intent and meaning of this contract and of the parties hereto.

And therefore, giving the language used a reasonable construction, the necessary implication from that language is, that the contractors were to have all the departmental printing, and that there was an obligation on the part of the Crown to give them such printing, and such an obligation being on the Crown this clause was no doubt likewise inserted for the protection of the Crown to enable the Crown, in the events indicated, to free itself from such obligation and be placed in a position to deal with other parties in relation thereto.

That this taking of the departmental printing out of the hands of the contractors applies to the whole departmental work contemplated by the contract, viz., all the departmental work required to be done by the respective departments, and not to work which might be in the hands of the contractors under requisition from any one of the departments, is made, to my mind, abundantly clear, for in this paragraph "the departmental printing" is spoken of without limit or restriction, and in the recital the meaning of the terms "the departmental printing" is placed beyond all doubt, and shows both

what tenders were advertised for and what all parties understood by the term "departmental printing" and how it was used and to be understood in the contract; for, after reciting at length the 6th section of the 32 & 33 *Vic*, we have this recital:

> And whereas, in pursuance thereof, tenders were advertised for, amongst other things, the printing for the several departments of the Government of *Canada* (commonly called the departmental printing) for the term of 5 years, to be reckoned and computed from the 1st day of October, 1874, and the Governor in Council has seen fit to accept a certain tender made for the performance of such service and work by the contractors.

If anything more could be wanting to place this beyond a peradventure, and to show that it did not apply to work for which requisitions may have been made, we have sec. 3 which makes provision for such work, and provides that such work "not being delivered and performed in a perfectly workmanlike manner," the department which may have required the work, may require the same to be re-executed, &c, and "the department so requiring the work to be done shall be at liberty, if it shall be thought the exigencies of the public service require it, to require other parties to do such work," and makes contractors liable to pay, &c.

In dealing with a clause such as the 6th, in the *Great Northern Railway* v. *Harrison* (1), in which the question was whether there was a covenant on the part of the company to take a certain quantity of sleepers, *Parke*, B., delivering the judgment of the Exchequer Chamber, after premising that

> No particular form of words is necessary to form a covenant, but, wherever the Court can collect from the instrument an engagement on the one side to do or not to do something, it amounts to a covenant, whether it is in the recital or in any other part of the instrument—

proceeds to apply the rule, and after going through the deed says:

(1) 12 C. B. 576.

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Then comes a clause which proves to demonstration that the company understood themselves to be contracting to receive the whole quantity of 350,000 sleepers within the times limited. "That in case the contractors, their executors, &c., shall not regularly deliver the said sleepers in such quantities and at such times and place as are or is herein agreed upon to the satisfaction of the engineers of the company according to this contract, or shall from any cause whatever other than the acts of the said company or their agent be prevented from making such delivery or deliveries as aforesaid according to this present contract, and if such default, impediment, or delay shall continue for the space of 15 days, next after notice in writing, signed by the secretary of the said company, or by their engineer, requiring them to put an end to such default, impediment, or delay, shall have been given to the said contractors, or if they the said contractors before the completion of this contract shall be declared bankrupt or insolvents, then, and in any of such cases, it shall be lawful for the company, and as they shall think proper by writing under the hand of their secretary, absolutely to determine this contract. Is not that just as if the company had in so many words recited that this is their contract? and if it be their contract it is clearly a contract on the one side to deliver, and on the other to receive, the entire number of sleepers mentioned in the recital and in the specification.

This construction of the agreement introduces no new term into the contract, but simply carries out the law and gives effect to the intention of the parties as it is to be gathered from the nature of the transaction and as exhibited on the face of the contract itself. To put any other construction would render the statute of no effect and to make the advertising, tender, acceptance and contract, so far as the contractor is concerned, perfectly illusory.

And when we look at the other work for which tenders were asked in the same advertisement and in the same terms, and which was tendered for, and tenders accepted in the same manner, viz.: the printing of the Statutes and the Royal *Gazette*, can it be supposed that it could ever have been conceived by either party, that after such an advertisement, tender accepted and contract, that any Department of the Government could take from

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the contractors the printing of the laws and *Gazette*, and give it to others or divide the work and give portions of it away from the contractors to others, as, for instance, to give the printing of the *Gazette* one week or month to the contractors and another week or month to other parties, and the contractors be compelled to be ready at all times, week in and week out, with materials and artizans to do the work? The proposition seems to me too absurd; the mere statement of such an idea suggests its own refutation, but if part of the departmental printing may be given by any of the departments to others to do when the contractor is able and ready and willing to do the work in a proper manner, as the petition alleges these contractors at all times were, why may not the printing of the *Gazette* or of the laws be dealt with in like manner? in other words: the tender and its acceptance was intended to be the agreement between the parties. The tender was accepted "pure and simple," and the tender and acceptance indicated the contracting mind of both parties, and so a contract was constituted between the Crown and the suppliants. The preparation of a contract by the officers of the Government and requiring the signatures of the tenderers thereto, was merely for expressing the agreement arrived at in formal language, and possibly to comply with the direction of the statute, certainly not to lessen the liability of the Crown, still less to release the Crown from the obligation of fulfilling the contract.

Had this case then rested on the contract alone, I should have been of opinion the obligation existed to give all the required printing to the contractors, but by the statute and contract read together, to my mind, the matter is placed beyond all question, and I should have dealt with it in a much more summary manner were it not that I find two of my learned brothers have come to

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a different conclusion. In deference to their views, I have considered it right to put forward at greater length than I should otherwise have thought necessary to do, the reasons which have so strongly constrained me to the conclusion at which I have arrived.

STRONG, J., concurred with the Chief Justice.

FOURNIER, J.:

I am of opinion that the appeal from that portion of the judgment respecting the departmental contract ought to be dismissed. As to the contract for the printing with the joint committee of the House and the Senate, I cannot find any way to make the executive answerable for it. The law takes such precautions to prevent any interference on the part of the Government in that contract, that I cannot see how they can be made responsible.

TASCHEREAU, J.:

I am of opinion that the appeal should be allowed on both parts of the action for the reasons contained in Justice *Gwynne's* judgment, which I have seen, and in which I fully concur.

GWYNNE, J.:

I am of opinion that this appeal should be allowed, and that judgment should be ordered to be entered in the Exchequer Court in favor of Her Majesty upon the demurrer filed to the suppliants' petition, and for the reasons stated in that demurrer.

As to the parliamentary contract, signed by and between the suppliants, of the first part, and *Henry Hartney*, in his capacity as clerk of the joint committee of both Houses of the Parliament of *Canada* on the printing of Parliament, of the second part, it shows plainly, upon its face, that it is not a contract between

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Her Majesty and the suppliants, and that Her Majesty is not affected by it, or liable to be proceeded against upon it by petition of right.

The joint committee on printing of both Houses of Parliament can in no sense be said to be servants or agents of Her Majesty, or in any respect to represent Her Majesty. They, as members of the respective Houses of Parliament, are appointed by the house to which respectively they belong, to render services, the object of which is to enable the respective houses effectually to perform their parliamentary duties; and for the due rendering of such services by such committee, the members constituting it can be responsible only to the respective houses by whom they are appointed, and if that joint committee, which is the body having authority over all parliamentary printing, and power to enter into all contracts for that purpose, are not themselves servants or agents of Her Majesty, it is plain that their subordinate officer or clerk cannot be such an agent. It is contended that as he receives his appointment under the great seal of the Dominion, contracts, entered into by him under the order and direction of his superiors, the committee, become contracts entered into by him on behalf of Her Majesty, but no case has been cited in support of this proposition, and if his immediate superiors, the committee, are not agents of Her Majesty, I cannot see how their subordinate officer or clerk can be such agent.

As to the other contract set out in the petition, which upon its face does purport to be made between the suppliants of the first part and Her Majesty the *Queen* of the second part, and which is executed by the suppliants, and is on their part a contract whereby, after reciting the fact that tenders had been called for by the Dominion Government, and had, in pursuance of such call, been made by the sup-

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pliants, for the printing of certain work for the government, namely, for the printing of the statutes and orders in council, at certain scheduled prices for that work mentioned in a specification, and for printing the *Canada Gazette*, at certain other scheduled prices specified for that work, and for printing what is called "departmental matter" at certain other scheduled prices appropriate to such matter, the suppliants covenanted that:

> In consideration of the sums and prices for the several different descriptions of work and services embraced in the said tender to be done and performed by the contractors in accordance with and at the respective rates and prices mentioned and expressed in the printed schedule and specification thereof annexed to the contract, and which is to be read and construed as part and parcel thereof as if the same were embodied therein, they, the contractors, should and would, from time to time, and at all times during the term of five years, well, truly, faithfully, and promptly do, perform and execute, or cause, or procure, to be done, performed, and executed all jobs or lots of printing for the several departments of the Government of *Canada* of reports, pamphlets, circulars, and blank forms of every description and kind soever coming within the denomination of Departmental Printing, and all the work and services connected therewith and appertaining thereto, as set forth in the said specification annexed to the contract, in such numbers and quantities as may be specified in the several requisitions which may be made upon them for that purpose from time to time by and on behalf of the said several respective departments, the contractors being in all cases furnished with the necessary supplies of paper, and they furnishing the necessary inks for the purpose; such jobs or lots of work to be executed and performed in a good and workmanlike manner, in strict accordance with the terms of the said schedule and specification in every respect and to the entire satisfaction of the Queen's Printer, and to be delivered by the said contractors to the said several departments or the Queen's Printer on their behalf, as he or they may direct within a reasonable period after the receipt of the requisitions therefor respectively.

The contract contains no express covenant or agreement as made, and in fact is not signed, by any one as representing or on behalf of Her Majesty. Now, from the above contract, as signed by the suppliants, although

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it may be that a contract upon the part of the Crown should be implied to the effect that the Dominion Government would give to the suppliants the printing of the matter particularly specified under the separate heads of the statutes, and orders in council and the *Canada* Gazette, yet as to the other jobs or lots of work, coming under the denomination of departmental printing the suppliants' contract, as it appears to me, is that they will execute in a good and workmanlike manner, at certain scheduled prices, all jobs or lots of such matter as the suppliants, by requisition, from the several departments, shall be required to execute, the departments supplying the paper, and that they will complete such work within a reasonable period after the receipt of such requisitions respectively; and from such a contract there cannot, in my judgment, be implied any agreement upon the part of the Crown, that *all* the departmental work which the departments may have occasion to have printed, shall be given to suppliants to print, which is the contention asserted by the suppliants in this petition.

In *Dwarris* v. *Harris* (1) and *Thorn* v. *Mayor of London* (2) it is laid down as a rule, that in determining a question of this kind, no covenant is to be implied, unless it is clear to all men of ordinary intelligence and knowledge of business, that what is sought to be implied must have been either latently in, or palpably present to the mind of both parties to, the contract when it was made; unless that be clearly so, the introduction of the covenant desired to be implied is, in truth, the introduction into the contract of a wholly new term, which no court is competent to do. In *Churchward* v. *The Queen* (3) *Cockburn*, C.J., states the rule that the court is not lightly to assume what is not

(1) L. R. 9 C. P. 1.
(2) L. R. 10 Ex. 123.
(3) L. R. 1 Q. B. 201.

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expressed, still less is it to imply that which it is convinced from what is expressed that the parties never intended. Mr. Justice *Mellor* (1) says:

> We have to ascertain from the nature of the instrument, the parties to it, the subject-matter of the contract, and the expressions actually used in it, what was the meaning and intention of the parties; and in order to ascertain that we must not only consider the actual language and expressions contained in the instrument, but all that must necessarily be implied from the scheme of the instrument and the expressions used in it, and if we can see that certain stipulations and conditions must have been necessarily intended by the parties, although not fully expressed in words, we must give effect to such intent.

And Mr. Justice *Lush* (2) says:

> In order to raise what is called an implied covenant, I apprehend the intention must be manifest to the judicial mind, and there must also be some language, some words or other, capable of expressing that intention.

In order to imply the covenant which is sought to be implied in the present case; namely, that besides the specific articles mentioned in the specifications, namely, the statutes, Gazette, &c., &c., *all* the departmental printing which might be required for the use of the various departments of the Government during the period of five years, should be given to the suppliants to execute, it is essential that the judicial mind should be convinced beyond all doubt from what is expressed in the instrument that such was the clear intent of the parties acting on behalf of Her Majesty. Now, so far from finding any words in the instrument indicative of such an intention, it appears to me to be impossible that the persons acting for Her Majesty would have consented, if they had been asked, to the introduction into the instrument of any words which could be construed to have the effect of the covenant which is sought to be implied. The introduction into the instrument of such a covenant, if proposed to have been inserted in express terms, might very naturally,

(1) P. 201. (2) P. 211.

as it appears to me, have been objected to as interfering with, and neutralising, during the five years named in the instrument, the power vested in the Governor General by the 7th sec. of the Act 32 and 33 *Vic.*, ch. 7, (upon which Act the suppliants rest their claim to have the covenant implied,) by which the Governor General is authorized by orders in council from time to time, for reasons stated in such orders, to cause printing, &c., for the public service to be executed without tender, notwithstanding the general provisions of the Act requiring all printing, &c., to be done under contracts after the receipt of tenders therefor. If the contention of the suppliants be correct that there should be implied a covenant, binding on Her Majesty, that the suppliants should have given to them *all* the departmental printing, which might be required for the public service during the period named, then of necessity the power of the Governor General under this section of the Act is interfered with, if not wholly excluded during the existence of the contract. To my mind there is nothing expressed in the instrument which would justify us in holding such to have been the intention of the parties acting on behalf of Her Majesty in entering into the contract which was entered into with the suppliants, and which is the subject of the present proceeding, and we cannot, I think, hold such to have been their clear intent without falling into the error of making a new contract for them.

*Appeal allowed as to demurrer on Parliamentary Printing contract, and dismissed as to demurrer on Departmental Printing contract, without costs to either appellant or respondent in either court.*

Solicitors for appellant: *O'Connor & Hogg.*

Solicitors for respondent: *Maclennan & McDonald.*

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*Oct. 24.
1883
*April 30.

DAME ANN BAIN.....APPELLANT;

AND

THE CITY OF MONTREAL.....RESPONDENT.

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

35 *Vic.* (*P.Q.*), *ch.* 51, *sec.* 192—*Assessment for foot-paths—Validity of—Proof of error—Onus probandi—Voluntary payment.—Notice, want of.*

On the 31st May, 1875, under the authority of 37 *Vic.*, ch. 51, sec. 192, (P.Q.) (1), the City Council of the city of *Montreal* by a resolution, adopted a report from their road committee prepared on the 30th April previous, as amended by a report of their finance committee of May 27, 1879, recommending the construction of permanent sidewalks in the following streets (*inter alia*) *Dorchester* and *St. Catherine*. On the adoption of these reports, with which an estimate indicating the quantity of flag stone required for each street, and the approximate cost of the work to be made in each street, had been submitted, the city surveyor caused the sidewalks in said streets to be made, and assessed the cost of these sidewalks according to the front of the real estate owned by the proprietors on each side of the same, and prepared a statement of the same, which he deposited with

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

"(1) Sec. 192. It shall be "lawful for the council of the "said city to order, by resolution, "the construction of flagstone "or asphalt sidewalks, or street "grading in the said city, and "to defray the cost of the said "works or improvements out "of the city funds, or to assess "the cost thereof in whole "or in part, as the said council "may, in their discretion, deem "proper, upon the proprietors or usufructuaries of the real "estate situate on each side of "such streets, public places or "squares, in proportion to the "frontage of the said real estate "respectively; and in the latter "case it shall be the duty of the "city surveyor to apportion and "assess, in a book to be kept by "him for that purpose, the cost "of the said works or improve-

the treasurer for collection. *D. A. B.* possessed real estate on *Dorchester* and *St. Catherine* streets, and did not object to the construction of the new sidewalk. On the 3rd December, 1877, a few days after receiving a notice from the city treasurer to pay within fifteen days certain sums, in default whereof execution would issue, *D. A. B.* paid, without protest, $946.25; and on the 29th Oct., 1878, paid a further sum of $438.90, and on the 14th November, 1878, without having received any notice, paid $700 on account of 1877 assessments.

In an action instituted by *D. A. B.* against the city of *Montreal*, to recover the said sums of money which she alleged to have paid in error that the assessment was invalid.

*Held*,—affirming the judgment of the Court below—(*Henry* and *Gwynne*, JJ., dissenting), that *D. A. B.* had failed, both in allegation and proof, to make out a case for the recovery of the assessment paid by her, either as a voluntary payment made in ignorance of its illegality, or as a constrained payment of an illegal tax, and that mere irregularities in the mode of proceeding to the assessment, although they might in a proper proceeding, have entitled the ratepayers to have had the assessment quashed, did not now entitle her to recover the amount back as a payment of a void assessment illegally extorted.

2. That the City Council in laying pavements in parts of the city only, the cost of which was to be paid by assessment according to the frontage of the respective properties, and not in proportion to the cost of the part laid opposite each property, were acting within the scope of the power conferred upon them by 37 *Vic.*, ch. 51, sec. 192.

3. That the objection founded on the invalidity of the assessment for want of notice, not having been alleged nor relied on at the trial of the case, was irrelevant on this appeal.

"ments, or such part thereof as "the said council may have deter- "mined should be borne by the "said proprietors or usufructu- "aries, upon the said real estate, "according to the frontage there- "of, as aforesaid; and the said "assessment, when so made and "apportioned, shall be due and "recoverable, the same as all "other taxes and assessments, "before the Recorder's Court."

The 39 *Vic.*, ch. 52, sec. 7 amended the above sec. 192, of the 37 *Vic.* ch. 51, by striking out the words "flagstone or asphalt sidewalks" in the second and third lines thereof, and substituting the following in their stead, "sidewalks made of stone "or asphalt, or both together, or "of any other durable and per- "manent material, to the exclu- "sion of wood."

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BAIN v. CITY OF MONTREAL.

APPEAL from a judgment of the Court of Queen's Bench for *Lower Canada* (appeal side) (1) confirming a judgment of the Superior Court for *Lower Canada*, sitting in the district of *Montreal*, which dismissed an action of the appellant *en répétition de l'indû* brought on the 8th January, 1879, whereby she claimed the recovery of an amount of $2,085.16, paid the respondent on account of a larger amount of $3,258, for which she has been assessed by certain assessment rolls made by the city surveyor, dated the 27th January, 1877, as being her proportion of the cost of flagstone footpaths laid by the city of *Montreal*, respondent, in front of her property in *St. Catherine* and *Dorchester* streets, in the city of *Montreal*, by and in virtue of a resolution of the city council of the 31st May, 1875.

The pleadings and facts sufficiently appear in the head note and the judgments hereinafter given.

Mr. *Barnard*, Q.C., and Mr. *Creighton* for the appellant:

There is no voluntary payment or acquiescence. The jurisprudence in *Lower Canada* on this point, which is of special application to the city of *Montreal*, is in the appellant's favor. *Leprohon* v. *The Mayor, &c of Montreal* and authorities cited (2); *Wilson* v. *The City of Montreal* (3); *Sutherland* v. *The Mayor of Montreal*, referred to by *Dorion*, C.J., in *Wilson* v. *The City of Montreal* (4); *The Corporation of Quebec* v. *Caron* (5); *Corporation de Rimouski* v. *Ringuet*, and *La Corporation de la Ville de St. Jean* v. *Bertrand*, cited in *De Bellefeuille's* edition C. C. L. C. (6). Civil Code of *Lower Canada* (7).

Moreover, this jurisprudence is based on undoubted

(1) 2 Dorion's Q. B. R. 221.
(2) 2 L. C. R. 180.
(3) 1 Legal News, 242; 3 Legal News, 282.
(4) 3 Legal News, 282.
(5) 10 L. C. Jur. 317.
(6) Under art. 1048, No. 819.
(7) Arts. 1047 et seq. Art. 1140.

authorities in the old French law. *Merlin*—Repertoire (1); *Merlin*—Questions de Droit (2); *Sirey*—Receuil Général (3); *Durieu*—"Poursuites en matière de Contributions directes (4)." See also,—The Budget Law of 1822 (5) which section has ever since been inserted in the annual budget.

This jurisprudence is also in accordance with the principle that the payment of a *jugement exécutoire par provision*, does not imply *acquiescement*. *Carré & Chauveau* (6); *Dalloz*—Jurisprudence Générale (7); *Rolland* de *Villargues* (8); *Sirey*—1867 (9).

The authorities cited by *Dorion*, C.J., in his notes, do not apply to the repetition of taxes, and are moreover contradicted by the following: *Laurent* (10); *Toullier* (11); *Delvincourt* (12); *Dalloz*—Jurisprudence Générale (13); *Rolland de Villargues* (14); Civil Code of *Lower Canada* (15).

The tendency of the jurisprudence both in *England* and *America*, is more favorable than formerly to the doctrine of coercion in law. *Union Bank* and the *Mayor* (16); *Peyser* and the *Mayor* (17); *Boston* and *Sandwich Glass Co.* v. *Boston* (18).

(1) Vs. "Restitution de droits indûment perçus." "Prescription," sec. 940. "Paiement des droits d'hypothèque, de Greffe, et de Contributions Indirectes."

(2) "Vente publique de meubles," sec. 2.

(3) 1867. *Douanes de la Réunion* contre *Lacaussade*. Cassation, 19 Août, 1867.

(4) Vol. 1., pp. 399 and 400.

(5) Sec. 22.

(6) Edition Belge, Vol. III, p. 377, and notes.

(7) Vo. "Acquiescement," Nos. 35, 612, 866. "Obligations," No. 4549.

(8) Vo. "Contrainte."

(9) P. 61, 405 (Cour de Cassation, 28th May, 1867). Particularly authorities cited in note, and 1875, pt. 1, p. 84 (Cour de Cassation, 9th Dec., 1874); 1871, pt. 1, p. 233 (Cour de Cassation, 13th Nov, 1871); 1862, pt. 1, p. 1054 (Cour de Cassation, 26th Nov., 1861).

(10) Vol. 20, p. 391.

(11) Vol. 11, Nos. 70 and 71.

(12) Vol. 3, pp. 448 and 449 and notes.

(13) Vo "Obligation," Nos. 5546, 5550.

(14) Vo. Répétition de l'indû sec. 6, Nos. 58 & 59, p. 177.

(15) Art. 1214.

(16) 51 Barbour (N.Y.) 159. Reversed on Appeal 51 N.Y.R., 638.

(17) 70 N. Y. R. 497.

(18) 4 Metcalf (Mass.) 189.

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This is a "popular action," not one for the appellant's sole benefit. If the tax is null for one ratepayer, it is null for all, and the court will consider the inconvenience of multiplying suits. *Molson's Bank* and the *City of Montreal* and *Hubert* intervening (1); *Scholfield* v. *Lansing* (2); *Thomas* v. *Gain* (3).

Municipal Code of the Province of *Quebec*, as to proceedings to quash by-laws, art. 698, 42-43 *Vic.*, *Quebec*, ch. 53, sec. 12, first provision for contesting by-laws, &c., in the city of *Montreal*, by petition to quash.

The proceedings of the corporation respondent are without jurisdiction, because the statutory power does not apply to new streets. There was no power to repave or to appropriate materials already laid down. *Wistar* v. *Philadelphia* (4); *Hammett* v. *Philadelphia* (5); *The Washington Avenue* case (6); *Seely* v. *Pittsburgh* (7); *Town of Macon* v. *Patty* (8); *Board of Works Fulham District* v. *Goodwin* (9); *Lowell* v. *French* (10).

Notice to "repave" held not sufficient, where the assessment was for "paving." *State* v. *Jersey City* (11), cited by *Harrison*, Municipal Manual (12).

36 *Vic.*, ch. 48, sec. 467, cited *ibidem*, p. 561, "a sidewalk once made to be kept in good repair at the expense of the city."

If the power to substitute a new sidewalk existed, it should have been exercised after a principle of contribution applicable to the whole city had been laid down. *Town of Macon* v. *Patty* (13).

The council did not execute the authority, but delegated it. *Thompson* v. *Schermerhorn* (14); *Hyde* and

(1) 1 Revue Légale, 542.
(2) 2 Am. Corp. Cas. 538.
(3) 24 Am. Rep. 541.
(4) 21 Am. Rep. 112.
(5) 3 Am. Rep. 615.
(6) 8 Am. Rep. 255.
(7) 22 Am. Rep. 761.
(8) 34 Am. Rep. 451.
(9) 1 L. R. Ex. D. 400.
(10) 6 Cushing, 223.
(11) 3 Dutch (N.J.) 536.
(12) 4th ed. 565, note N.
(13) 34 Am. Rep. 451.
(14) 6 N. Y. Rep. 92.

*Goose* v. *Joyes* (1); *Powell* v. *Tuttle* (2); *Scholfield* v. *Lansing* (3); *Meuser* v. *Risdon et al* (4); *Bayley* v. *Wilkinson* (5); *Abrahams* v. *The Queen* (6): *Sedgwick* on Statutory Law (7); *Dillon* on Municipal Corporations (8).

The pretended subsequent ratification by the council, even if it existed, would be of no avail in law.

The state of *Maryland ex rel. The City of Baltimore* v. *Kirkley et al* (9); *Brady* v. *The Mayor* (10).

The resolution was uncertain. *Tufts* v. *The City of Charleston* (11); *Ex parte Jenkins* (12).

If the council has the statutory power to make resolutions applying to particular streets, the resolution in question is, under the circumstances unreasonable and unjust.

See *Lowell* v. *French* (13) wherein a wooden sidewalk was held to be a permanent one.

The following authorities show that if the resolution be unreasonable or unjust it will be set aside by the court as if utterly null and void: *Sedgwick*, Statutory Law (14); *Maxwell* on Statutes (15); *Hardcastle* on Statutes (16); *Kyd* on Corporations (17); *Angell* and *Ames* on Corporations (18); *Dillon* on Municipal Corporations (19); *Boone* on Corporations (20); *Arnold*, Law of Municipal Corporations (21); *Harrison's* Municipal Manual (22);

(1) 2 Am. Corp. Cas. 538.
(2) 3 Comstock, 296.
(3) 2 Am. Corp. Cas 538.
(4) 2 Am. Corp. Cas. 101.
(5) 16 C. B. N.S. 163.
(6) 6 Can. S. C. Rep. 10.
(7) 1874 ed., 397, 398.
(8) 2nd ed., vol. 1, sec. 60, p. 180, and note 2. *Ibid* vol. 2, sec 567, p. 667; and sec. 618, p. 721 note.
(9) 2 Am. Corp. Cas. p. 425.
(10) 20 N. Y. Rep. 319.
(11) 2 Am. Corp. Cas. 469.
(12) 12 L. C. Jur. 273.
(13) 6 Cushing 233.
(14) 1874 ed. p. 397.
(15) Pp. 100 et seq.
(16) Pp. 151, 152.
(17) Vol. II, 107 and 155.
(18) 11th ed. sec. 347 et seq. 387.
(19) 2nd ed. vol. I, secs. 253, 256.
(20) Sec. 58.
(21) Eng. ed. 1875, p. 19.
(22) 4th ed. 242, note K.

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*Stevens'* Commentaries (1); *Cooley*, Constitutional Limitations (2); *Church* v. *The City of Montreal*, per *W. Dorion*, J. (3); *Co. of Framework Knitters* v. *Greene* (4); *Bosworth* v. *Hearne* (5); *Marshall* v. *Smith* (6); *Hall* v. *Nixon* (7); *Fielding* v. *Rhyl Improvement Commissioners* (8); *City of Bloomington* v. *Wahl* (9); *City of Boston* v. *Shaw* (10); *Clapp et al.* v. *The City of Hartford* (11); *Dunham* v. *The Trustees of Rochester* (12).

We also contend that the assessment is null: Because not in conformity with the resolution of the council and rely on—*The King* v. *Cunningham* (13); *Richter* v. *Hughes* (14); *Davison* v. *Gill* (15); *Whitchurch* v. *Fulham Board of Works* (16); *Pound* and Lord *Northbrook* v. *Board of Works for Plumstead* (17); *Swinford* v. *Keble* (18); *Sedgwick*, Statutory Law (19). Because there was no notice enabling parties to be heard against it: *Dillon* on Municipal Corporations (20); *Harrison*, Municipal Manual (21); *Nicholls* v. *Cumming* (22); *Maxwell* on Statutes (23); *State* v. *New Jersey* (24); *Stuart* v. *Palmer* (25); *Thomas* v. *Gain* (26); *The State* v. *The Mayor of Newark* (27); *Flatbush* Avenue case (28). And that a resolution or by-law may be attacked in incidental proceedings. See *Kyd* on Corporations (29); *Dillon* on

(1) 7th ed., vol. 3, p. 13.
(2) 3rd ed., 200.
(3) Reported in *Montreal Gazette*, 1st March, 1878.
(4) 1 Lord Raymond, 113.
(5) 2 Strange, 1,085.
(6) L. R. 8 C. P. 416.
(7) L. R. 10 Q. B. 152.
(8) L. R. 3 C. P. 272.
(9) 2 Am. Corp. Cas. 152.
(10) 1 Metcalfe 130.
(11) 2 Am. Corp. Cas. 117.
(12) 5 Cowen, 465.
(13) 5 East 478.
(14) 2 B. & C. 499.
(15) 1 East 64.
(16) I. L. R. Q. B. 240.
(17) 25 L. T. 463.
(18) 14 L. T. N. S. 771.
(19) P. 299 et seq.
(20) 2nd ed. 741, note 2.
(21) 1878 ed. 565, note C.
(22) 1 Can. S. C. Rep. 395.
(23) P. 325 et seq. and cases there cited.
(24) 4 Zabriskie 662.
(25) 74 N. Y. Rep. 183.
(26) 24 Am. Rep. at 540.
(27) 18 Am. Rep. 729.
(28) 1 Barbour 287.
(29) Vol. 2, p. 170.

Municipal Corporations (1); *Harrison* Municipal Manual (2); *Reg.* v. *T. B. Rose* (3); *Reg.* v. *Wood* (4); *Dunham* v. *The Trustees of Rochester* (5).

Then it is for the municipal corporation to show its authority. Appellant, having alleged that the by-law is illegal, null and void, is not obliged to specify the nature of the legal objections. Moreover respondent has recognized the principle that he is bound to justify.

*Redfield* on Railways (6); *Kyd* on Corporations (7); *Dillon* on Municipal Corporations (8); *Sedgwick*, Statutory Law (9); *Angell* and *Ames* on Corporations (10); *Cooley* on Constitutional Limitations (11); *Stephens* and the *Mayor, etc.*, of *Montreal* (12); *Patton* and the *Corporation of St. André d'Acton* (13); *Queen* v. *Bristol* and *Exeter Railway* (14); *The Sheffield* and *Manchester Railway* (15); *Hall* and *Nixon* (16); *Hoyt* v. *Saginaw* (17), *per Cooley*, J.

As to inconvenience to the corporation, it is no ground against so holding. *Swinford* and *Keble* (18); *Hall* and *Nixon* (19); *Hoyt* v. *Saginaw* (20).

Mr. *Rouer Roy*, Q.C., for respondent.

Mere apprehension of an impending distress warrant, threats to use legal remedies, do not make payment com-

(1) 2nd ed., vol. 1, sec. 353, p. 441.
(2) 4th ed. 242, note k.
(3) The Jurist 1855, p. 802.
(4) 5 E. & B. 58.
(5) 5 Cowan 465.
(6) 4th ed., Vol. II, 307.
(7) Vol. II., 164 to 167.
(8) 2nd ed., Vol. II, sec. 55, p. 173 *et seq* particularly note 1 *in fine* 176, and sec. 605, 706, and note 2 p. 707.
(9) 1874 ed., 303, 304, 306.
(10) 11th ed., sec. 366 p. 408.
(11) 1878 ed., 236 note 1.
(12) *Vide* p. 135 of printed Transcript in Privy Council Record.
(13) 13 L. C. Jur. 21.
(14) Hodges on Railways, 306.
(15) 2 Q. B. 978.
(16) 10 Q. B. L. R. 152.
(17) 2 Am. Rep. 79 & 80.
(18) L. T. N.S. 771.
(19) 10 Q. B. L. R. 152.
(20) 2 Am. Rep. 79 and 80.

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pulsory. Writ of execution must have issued. See *Dillon* on Mun. Corp. (1).

On the question of what is a voluntary payment, I rely on the following authorities:

*The Collector* v. *Hubbard* (2); *Supervisors* v. *Manny* (3); *Sumner* v. *First Parish* (4); *Stetson* v. *Kempton* (5); *Wright* v. *Boston* (6); *Preston* v. *Boston* (7); *Richmond* v. *Judah* (8); *Smith* v. *Readfield* (9); *Baltimore* v. *Lefferman* (10); *Gordon* v. *Baltimore* (11); *Taylor* v. *Board of Health* (12); *Town Council* v. *Burnett* (13); *Lee* v. *Templeton* (14); *Abbott* on Law of Corporations (15).

In the case of *Leprohon* v. *The Mayor, &c. of Montreal*, relied on by appellant, the city had no power to tax inspectors of potash, as was recognized by the defendants themselves. Payment was without consideration. Here, on the contrary, the power of the city council is admitted, and there is a consideration, viz., the benefit accruing from the improvement.

In the case of *Quebec* v. *Caron* payment was made in consequence of threatened violence, stoppage of water, action in damages, &c.

*Re Wilson* v. *City*, payment under protest, the appeal was solely on question of interest.

*Re Sutherland* v. *Mayor et al of Montreal.* Point not in issue; decided on different grounds.

*Burroughs* on Taxation (16) roll of assessment is to a certain extent judicial; when closed, equivalent to a judgment. Hence payment constitutes an acquiescence.

*Rolland de Villargues* (17).

(1) 2 Vol., 857, No. 751 and note 3.
(2) 12 Wall. 1, 12, 1870.
(3) 55 Ill. 160, 1870.
(4) 4 Pick. 361.
(5) 13 Mass. 272.
(6) 9 Cush. 233.
(7) 12 Pick. 7.
(8) 5 Leigh (Va.), 305, 1834.
(9) 27 Maine 145.
(10) 4 Gill. (Md.) 425, 1846.
(11) 5 Gill. (Md.) 231.
(12) 31 Pa. 73.
(13) 34 Ala. 400, 1859.
(14) 13 Gray 476.
(15) P. 876, No. 18.
(16) P. 666.
(17) Vo. Acquiescement and Répetition de l'indû, Nos. 7, 37, 53.

There is no vagueness or uncertainty about the resolution of council.

In adopting the reports of the committees, the city council has virtually determined: 1. That sidewalks should be laid; 2. In what streets; 3. To what extent in each street; 4. Of what material; 5. The maximum of the expense.

There has been no delegation in the sense of the authorities quoted by appellant.

The power given the council was to order (not to construct) the laying of footpaths. The term order implies the carrying out of the improvement by its committees and officers, the council having determined all that was required by the charter, where no direction was given as to dimensions of the work.

*Dillon* (1); *Cooley* on Const. Lim. (2).

By-law No 47, referred to in respondent's factum, vests city surveyor with control over sidewalks under the direction of the road committee; Legislature must be presumed to have had this by-law under its notice when it gave council power to order sidewalks, since our by-laws are public laws (3); *Hopkins* v. *The Mayor of Swansea* (4); *Dictum* of Lord *Abinger*. *Milne* v. *Davidson* (5).

The grounds of an action must be alleged with precision and clearness, so as to enable defendant to know how to answer. General allegations are of no avail (6).

(1) 1 Vol., 178, No. 58, note 1; p. 181, No. 60, and 2 Vol., No. 618, note 1.

(2) P. 205, note 1.

(3) 37 *Vic*, ch 51, sec. 127 (City Charter); 1 *Dillon*, No. 246, n. 1.

(4) 4 M. & W. 621, 640.

(5) 5 *Martin* (La) 586, 1827.

(6) 1 *Jousse*, Ord. 1667, Tit. 1er; 1 *Thomine-Desmazures*, 159; 1 *Rodière*, Proc. Civ, 174, 285; 1 *Bioche*, Dict. proc. vo. Ajournement, Nos. 75, 76, 81. *Chauveau*, Dict. proc. vo. Exploit, *passim*. *Jouraal du Pal.* Rép. Gén. vo. Exploit, p. 134, Nos. 476, 481. 2 *Dalloz*, Dict. Jur. Gén. vo. Exploit, p. 528, No. 42, No. 507. 1 *Dalloz & Vergé*, C. Proc, p. 128, No. 2 Formalités intrinsiques, libellé, exposé des moyens. *Dalloz & Vergé*, C. Proc., p. 137, No. 355, libellé.

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*Code Proc.* (*Wotherspoon*), arts. 20, 50, 51, 144, 270, 320 and diss. on pleading by *Ch. J. Sewell* at p. 15 of same work, ed. 1880.

*Rodier*, Quest., p. 17: "Il faut que le défendeur con-"naisse ce qu'on lui demande, que le juge sache sur quoi "il a à prononcer, et que la sentence soit relative à la "demande."

The allegation in appellant's declaration that the assessment was null and void, did not authorize her to prove all sorts of pretended informalities, since she limited her grounds of action to the four points specified; otherwise, she would have been entitled to prove want of quality of the city surveyor, the irregularity of the council meeting, want of notice of that meeting, &c., and the alleging of the four specific different grounds could only be considered as a trap laid to surprise the good faith of the defendant.

The evidence must be confined to the issues: *Grant* on Corporations (1). The rule has invariably been adhered to in the Province of *Quebec*.

The *onus probandi* was on appellant: the respondent not bound to adduce evidence. "*Ei incumbit probatio qui dicit, non qui negat.*"

It would have been otherwise, if city had sued for the assessment: "*Omnia præsumuntur rite acta esse*" *Reniére* v. *Milette* (2); the trustees were plaintiffs, still *Ch. J. Lafontaine* adopted the maxim, "*Omnia præsumuntur, &c.*" *Hilliard* on Tax. (3); *Dillon* (4).

Nor can appellant invoke injustice to third parties, her action not having the character of an *action populaire*.

It was so decided *re The Mayor* v. *Stephens* (5):

(1) Ed. 1850, p. 312 and seq; 1 Taylor, ev., 7th Eng. ed. 283.
(2) 5 L.C. R., 87, 91.
(3) P. 295, sec. 14, 15.
(4) Vol. 2, p. 747, No. 650.
(5) Printed Transcript (Priv. C.) *in fine*.

The action was a mere personal action, in which he sought to be relieved from the distress upon his property, and to have damages for the illegal act of seizure. The judgment cannot have the effect of a judgment *in rem*, and must be construed to mean that the assessment was null and of no effect against the plaintiff.

Statute of *Quebec*, 42 and 43 *Vic.*, ch. 53, having been passed long after institution of the present case,—sec. 12 does not apply. *Cooley* on Tax. (1); *Cooley* on Tax. (2).

The discrepancy in the width of the sidewalks was not even alluded to, in appellant's action. The point is irrelevant and foreign to the issues.

Besides, the Charter did not require council to fix width, and they did not fix it; the city surveyor had control on this point, and, as observed by a witness, width varied according to sinuosities and irregularities of streets; moreover, the evidence on that point is, to say the least, ambiguous and uncertain.

Lastly, the appellant has seen the work done under her own eyes and never complained. *Hilliard*, Tax. (3); *Michie* v. *Corporation of Toronto* (4), *dictum* of *Draper*, C. J.; *Harrison*, Mun. Man (5); *People* v. *Utica* (6); *New Haven* v. *Fair Haven* (7); *Angell*, Highways (8).

On the question of notice. It is not a ground of the present action; therefore irrelevant.

Hence the maxim: "*Omnia præsumuntur*, &c." applies.

In the Province of *Quebec*, the rule is that where all the formalities prescribed by statute have been complied with, the proceedings are valid: and, should the appellant have thought of urging this ground of want of notice before the Superior Court, or in the Court of Appeals, she would have been told, as she was repeatedly on other points, that the question was not in issue,

(1) P. 153, n. 2.
(2) P. 155, n. 1.
(3) P. 384, sec. 70.
(4) 11 U. C. C. P. 385.
(5) Last ed. 565.
(6) 65 Barbour's R. 19.
(7) 9 Am. Rep. 399 & 405.
(8) P. 221, sec. 196.

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and, besides, that the statute did not require such a notice.

The knowledge of the appellant of the improvement being carried on opposite her property (where she resided) was a sufficient notice.

RITCHIE, C.J.:—

This was an action instituted by the appellant to recover $2,085, which she alleges to have paid by error, on account of a larger amount claimed by the city, under a special assessment for a flag-stone sidewalk laid in front of her properties in certain streets of *Montreal*. The appellant opposed the assessment on several grounds. The first of which is on the ground "that at the time the city caused the sidewalks to be constructed in front of her properties, she had good serviceable and permanent sidewalks which were removed by the corporation without accounting or making any allowance for the same; and also that the resolution of the council was too indefinite, as it did not determine the kind of stone, the width of the sidewalk, or the quality of the work.

I agree with Chief Justice *Dorion* in saying that the plaintiff has failed to establish her first ground of objection as well as the second. Had there been any objection taken at the time, the corporation had it in their power then to remedy any irregularities. I think it is too late now for this plaintiff to complain of uncertainty in the resolutions or irregularities in the assessment roll.

The city council had clearly under 37 *Vic.*, ch 51, sec. 192, as amended by sec. 7 of 39 *Vic.*, ch. 52, the right to "order by a resolution the construction of the sidewalks of stone or asphalt in the city, and to assess the costs thereof in whole or in part, as the council may in their discretion deem proper, upon the proprietor or usufructuaries of the real estate situate on each side of

said streets, public places, or squares, in proportion to the frontage of the said real estate respectively." And the city surveyor, under the same statute, had power to apportion and assess the costs of the said works or improvement, &c, upon the said real estate, according to the frontage thereof.

The improvements have been made in front of plaintiff's properties; she saw the work going on, and permitted it to go on, she is in the full enjoyment of such improvements, and after she has voluntarily paid the amount, without objection or protest, how can she, assuming the resolution may be too general, and that there may have been irregularities in the mode of assessment, ask the amount to be refunded to her on such grounds?

I do not think there was such error in the payment she made as would justify her under the laws of the Province of *Quebec* to raise now these objections. I think it is entirely too late, and I do not think she has given any valid reason why the amount expended for her benefit should be refunded.

STRONG, J :—

I am of opinion that this appeal must be dismissed. The payment made by the appellant was a voluntary one, made without any other pressure than that of a demand on the part of the corporation, there having been, so far as the evidence shows, no seizure of goods or other constraint. It certainly appears, according to the later authorities, differing in this respect from *Pothier* (1), that the action *condictio indebiti* can be maintained as well for the recovery of a payment made under error of law as for one made in error of fact (2), but ignorance or error of law is not to be presumed but must be proved.

(1) *Pothier, traité de l'action condictio indebiti*, No. 162.

(2) *Aubry et Rau* 4 *Tome* p. 729, authorities in note.

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In the present case the plaintiff has not in her declaration alleged that at the time of payment she was ignorant of the legal objections to the assessment which she now invokes, nor has she proved such ignorance.

There is, therefore, wanting an essential ingredient, both in allegation and proof, to the establishment of a right to the *répétition de l'indû* upon the ground of payment in error.

That a tax paid without compulsion or remonstrance is to be considered a voluntary payment, which cannot be recovered back upon mere proof of its illegality, is well established by numerous authorities in English law, and these, although they would not be conclusive, if error had been proved, are not the less relevant to show that the payment here must be considered a voluntary one, as distinguished from a payment after a distress or after the inception of legal process to enforce it. *Grantham* v. *City of Toronto* (1); *Dillon* on Municipal Corporations (2).

The plaintiff has therefore failed to make out a case for the recovery of the money, either as a voluntary payment made in ignorance of its illegality, or as a constrained payment of an illegal tax.

The reasons just stated are alone sufficient to warrant the dismissal of the appeal. But upon the other grounds stated in the "considerants" of the judgment under appeal and on the notes of the learned Chief Justice, it would seem impossible that the plaintiff could succeed. I can find nothing in the statute which limits the power of the city council to make a special assessment on the property owners for sidewalks of flag stones or asphalts in certain localities and yet to provide for the construction of wooden side-walks out of the general

(1) 3 U. C. Q. B. 212.
(2) Ed. 3, secs. 941, 942, 943.

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rates. This being so, the only objection would be to the vagueness of the resolution and the correctness of the mode of proceeding,—but these would constitute mere irregularities which, although they might in a proper proceeding have entitled the ratepayers to have the assessment quashed, do not entitle a party who has paid the tax to recover the amount back as a payment of a void assessment illegally extorted (1).

It may be that the assessment was void by reason of the omission to give notice of the making of it to the proprietors, for although the statute requires no such notice, yet in a quasi-judicial proceeding, such as the imposition of a tax, sound rules of statutory construction require that the obligation of giving a notice is to be implied, but a sufficient answer to any objection founded on the invalidity of the assessment for want of notice has been given by the respondent's counsel in his supplementary factum; namely, "that it is not a ground of the present action and is therefore irrelevant."

For these reasons I am of opinion that the judgment of the Superior Court was entirely right, and the appeal therefrom was properly dismissed by the Court of Queen's Bench, whose judgment must be affirmed with costs.

FOURNIER, J.:—

I am in favour of dismissing the appeal for the reasons given by the learned Chief Justice of the Court of Queen's Bench, and by my learned brother *Taschereau*, whose judgment I have read.

HENRY, J.:—

The first question involved in the consideration of this case appears to me to be: whether the payments made by the appellant were in law such voluntary acts

(1) Dillon, Ed. 3, sec. 941, and cases there cited.

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on her part that she cannot now seek to recover them or any of them back in this action. In considering this legal proposition involving also the consideration of the evidence in the cause I have referred to, article 1047 of Civil Code, which provides as follows:

> He who receives what is not due him through error of law or fact, is bound to restore it, or if it cannot be restored in kind, to give the value of it.

The same provision will be found in article 1376 of the code *Napoleon*, and the authorities in *France* hold that the receiving party, in such a case, is bound to make restitution as well in case he became the receiver in good faith, as in bad—the duty to repay is imposed as soon as he learns that the demand for which the payment was made was illegal.

When therefore the repayment was demanded, if not before, the respondent was bound, under the authority just referred to, to repay the amount illegally paid, if such were the fact. If the tax in this case were illegal through irregularities of the respondent or otherwise, he was bound to know it, and ignorance of the law and what it required is no legal excuse or defence. The law is therefore plain as applicable to the circumstances, and the next inquiry is, necessarily, as to the evidence.

The first matter of proof in the proceedings, which formed the basis of the tax on the appellant, was the report of the road committee and of the finance committee of the city of *Montreal* which were approved of by the city council. Next, evidence that the sidewalks referred to in the reports were made, and that a notice was served on the appellant from the city treasurer, as follows:

> Take notice, that having failed to pay the above-mentioned sums within the time prescribed by public notice, you are hereby required, within fifteen days from the date hereof, to pay the same to me, at my office, together with the costs of this notice and service thereof

as below; in default whereof execution will issue against your goods and chattels.

(Signed) *James F. D. Black*,
City Treasurer.

*Montreal*, 27th Nov., 1877.

Costs 10c.
Notice 20c.

30 cents.

The ultimatum was, therefore, an execution to levy on the goods and chattels of the appellant if the sums demanded were not paid in fifteen days. The appellant may fairly be presumed to have known that the sidewalks had been made, but there is nothing in the evidence to show that she knew that she was to be called upon to contribute in the shape of a tax for the cost of them She, or her agent, had good reason to suppose that the city authorities had proceeded legally, and, under that impression, paid the several sums demanded from time to time, but further, she must also have felt that, rightfully or otherwise, she occupied such a position, that say or do what was in her power, she could not prevent the levy of the execution as threatened in the notice. She had, therefore, to adopt the only mode open to her of preventing it by the payment of the sums demanded. Payment under such circumstances cannot, therefore, be characterized as voluntary. She was as helpless to resist the threatened levy as an unarmed traveller would be when stopped by an armed robber who demanded his money, threatening the consequences of a refusal, and who would be glad to escape the consequences by handing over the money demanded, as she did. The payment might be considered voluntary in the one case as well as in the other. Besides, can we assume the payments in this case to have been made voluntary under the circumstances? What I would call a voluntary payment is one made after a full knowledge of all the facts. It is in no way shown

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that the appellant, when the payments were enforced from her, knew what the proceedings of the city authorities were; it is not shown that she knew of any irregularities having been committed, or that by the payments made she could be considered to waive. Parties who allege a voluntary payment must show that when such was made the maker of it thereby waived the objections which he subsequently relied on. There is nothing in the evidence to establish that position. The defence that the payment was voluntary is founded on the doctrine of estoppel by which a party, who by words or actions admits the existence of certain facts or circumstances, and thereby changes the position of another, is prohibited from saying that what he admitted was untrue. Here no such position can be taken. Besides, the article of the code to which I have referred draws no distinction between voluntary and involuntary payments, but simply enacts that "He who receives what is not due to him, through error of law or of fact, is bound to restore it." Besides the provisions in article 1047, we have that contained in article 1140:

> Every payment pre-supposes a debt; what has been paid where there is no debt, may be recovered.

It provides that "there can be no recovery of what has been paid in discharge of a natural obligation." The latter provision does not apply to the circumstances of this case, and therefore leaves the first paragraph of the article to its full operation. Article 1214 is also applicable to our inquiry on another point. It declares that:

> The act of ratification or confirmation of the obligation which is voidable, does not make proof, unless it expresses the substance of the obligation, the cause of its being voidable and the intention to cover the nullity.

The case of payments by the appellant of the taxes sought to be recovered may not come exactly within

the provisions of that article, but we are, I think, bound to apply to her acts of payment the equitable provisions of the article. If we do so, then our judgment must on that point be in her favour.

I have looked at and considered several cases in the courts in the Province of *Quebec*, and in none of them do I find that the question of the voluntary payment of taxes alleged to have been illegal was raised as a defence to an action brought to recover money paid as taxes illegally imposed. In the Court of Revision at *Quebec* (1) it was unanimously decided that a seigneur who had paid an illegal tax could recover it, even from the successors of the Commissioners of Schools to whom he had paid it.

See also *Leprohon* v. *Montreal Corporation* (2) where it was held:

That a party who has voluntarily paid a tax imposed by a by-law of a municipal corporation, which by-law is declared by the court to be void, has a right to recover back what he has so paid.

*Grant* on Corporations (3) says:

Where a corporation has been receiving money wrongfully, they are liable in assumpsit for money had and received.

And he cites the case of *Hall* v. *The Mayor, &c.*, of *Swansea* (4) as the leading case on that point. In that case the question of liability being raised, Lord Chief Justice *Denman* (5) says:

So, here, if the corporation have helped themselves to another man's money, it would be absurd to say that they must bind themselves under seal to return it. The question is what title they have to retain the money, and the only title they show is there having taken it. Their wrongful act binds them to return it without any actual promise.

There have been many others decided in the courts of *Quebec*, and they have been decided in the terms of the

(1) 3 Q. L. R. 323.
(2) 2 L. C. R. 180.
(3) P. 61.
(4) 5 Q. B. 526.
(5) P. 546.

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code—not on the question of the voluntary or involuntary payment of the taxes, but solely on the question as to the validity of the proceedings and the right to impose and collect the taxes. The sole question was whether the taxes were legally imposed, and in every case where they were found illegal the parties paying them were decided to be entitled to recover back the amount of them. It may be contended, however, that in this case the appellant must be presumed to know the law and the proposition may be a sound one, but she cannot be presumed to know that the respondent had not acted according to its provisions.

The respondent is called upon to repay moneys illegally obtained from the appellant by threats of an execution against her goods and chattels. They are then called upon to allege and prove that they were legally entitled to collect from her and retain the moneys in question. If they fail in doing so, she is entitled to recover. The prescription in such a case is thirty years, and we cannot make it less. We may be told that a judgment in favor of the appellant will operate injuriously to the public interests, and open the door for many others to come forward with similar claims. My answer is simply that with such consequences or results we have nothing to do. It is our province and duty to declare the law, and if the public interests thereby suffer, the blame must rest with those who, placed in a position of heavy responsibility, have negligently executed the public trust confided to them, and thereby produced the very results they would ask this court to prevent; when, in the proper discharge of our duty we have it not in our power to do so. Having therefore decided in favour of the appellant on the first objection raised to her right to recover, I will refer the plea to her declaration. The plea sets out in substance—

That in deciding that a sidewalk in stone or flags should be con-

tructed on certain streets, and that the cost thereof should be borne one half by the proprietors or usufructuaries of the properties situated on the said streets, and that a special assessment should be imposed for that purpose according to law and in proportion to the frontage of each such property, the city of *Montreal* acted within the limits of its corporate privileges and exercised a power which is in its nature legislative. That neither the city of *Montreal*, nor the surveyor exceeded their authority in the matters aforesaid, and that in the making of the assessment roll all the formalities required by law were duly complied with. That the plaintiff was justly indebted to the defendants when she paid to the defendants the sum placed to her charge as her part of the contribution to defray the half of the cost of the construction of the said side walks. That long before the institution of the present action the plaintiff has recognized and admitted the validity of the assessment roll by paying to the defendants the sum of $2,085.15, the amount o her contribution, &c.

The authority for the proceedings of the respondent is contained in section 192 of the act of the Legislature of *Quebec* (37 *Vic.*, ch. 51) entitled "An Act to revise and consolidate the charter of the city of *Montreal* and the several acts amending the same."

It shall be lawful for the council of the said city to order by resolution the construction of stone or asphalt sidewalks or street grading in the said city, and to defray the cost of the said works or improvements out of the city funds, or to assess the cost thereof, in whole or in part, as the said council may, in their discretion, deem proper, upon the proprietors or usufructuaries of the real estate situate on each side of such streets, public places or squares in proportion to the frontage of the said real estate respectively; and in the latter case, it shall be the duty of the city surveyor to apportion and assess in a book to be kept by him for that purpose the cost of the said works or improvements or such part thereof as the said council may have determined should be borne by the said proprietors or usufructuaries upon the said real estate, according to the frontage thereof as aforesaid, and the said assessment when so made and apportioned shall be due and recoverable the same as all other taxes and assessments before the Recorder's Court.

Under the Act the Recorder's Court had no further jurisdiction in the matter than to issue the execution or warrant to levy for the taxes imposed in case they

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remained unpaid for fifteen days after demand and notice from the city treasurer.

The section just quoted gives power to the council, by resolution to order the construction of stone or asphalt sidewalks, but the plea does not allege that any such order to construct such was passed, and there is no proof that any such was passed. It is true the two committees, before referred to, made certain suggestions and recommendations to the council. The council considered those reports, and the following extract from the minutes show what the action of the council was. On the 51st of May, 1875—

> The order of the day being read to consider the reports from the road and finance comittees to construct side walks in certain streets, the following reports were brought up and read, and on motion of Alderman *Nelson*, seconded by Alderman *Davis*, it was resolved that the said reports be adopted.

The reports referred to are set out in the declaration and affect differently, as I read them, the interests of the appellant. The claim against her is for the sidewalks on *Dorchester* and another street. The road committee, in their report, recommend that the sidewalks on *Dorchester* street be made "from *Union Avenue* to city limits on both sides," while the finance committee, in their report, recommend an amendment to the report of the road committee, and suggest that the sidewalks on *Dorchester* street be made "from corner of *Beaver Hall* terrace westward to the city limits" The minutes of the council show that it was resolved to adopt both the reports. As respects *Dorchester* street then, which of the two reports is really confirmed or adopted? The termini are different, and is it from *Union Avenue* or *Beaver Hall* terrace that the adoption of the report decides upon as one of such termini? The resolution of the council I consider as void for uncertainty, not only as affecting *Dorchester* street, but others, as a comparison of the two reports will show.

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I take, however, a higher ground of objection to the legality of the proceedings. By the statute under which they were taken (37 *Vic.* ch. 51, sec. 192) the city council was authorized "to order by a resolution the construction of sidewalks," &c. The order for the construction must therefore be made by the council. No such order was made for the construction of the sidewalks in question by the only body authorized to make such an order. As far as the case shows, the road committee volunteered to make a report to the council containing certain suggestions and recommendations. That report was referred to the finance committee, who, with certain amendments and changes recommended the adoption of the report. As I have before stated, both reports, although inconsistent with each other, were adopted. Here the action of the City Council ended, and what did such adoption amount to? Certainly nothing more than a present approval of what the reports recommended. I cannot give effect to that mere signification of approval of the reports as an "order for the construction" of the sidewalks. The respondent claims in his plea that the statute conferred on the council a *quasi* legislative power in the premises. To test the value of the resolution adopting the reports, it is only necessary to refer to well known practice of parliaments and legislatures, by which the opinion of members is ascertained in a general way as to any particular measure or matter by a resolution affirming some proposition. If after consideration the resolution be sustained, a bill providing for the mode and manner by which the general terms of the resolution shall be carried out is the next and necessary proceeding, and it matters not how specific the resolution may have been in its details, the only means of giving effect to it is by an act. The resolution is but an expression of opinion favourable to the legislation proposed, and if no act be

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passed, it remains on the journals merely as such an expression, and without giving the slightest authority to any one to act in the matter. In this case no one was authorized to build the sidewalks in question, nor did the council authorize any one, as far as I can see, to enter into contracts to bind the council or the city. To establish this proposition it is only necessary to put a very plain case. Suppose an action were brought against the city by a contractor for the materials supplied by a party who entered into an agreement with the city surveyor, or by a party who sustained damages by his negligence whilst engaged in the work, would it not be a good defence for the council to answer that, although approving the reports of the two committees, no order or authority was given to carry out the recommendations contained in them.

It is a legal proposition universally recognized that where power of taxation is given as the result of certain proceedings by a statute to one body, there can be no delegation of it to another. Here then the power to order by resolution is given only to the city council. That body was to decide on the material or materials to be used, and, as a necessary consequence, on the width of the sidewalks. They were to be made of stone or asphalt, or both together, or any other durable and permanent material to the exclusion of wood. To order a stone sidewalk would necessarily require some provision as to the mode and manner of making it. It might be called a stone sidewalk, if made of McAdam stone—or of any other size. It might be made of free stone, granite, slate, or any other kind of stone laid in blocks or thin slabs, with or without cement;—the city was to bear the whole of the cost or of such part as the council should decide—the proprietors or usufructuaries to be assessed for the balance. Up to this point the city council were alone authorized to act. After

all had been done by the council, and a decision had been come to by the council, and the necessary resolution passed to assess the proprietors or usufructuaries, then, and then only does the section in question call for the action of the city surveyor, and his duty or authority is confined to the apportionment and assessment by him of "the cost of the said works or improve-"ments or such part thereof as the council may have "determined, should be borne by the said proprietors or "usufructuaries." How different has been the proceedings. The council decided to adopt the reports of the two committees. The road committee merely recommend that a flag stone foot path, or side walk, be laid on the streets named, without specifying the width of such sidewalks, or describing in any way how they were to be made The city surveyor, however, seems to have taken upon himself the whole responsibility, and made such sidewalks, and of such widths and of such materials as he pleased. If the council afterwards ratified his acts, that might bind the city, but would not affect other parties or interests. In acting as he did, I consider he undertook to do what the Legislature gave him no power to do, and which his position as city surveyor did not authorize. The act gave the council, and the council alone, the power which he exercised, and which the records show the council did not even authorize him to do, were such in its power. He might in the exercise of an arbitrary and irresponsible power have made the sidewalks double, or only half the proper width, and if he had the right to decide, the public and the proprietors would necessarily be injured. If the Legislature intended the exercise by him of such a power, it would have so provided. I consider, then, that as the council in this relation failed to do what the Legislature intended and provided for, I consider there is no foundation for an assessment.

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The same objection I have taken to the absence of any order of the council for the construction of the sidewalks is available also as to the assessment. The council was required "to order by resolution" the construction of the sidewalks and to assess the costs thereof in whole or in part on the proprietors, &c. Now, there is no resolution in the terms of that provision. The assessment is specially required to be made by the council, and I hold that such was not in any manner done by the mere adoption of the reports of the committees, before, too, any work was done, and when no body could tell the amount for which the assessment should be made. The apportionment and assessment made by the city surveyor, is, in my opinion, *ultra vires* in the absence of a previous resolution, in the terms of the section, of the city council. I consider there was not, at the time of the several payments which were made by the appellant as set out in her declaration, any debt due by her to the city as alleged by the respondents, and that she is entitled to recover back the same, and as the city council should, under the circumstances be deemed to have enforced such payments in bad faith, I think she is also entitled to interest from the date of the several payments. I think the appeal should be allowed and judgment entered accordingly for the appellant.

TASCHEREAU, J.:—

I am of opinion to dismiss this appeal. No other judgment could have been given in the case than the one dismissing the appellant's action given unanimously by the two courts and five judges appealed from.

The appellant's first contention is, that though her demand has been met by a general denial of all her allegations, yet she is not obliged to prove her case. *Onus probandi*, for her, is no vain word. It is a real

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*onus*, and so she would like to get rid of it and to throw it upon her adversary. Some English and American authorities have been cited in support of her proposition, that where a corporation relies upon its proceedings as a matter of defence the burden of proving the regularity of these proceedings falls upon this corporation. These authorities are not applicable to actions *en répétition de l'indû* and to the present case, which is ruled exclusively by our own civil law, under which there is no room for doubt or argumentation on this point, and this whether the defendant be a corporation or a private individual. It is laid down in precise words in the Digest (1) *De probat. et præsumpt.*, that if, on an action *de condictione indebiti*, the defendant admits to have received the sum claimed by the plaintiff, but contends that it was justly due to him, it is for the plaintiff who sues to recover back this sum on the ground that it was not due, to prove that it was not due; and a note in *Toullier* (2) says that this is still the law; *Laurent* (3) is also clear on this. An exception to this rule existed in the Roman law in favour of ignorant or negligent persons, or women, minors, and certain other privileged classes, but such exceptions are not now recognized.

Apart from the general rule, that the plaintiff has to prove his case, and that the defendant has not to adduce any evidence till the plaintiff's case is made out, there is a special one, in actions *en répétition de l'indû*, why it should particularly be so; it is that there is a legal presumption against the plaintiff, that as he paid there was a debt, according to Art. 1140 C. C. This presumption, says Art. 1239 C. C., exempts the defendant from making any proof. "You have paid me," can he say; "you are therefore presumed to have owed me

(1) Lib. XXII. Tit. III. (2) 4 Vol. Belg. edit., p. 230.
(3) Vol. 20, Nos. 366, 467, 368.

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what you paid. You must prove that you did not owe me to get back your money. I have not got to prove that you owed me."

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In other words, as stated in *Lahaye* Code Civil (1):

Puisque tout paiement suppose une dette, on doit conclure de là que c'est à celui qui a payé mal à propos et qui veut répéter à prouver qu'il ne devait pas. *Præsumptionem pro eo esse qui accepit nemo dubitat*, dit Paul.

It is true that in the present case the corporation defendant fyled with the general issue an exception in which it is pleaded that the sum paid by the plaintiff was legally due in virtue of certain resolutions and proceedings of the council; it is also true that *reus excipiendo fit actor*, but this does not relieve the plaintiff from the *onus probandi*, from the obligation to prove her case.

Le demandeur doit prouver le fait, qui sert de base à sa prétention; et comme le défendeur est toujours assimilé au demandeur lorsqu'il avance quelque chose dans ses exceptions, c'est à lui à prouver le fait sur lequel il appuie sa défense. Mais celui-ci n'est tenu à cette preuve que lorsque celui-là a vérifié le fondement de sa demande. *Merlin*, Rep. vo. preuve, p. 705.

*Demolombe*, (2) says:

C'est à celui qui prétend avoir payé indûment et qui veut exercer la répétition qu'encombe la charge de prouver que la dette n'existait pas.

And error in the payment must also be proved by the plaintiff. The law of theDigest on the subject says:

C'est pourquoi celui qui prétend avoir payé ce qu'il ne devait pas, est obligé de justifier par de bonnes preuves que c'est par la mauvaise foi de celui à qui il a payé, ou par de justes raisons d'ignorance, *vel aliquam justam ignorantiæ causam*, qu'il a ainsi payé ce qu'il ne devait pas: autrement il n'aura aucune action pour ce faire rendre ce qu'il aura payé. (Traduction *Hulot*.)

Et le digeste dit: *Si sciens se non debere solvit, cessat repetitio.* (De condict. indeb.)

(1) P. 537.

(2) Vol. 28, page 23.

See also same author Vol. 27, No. 30, and Vol. 31, No. 284.

This same law says :

Lorsque quelqu'un paye une chose qu'il sait ne pas devoir dans l'intention de la redemander après, il est privé du droit de la repéter. (Traduction *Hulot.*)

And in Pandectes françaises (1) it is said :

Pour qu'il y ait lieu à la répétition, il faut que celui qui a payé ignore qu'il ne doit pas, car celui qui paie sciémment ce qu'il ne doit pas, ne peut pas repéter, quand même, en payant, il aurait eu l'intention de reclamer ensuite.

*Pothier* (2) says :

Il n'y a lieu à l'action *condictio indebiti* pour ce qu'on a payé sans le devoir, que lorsque c'est par erreur qu'on a payé.—Si, lors du paiement que j'ai fait d'une chose, je savais ne la pas devoir, je n'en ai aucune répétition.

*Demolombe* (3) says as clearly :

Nous disons, au contraire, que l'erreur est toujours requise de la part de celui qui a payé, de sorte que le paiement de l'indû fait en connaissaince de cause ne donne lieu à aucune action en répétition.

As late as 1878, the Cour de Cassation in a case of *Chemin de fer du midi* v. *Schmid* (4) held that :

C'est à celui qui répète la chose payée de prouver qu'elle a été payée indûment et par erreur.

On the same principle, the *Louisiana* Court of Appeal, in *Hills* v. *Kerrion* (5) held, that to reclaim money paid on the ground that it was not due, the plaintiff must show not only that it was not due, but also that it was paid through error. See also *Urquhart* v. *Gore* (6).

The authorities and decisions referred to in *Merlin, Rép.* vo. *Restitutions de droits indûment percus, vente de meubles,* and *prescription,* relied upon by the appellant, have no application to the present cause. They are based on special laws concerning the public revenues in *France.*

According to the principles which must govern this

(1) 10 Vol., p. 377.
(2) No. 160
(3) Tome 29, No. 276.
(4) Dalloz, Jurisp. gén., 1879.
(5) 7 La. R. 522.
(6) 4 La. R. 207.

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action, the plaintiff had consequently to prove: 1st. The payment; 2nd. That the sums paid were not due; and 3rd. That she paid through error or involuntarily; that is to say, under *contrainte*. The payment is admitted. The other allegations are denied.

In this case, however, the plaintiff does not allege error. She rests her claim on the exclusive ground that she paid under *contrainte*—under compulsion. She therefore could not be admitted to prove error, and she did not attempt it. There is not a word of evidence as to this. Her agent, who made this payment for her, and who was examined as her witness, was not even questioned on this point. Had she alleged such error, to rebut the presumption of implied ratification arising out of her payments, the proof of it would have been on her. On this, there can be no doubt. The authorities I have just quoted are clear. *Marcadé*, it is true, (1) contends that the burthen of proving the absence of error or of ignorance of the party making the payment falls on the party to whom the payment was made. But *Merlin*, though at first of that opinion, and *Toullier*, *Bédarride* and *Rolland de Villargues* are of a contrary opinion. *Toullier* says (2):

> Finissons par observer qu'il nous parait que *Merlin* ne s'est point exprimé avec son exactitude ordinaire quand il a fait entendre que pour qu'un contrat fut ratifié par l'exécution volontaire, il fallait prouver que la partie obligée avait, en l'exécutant, connaissance du vice qui pouvait le faire annuler. Autrement, dit il, et à défaut de cette preuve, elle est censée ne l'exécuter que parcequ'elle en ignore le vice. Cette proposition nous parait contraire à l'article 1338, qui porte expressément qu'à défaut d'acte de confirmation ou ratification, il suffit que l'obligation soit exécutée volontairement. Si l'exécution volontaire suffit, celui au profit de qui le contrat est ratifié par l'exécution n'a donc rien autre chose à prouver. Il n'est pas tenu de prouver que le ratifiant connaissait le vice du contrat quand il l'a volontairement exécuté; c'est, au contraire, à ce dernier de prouver qu'il ne le connaissait pas, s'il croit pouvoir le faire.

(1) Vol. 5, p. 93. (2) Vol. 4, No. 519.

Our law, as to ratification by voluntary execution, is the same as here mentioned by *Toullier*, though not included in our Code, art. 1214, as it is in art. 1338 of the Code *Napoléon*. See also *Solon*, *Nullités* (1).

*Merlin* (2) admits that the opinion he had given on the point in the previous editions of his works was wrong, and he concludes, with *Toullier*, that the proof of the error in the payment lies on the plaintiff who alleges it.

*Laurent* (3), also says :

Le motif que l'on donne pour dispenser le demandeur de faire cette preuve se retourne contre lui. Sans doute, personne n'est présumé jeter son argent, mais qu'en faut-il conclure? Il faut dire avec *Toullier* que c'est une raison de plus pour imposer la preuve de l'erreur à celui qui, contre toute probabilité, soutient qu'il a payé par erreur ce qu'il ne devait pas.

See also *Fradet* v. *Guay* (4).

*Bédarride*, de la fraude (5), adopts as follows *Merlin's* last opinion :

Cette démonstration nous parait sans réplique ; nous admettons donc que l'éxécution fait présumer par elle-même la connaissance du vice de l'obligation que cette présomption doit céder devant la preuve du contraire ; que cette preuve est à la charge exclusive du débiteur pretendant se faire relever des effets de l'obligation.

And he cites a decision of the Cour de Cassation, dated July 23, 1825, in that sense. *Solon* (6) thinks that this is going too far, and that as to implied ratification a distinction should be made between *nullités apparentes* et *nullités cachées*. But his opinion, however, does not help the plaintiff, for he says :

Si le vice était apparent il y a présomption légale que la partie qui a exécuté l'acte connaissait les moyens qu'elle avait de le faire annuler, car comme chacun est censé connaître le droit, personne ne peut prétendre avoir ignoré l'imperfection apparente et en quelque

(1) 2 Vol. P. 369.
(2) Quest. Vo Ratification (4th edit.).
(3) Vol. 20, No. 368.
(4) XI Rev. lég. 531.
(5) 2 Vol. No. 608.
(6) Nullités, Vol. 2, 373.

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sorte matérielle, d'un acte qu'il avait dans les mains, ou qu'il était sensé y avoir, par la facilité qu'il avait de se le procurer. En pareil cas, il est à présumer que l'exécution a été volontaire, c'est a dire qu'elle a été faite dans l'intention de couvrir la nullité.

Here, the causes of nullity alleged by the plaintiff against the proceedings of the counsel were all of them apparent on the face of the documents, and the plaintiff had free access to these documents and could see them when she pleased. If she did not see them, it is her own fault, and *vigilantibus non dormientibus subvenit lex.* Error of law and error of fact, I may remark, are here on the same basis under article 1047 of our code, which is not given as new law, though it settled a mooted point. Though the *Napoleon* code is not so clear, error of law and error of fact are also in *France* both good grounds of revision. See *Marcadé* (1); *Demolombe* (2); *Laurent* (3).

I say, then, that the plaintiff in this case has made the payments in question with the full knowledge, at the time she made them, that she was not bound to make them, and this, 1st., because she does not herself allege that she made them through error; 2nd., because she did not prove or attempt to prove that she made them through error; 3rd., because the legal presumption is that she was aware, when she made them, of the grounds of nullity she now complains of in the defendants' proceedings. Now, if she has not paid through error, she is presumed to have paid voluntarily, unless she proves that she paid under *contrainte* and under violence as it were. In fact, though it seems to have been lost sight of at the argument before us, her action is, as I have already remarked, simply based on this last ground, and is not the action *condictio indebiti, stricto sensu.* She says virtually to the defendant: "I "paid you, though I knew I did not owe you; but I

(1) 5 Vol. No. 255. (2) Vol. 29 No. 280.
(3) Vol. 20 No. 354.

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"was constrained to do so to avoid the seizure and sale "of my goods, or, in other words, I paid through fear and "under threats of violence." In law, these certainly are good grounds of action. Art. 998 C. C., relating to contracts made under legal constraint or fear, enacts that:

If the violence be only a legal constraint or the fear only of a party doing that which he has a right to do, it is not a ground of nullity, but it is, if the forms of law be used or threatened for an unjust and illegal cause to extort a consent.

Replace this last word consent by payment, and we have the law applicable to the plaintiff's demand in the present case.

I am thus brought to the consideration of the question whether the plaintiff has established, 1st, That the payment in question was extorted from her through the fear of forms of law used or threatened against her; and 2nd, if these forms of law were used or threatened against her for an unjust and illegal cause.

The Superior Court and the Court of Queen's Bench have both unanimously found as a matter of fact, that the plaintiff made her payments voluntarily, and not under compulsion. I concur fully in this finding. The evidence shows that the plaintiff did not at all act under the influence of the fear of forms of law, when she made these payments; but on the contrary, acted throughout as voluntarily as possible, and with the most perfect freedom.

In the first place, she paid without protest, and so, presumably, voluntarily. The case of *Leprohon* v. *City of Montreal* (1), relied upon by the plaintiff, was very different from this one. There the plaintiff alleged a payment made through error. Of course, one who pays through error, cannot protest: he is under the impression that he owes, and has nothing to protest against, or no reason to protest at all. But here the plaintiff knew,

(1) 2 L. C. R. 180.

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or is in law held to have known, that she did not owe the sum she paid; she merely contends that she paid under *contrainte* or fear. She should then have paid under protest. The case of *The Corporation of Quebec* v. *Caron* is precisely like the present one; that is to say, there also the defendant had paid under *contrainte*, knowing that he did not owe; but the defendant had alleged in his declaration, and specially proved, that he had paid under protest, and this protest was a special ground of the judgment of the court. In *Wilson v. The City of Montreal* (1) the payment had also been made under protest.

In *Dubois* v *La Corporation d'Acton Vale* (2) there had also been a protest.

In *Sutherland* v. *The Mayor of Montreal*, cited by the Chief Justice in *Baylis* v. *The Mayor* hereafter cited, it also appears that the payment had been made under protest.

In *Baylis* v. *The City of Montreal* (3) there had been no protest, and the majority of the court seemed to have been of opinion that such was not necessary. I, however, remark that, in that case, a warrant of distress had actually been issued against the defendant when he paid. The Chief Justice seems to insist specially upon that fact, and it is one of the *considérants* of the judgment.

The case of *Buckley* v. *Brunelle* (4) was also a payment alleged by the plaintiff to have been made through error, and which the Court of Appeal held to have been made contrary to a law *d'ordre public*.

I cannot help but thinking that, that when a party pays a debt which he believes he does not owe, but has to pay it under *contrainte* or fear, he ought to accom

(1) 1 Leg. News 292, and 3 Leg. News 282.
(2) 2 Rev. leg. 565.
(3) 23 L. C. Jur. 301.
(4) 21 L. C. Jur. 133.

pany this payment with a protest, if not under the impossibility to make one, and so put the party whom he pays under his guard, and notify him that he does not pay voluntarily, if this party is in good faith. If he is in bad faith and receives what he knows is not due to him, he is, perhaps, not entitled to this protection. A distinction might also perhaps be made between the case of a payment under actual *contrainte*, and one made under a threat only of *contrainte*, or through fear.

If there is an actual *contrainte*, a protest may not be necessary, and in some cases, it is obvious, may be impossible, but if there is a notice of threat only of *contrainte*, then, if the party pays before there is an actual *contrainte*, he should pay under protest. *Demolombe* (1), seems, at first sight, to say that a protest is not absolutely necessary, but he speaks, it must be remarked, of the case of an actual *contrainte*.

Of course, each case has to be decided on its own facts. It is not as a rule of law that a protest may be said to be required. For a protest is of no avail when the payment or execution of the obligation is otherwise voluntary. *Favard de Langlade*, Rép. Vo. *Acquiescement* (2); *Solon* (3); *Bédarride* De la Fraude (4).

The contention of the appellant, that as the payment of a judgment *exécutoire par provision* is not an *acquiescement* to it, so the payments she made to the corporation should be held not to be an *acquiescement* to its proceedings. But the case of a judgment *exécutoire par provision* stands on totally special grounds. *Bioche*, Procédure (5). The rule is, that he who executes a judgment of that nature is not estopped from appealing it. Why? The very terms given to these judgments explain it. They are pro-

(1) Vol. 29 No. 77.
(2) Par. XIII.
(3) 2 Des Nullites, No. 436.
(4) Vol. 2, No. 609.
(5) Vo. Jugement No. 222. See Boncenne 560 et seq.

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visional. He who pays such a judgment pays only what is a provisional order, his very payment is therefore only provisional; therefore, it is impossible to attach to such a payment consequences to which the very nature of the judgment is forcibly opposed. Yet, *Pothier* requires that the payment of such a judgment should be made under protest, if the party desires not to acquiesce in it. However, some modern cases seem to say that a protest is not necessary. But here there is no provisional order; the corporation's judgment against the appellant for the rate was equivalent to a judgment—was a final judgment; and the voluntary payment of a final judgment, unaccompanied by protest or reservation, has always been held to import a complete *acquiescement* to it, in fact the clearest and most unequivocal possible. *Charbonneau* v. *Davis* (1); *Poncet*, Des jugements (2); *Bioche*, Procéd. Vo. *Acquiescement* (3); *Merlin*, Quest. dr. Vo. *Acquiescement* (4).

*Pothier* (5) says:

A plus forte raison doit-elle être censée avoir acquiescée lorsqu'elle est entrée en paiement, soit de la somme portée par la condamnation soit des dépens auxquels elle a été condamnée, à moins que dans les cas auxquels la sentence est exécutoire par provision, elle n'ait payé en vertu de contrainte, en protestant qu'elle ne payait qu'en vertu de contrainte, sans préjudice à l'appel par elle interjeté, ou qu'elle comptait interjeter.

*Jousse*, under art. 5, tit. XXVII de l'ordonn. de 1667, also requires a protest.

*Guyot*, Rep. Vo. Chose jugée (6), says:

Il suffit que l'acquiescement puisse se présumer par la conduite de la partie, comme si elle demande du temps pour payer ou pour exécuter la sentence, à moins que la sentence, étant exécutoire par provision, elle n'eût payé ou promis de payer que pour éviter des

(1) 20 L. C. Jur. 167.
(2) Vol. I., No. 285, and Vol. II., No. 249.
(3) Nos. 50, 70, 82, 86, 90 and 96.
(4) Par. 3.
(5) Vol. 1 No. 860.
(6) P. 481.

contraintes ; et encore faudrait-il qu'elle eût fait ses protestations, sans quoi elle serait présumée y avoir acquiescé.

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Some of the authorities would tend to say that in a case like the first payment made by the appellant, of which I will speak presently, a protest would not be necessary ; but they are all unanimous in the conclusion that payments made under the circumstances under which the appellant made her second and third payment should have been made under protest, if made with the intention to claim them back. Indeed, as I have already remarked, even had there been a protest, these last payments should be held to have been voluntary. The absence of protest cannot but have always great weight against the contention that an act done under the circumstances disclosed in this case was not voluntary.

Then, what evidence did the appellant bring to prove that she made these payments under *contrainte* or fear at all ? Her claim is based on three different payments of three instalments of the taxes in question : one on the third December eighteen hundred and seventy-seven ; one on the twenty-ninth October, eighteen hundred and seventy-eight ; the other one on the fourteenth November, eighteen hundred and seventy-eight. As to the two first payments the plaintiff's sole proof of *contrainte* consists in the notices given to her by the corporation under sec. 86, 37 *Vic*, ch. 51, requiring her to pay the said two instalments of the said taxes and informing her that in default of such payment, execution would issue against her goods and chattels. These notices are dated the 27th November, 1877, and in the absence of proof to the contrary, must be held to have been served on that day. What did the plaintiff do on the receipt of these notices ? She paid on the third of December, 1877, a few days after the notice, and nine days before a warrant of distress

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could at all be issued, a first instalment of the said taxes without any protest of any kind; she then waited ten months, and without any other notice or threat of any kind, again without protest, paid a second instalment of these taxes No warrant of distress was ever issued against her. *Bédarride* (1). Then, one month later again, she walks up to the city treasurer's office and pays $700 for a third instalment, without ever having been threatened with seizure for it; nay, without ever even having been asked to pay it, and, it must not be lost sight of, with the full knowledge, or presumed knowledge, all this time, of the illegalities in the defendant's proceedings she now relies upon. Can this plaintiff now contend, under these circumstances, that she made these payments under *contrainte* or fear? For the first one, perhaps, if alone, there might be a reasonable ground for such a contention, but the two last ones, it seems to me clear, and the last one more particularly, were made without *contrainte* or threats of any kind, and as such were ratifications of the first, or rather, they reflect back on the first and indicate that it was equally made as voluntarily as possible. I must say that, in my opinion, the plaintiff should have taken her action after the first payment, instead of paying two other instalments ten and eleven months later. Her conduct, as evidenced in the case, establishes conclusively that she did not at all act under *contrainte* in the matter. I say then that, even if the plaintiff did not owe the sums she so paid to the corporation, she could not now recover them back.

1st. Because she did not pay through error.

2nd. Because she did not pay under *contrainte* or compulsion.

This would dispose of the plaintiff's action, but, with the courts below, I go further, and say that, in this case,

(1) Vo. 2 Nos. 604, 605.

she did not prove that she did not owe the sums she paid, or, in other words, she did not prove that legal forms were threatened against her for an unjust or illegal cause

Under the doctrine of implied ratification, the plaintiff has, I have already remarked, by paying these taxes, waived her right to impeach their legality upon any ground appearing on the simple inspection of the Corporation's proceedings :

Si la nullité est apparente, l'exécution est toujours volontaire et entraîne nécessairement la ratification (1).

There is nothing here to support the contention that the resolution and assessment roll were null *d'une nullité absolue ;* they might have been voidable, and that is all. This also supports the *considérant* of the judgment of the Superior Court that,—

Considérant que la demanderesse n'a pas demandé par ses conclusions la nullité de la résolution et des rôles de côtisation en question, mais qu'elle conclut seulement au remboursement des sommes de deniers qu'elle a payées en plusieurs versements à plusieurs mois d'intervalle en vertu des dits rôles.

What is a nullity of *non esse*, can be treated as such in certain cases, *Dumont* v. *Laforge* (2), but what is simply voidable must be annulled, and is valid till so annulled, as said by Mr. Justice *Tessier*, in *Baylis* v. *The City of Montreal.* The majority of the court there held, it is true, that the proceedings complained of, in that case, were an absolute nullity, but they did not dissent from the law so laid down by Mr. Justice *Tessier* as to voidable acts.

The question of want of notice raised by the appellant before us is not opened to her. She did not allege it in her declaration ; it does not appear before the face of the proceedings, and was not before the courts below. If she had invoked the want of notice as a ground of

(1) Solon, Nullités, Vol. 2, No. 418. (2) 1 Q. L. R. 159.

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the action, the defendant might, perhaps, have proved that such notice was actually given.

In *Garden Gully United Quartz Mining Co.* v. *McLister* (1), in the Privy Council, Sir *Barnes Peacock*, delivering the judgment of the court, said:

> Their lordships are not disposed to hold parties too strictly to their pleadings in the lower courts, but they consider that it would be an act of gre t injustice to allow defences to be set up in appeal which have not been suggested or alluded to in the pleadings, or called to the attention of the courts below. In *Devine* v. *Holloway* (2), it was also held in the Privy Council that an objection not raised in the court below cannot be taken unless it is patent upon the face of the proceedings so that the Appellate Court can take notice of the objection. In *Shay* v. *Marshall* (3) the House of Lords would not permit parties on appeal to raise objections which they did not raise in the court below. In *Livingstone* v. *Rawyards Coal Co.* (4), it was held per Lord *Cairns*, in the House of Lords that "it is not usual to argue points in this house that have not been argued in the court below."

I refer also to *Mackay* v. *Commercial Bank of New Brunswick* (5), and to *L'Union St. Joseph* v. *Lapierre*, in this court (6). The recent case *Firth, ex parte* (7), is also in the same sense.

On the resolution itself and the assessment roll made thereon, I have very little to add to the remarks made by the learned judges of the Court of Queen's Bench or to the *considérants* of the judgment of the Superior Court. I will simply remark that the appellant seems to forget that with us:

> Point d'intérêt, point d'action, pas de nullité sans grief. Les lois ayant principalement pour objet l'ordre public et la conservation des intérêts particuliers, (says *Solon*,) leurs dispositions n'ont et ne peuvent jamais avoir de l'importance qu'autant que de leur inobservation doit résulter un dommage quelconque; l'absence de tout préjudice enlève à une contravention toute sa gravité, et ce serait méconnaître la volonté du législateur et les règles de l'équité que de

(1) 33 L. T. (N. S.) 408.
(2) 14 Moo. P. C. C. 290. C. & F. 245.
(3) 19 Ch. Div. 419.
(4) 5 App. Cases 29.
(5) L. R. 5 P. C. 409.
(6) 4 Sup. Court Rep. 164.

faire résulter de cette contravention la nullité d'un acte ou d'une convention; aussi a-t-on toujours tenu pour certain qu'il n'existe pas de nullité sans grief.....La maxime qu'il n'est point de nullité sans grief a pour objet de repousser une action dont le mobile est la chicane ou la malice. (1)

This disposes of what seemed at the argument the strongest cause of nullity involved by the plaintiff against the corporation's proceedings, that is to say, the ground based on the fact that a sidewalk of four feet only could be made, and not one of six feet as has been done. Far from its being demonstrated in any way that the plaintiff has any interest in complaining of this, it is proved that the six feet sidewalk actually cost less than the estimate made for a four feet one. So that the plaintiff complains of what turned to her benefit. How can she be admitted in a court of justice when she has suffered no grievance, when the corporation gave her more than she was entitled to. Then as said in *Dillon* (2):

A municipal corporation may ratify the unauthorized acts and contracts of its agents or officers, which are within the corporate powers, but not otherwise. Ratification may be inferred from acquiescence after knowledge of all the material facts, or from acts inconsistent with any other supposition. The same principle is applicable to corporations as to individuals.

Here if the corporation did not order the six feet sidewalk, it certainly approved of it and ratified the surveyor's doings in accepting it. See *Municipality* v. *Guillotte* (3). So that the assessment made was perfectly legal.

The appellant invoked that part of the judgment of the Superior Court by which judgment was given against the corporation for the interest over paid by her, as admitting the principle that her action ought to be maintained. This at first sight would appear a contradiction in the judgment, but the defendant explained

(1) Des Nullités, vol. 2 Nos. 407, 413.

(2) 2 Vol., No. 385.

(3) 14 La. An. 297.

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to us at the hearing that this part of it was given by consent.

GWYNNE, J.:—

It cannot but be with the greatest distrust of my own judgment that I find myself unable to concur in the conclusion arrived at by so many learned Judges who have expressed their opinion upon the matter in contestation in this case as well in the courts of the Province of *Quebec* as in this Court. However, as after the best consideration I have been able to give the case according to my understanding of it, and an earnest desire to concur with my learned brothers constituting the majority of this court, I find myself unable to do so, the parties litigant are entitled to an expression of my opinion, whatever it may be worth. I understand the judgment of the court in effect to be that the payments made by the plaintiff, which she now seeks to recover back, must be regarded as having been made voluntarily by her, and that, therefore, they cannot be recovered back, and that it is a matter of no importance whether the demand made upon her by the corporation of the city of *Montreal* was a legal demand or not. That is to say, that it is a matter of indifference, in so far as the present action is concerned, whether or not the corporation exercised the powers conferred upon them by the statute in such a manner as to attach to the amount demanded the character of an assessment duly imposed by authority of law so as to constitute a debt due from the plaintiff to the corporation. It is upon this point *in limine* that my difficulty arises, for whether or not the proceedings of the corporation were so conducted in accordance with the powers conferred upon them by the statute, as to constitute the demand made by the corporation upon the plaintiff to be legally due from her in the character of an assessment lawfully imposed,

appears to me to be an element in the consideration of the case before us which cannot be separated from it, and upon the answer to which, in the affirmative or the negative, the right of the plaintiff or of the defendants to succeed in this contestation wholly depends. If the proceedings of the corporation were not such as to make the sum demanded a legal debt or sum due from the plaintiff to the corporation in the character of an assessment lawfully imposed, I cannot give my assent to the proposition that the payment of a demand which was made upon the plaintiff as a legally imposed assessment which she was in law obliged to pay, and which demand was accompanied with the threat to levy the amount out of her property by summary process of law, which could have been done if the assessment had been legally imposed, can be regarded as a voluntary payment, if it should afterwards appear, as is now insisted, that the demand never had been legally imposed, and in point of fact, that the proceedings authorized by law, as necessary to be taken to constitute a legal valid assessment and to impose a liability upon the plaintiff to pay the amount demanded, never had been taken. Surely, if in point of law the assessment was not imposed in accordance with the powers conferred upon the corporation, it constituted no assessment and created no debt or sum due from the plaintiff to the corporation. In such case the demand upon the plaintiff was an illegal demand of a sum of money which the corporation had no right to receive, and the retention of a sum of money paid under the circumstances above mentioned cannot, as it appears to me, be justified and defended upon any principle having the sanction of equity and good conscience. The case appears to me to come within the article 1047 of the Civil Code, which declares that he who receives what is not due to him through error of law or of fact, is bound to restore it.

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*Laurent* (1), in his observations upon the corresponding article No. 1376 of the Code *Napoleon*, says that the obligation to make restitution is the same whether the defendant received what he did receive in good or in bad faith—that good faith in him who receives that which is not due to him does not permit him to retain that which he received *indûment*; on the contrary, it imposes upon him a duty to repay it so soon as he learns that that the payment was *indû*. With the greatest deference for the opinions of the learned judges with whom it is my misfortune to be unable to concur, and with the utmost distrust, consequently, in my own judgment, I must, nevertheless, say that the character of voluntary payment cannot, in my opinion, be attributed to the payment made by the plaintiff in this case without a disregard of the above article of the C. C., which the very able, and, I may be permitted to add, to my mind, conclusive argument of the learned counsel for the appellant, has convinced me does apply to, and has a most important bearing upon the decision of, this case.

The material contents of the plaintiff's declaration, so far as it is necessary to set them out here, are as follows: The plaintiff alleges that she has paid to the defendants the sum of $2,085 15, being the amount of a certain tax assessment levied on the plaintiff's property by the defendants in virtue of a certain special assessment roll, as follows, to wit:—$946.25 the 3rd December, 1877, and $438.90 the 29th October, 1878, in virtue of a special assessment roll made by the city surveyor of the said city of *Montreal*, the defendants aforesaid, to defray one-half of the cost of laying sidewalks in front of the plaintiff's property on *Dorchester* street, said assessment roll bearing date the 27th January, 1877, and the sum of $700.00 the 14th

(1) Vol. 20, p. 393.

November, 1878, in virtue of another special assessment roll made by the said city surveyor to defray one-half of the cost of laying sidewalks in front of the Plaintiff's property on *St. Catharine* street. The evidence fails to shew with certainty that this last sum of $700.00 was assessed for the cost of sidewalks, but the defendant's plea admits that the whole sum of $2,035.15, in the plaintiff's declaration mentioned, of which the $700.00 is part, was charged and paid as assessed upon plaintiff for the sidewalks, as most probably it was, although not clearly made so to appear in evidence, in consequence perhaps of the admission in defendants' pleas. The declaration then alleges that the said tax was so paid to avoid the seizure and sale of the property belonging to the plaintiff, the said defendants having threatened the plaintiff with such seizure, and then and there proceeding to collect such tax by means of seizure from the other parties mentioned in said assessment rolls. And the plaintiff alleges that the said assessment rolls are illegal, null and void, and the said City of *Montreal*, thereunder, had no right in law to assess the said plaintiff's property.

The city council of the city of *Montreal* adopted by resolution two reports, the one of the road and the other of the finance committee of the council. The mode of adopting the reports appear to have been as follows: On the 31st May, 1875, the order of the day being read to consider reports from the road and finance committees to construct sidewalks in certain streets, the following reports were brought up and read, and on motion of alderman *Nelson*, seconded by alderman *Davis*, it was resolved that the said reports be adopted.

The reports so adopted are set out in the declaration as follows: The road committee respectfully report:—

That the question of sidewalks has recently engaged their attention, and fully impressed with the necessity of doing away with the old

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and decayed method of planked footpaths, your Committee believe the time has come when an effort should be made to inaugurate a new system of good and substantial sidewalks in the city.

It will take many years, of course, before these can be laid throughout the city generally, and it is only gradually that this much needed improvement, can be obtained.

As the proprietors on the line of the streets where these new footpaths are to be laid will undoubtedly receive a direct benefit from the improvement, your Committee believe they should bear a proportion—say one-half of the cost thereof.

Your Committee therefore recommend that it be resolved to lay, in the course of this summer (eighteen hundred and seventy-five) a flag stone footpath or sidewalk in the following streets or sections of streets namely: (here follows the enumeration of several streets, including Dorchester street from Union Avenue to the city limits on both sides, and St. Catherine street from Bleury to Guy streets), and that the cost of said footpaths or sidewalks be borne and paid as follows: *i. e.*—one-half by the Corporation, out of the loan, for street paving and permanent sidewalks, and the other half by the proprietors or usufructuaries of the real estate on each side of such streets, public places, or squares, by means of a special assessment to be imposed and levied according to law, and in proportion to the frontage of their properties respectively.

Your Committee further recommend that an appropriation of $79,623, being the amount of the accompanying estimates less the items per chain stone and flag-stone already appropriated, be made to your Committee for the purpose of said footpaths, and of the said loan, for street paving and permanent sidewalks, the whole nevertheless respectfully submitted.

The Finance Committee respectfully report that as directed by the Council, they have considered the accompanying report of the Road Committee recommending the laying of flagstone foot-paths in certain streets and on certain conditions therein mentioned, of date the 30th April, ultimo, and that they concur in the recommendation therein made with the exception of the streets, avenues, squares and places wherein the said foot paths are to be laid, which shall be as follows: (Here follows an enumeration of the places approved by the Finance Committee, including Dorchester street from corner of Beaver Hall terrace westward to the city limits, and St. Catherine Street from Bleury street to Guy street.) Your Committee recommend that, so amended, the said report of the Road Committee be adopted, the whole nevertheless respectfully submitted.

The declaration then proceeds to allege:

That it is on the sole strength of the resolution of the City Council adopting the above reports of the said Road and Finance Committees of the said City Council, that the City Surveyor has proceeded to introduce in the said streets a new sidewalk, removing the one formerly existing which was in a good state of preservation, and in many parts thereof of durable and permanent materials, and using the materials thereof without accounting for the same, and the said plaintiff alleges that at the time the said city caused the said sidewalks to be constructed in front of her said properties, the said plaintiff had good permanent serviceable sidewalks in front of her said properties, and the said plaintiff further alleges that the said resolution as given above is altogether indefinite, and such as could only lead to the most arbitrary proceedings on the part of the official charged with the duty of carrying out the same. That while it orders the laying of a flag-stone footpath in Dorchester and St. Catherine streets, it does not determine the kind of stone, the width of sidewalk or the quality of the work. That in the absence of a provision of the statute allowing the new system to be introduced gradually, the Council could not force the proprietors in said streets to pay the cost of one-half of the new sidewalks while the proprietors in other streets are wholly provided with sidewalks out of the city funds without any contribution on their part.

That moreover the said assessment has been passed on an illegal principle inasmuch as more has been charged plaintiff than the sidewalk has cost in proportion to frontage of plaintiff's said properties, the plaintiff being charged a proportion of the cost of the sidewalk throughout the whole of said Dorchester and St. Catherine streets instead of the cost of the sidewalk actually laid in front of the plaintiff's properties. That in the aforesaid amount paid to defendants by plantiff was included the sum of $269.59 for interest on the capital unpaid illegally charged to plaintiff by defendants at the rate of 10 per cent. That the plaintiff in virtue of the above allegations has a right to have the said sum of $2,085.15 refunded to her with interest from the day of payment, wherefore the plaintiff prays that the said defendants be condemned to pay and satisfy her the said sum with interest from the date of payment.

To this declaration the defendants plead

That in deciding that a sidewalk in stone or flags should be constructed on the streets named, and that the cost of such sidewalk should be borne one-half by the proprietors or usufructuaries of the properties situated on the said streets, and that a special assessment should be imposed for that purpose according to law, and in proportion to the frontage of each such property, the City of *Montreal*

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acted within the limits of its corporate privileges and exercised a power which is in its nature legislative. That neither the City of *Montreal* nor the City Surveyor exceeded their authority in the matters aforesaid, and that in the making of the assessment roll all the formalities required by law were duly complied with, that the plaintiff was justly indebted to the defendants when she paid to the defendants the sum placed to her charge, as her part of the contribution to defray the half of the cost of the construction of the said sidewalks; that long before the institution of the present action the plaintiff has recognized and admitted the validity of the said assessment roll by paying to the defendants the sum of $2,085.15, the amount of her contribution.

That therefore the plaintiff cannot be heard to demand the recovery of the said sum as having been illegally paid to the defendants, and the allegations contained in her declaration are untrue.

The plaintiff joined issue upon this plea. Now, the plea, upon which issue is so joined, seems to me to rest the defence of the defendants wholly upon the legality of the proceedings of the Corporation of the City of Montreal, so as to give to them the character and effect of an imposition, in its nature legislative, upon the plaintiff as a good and valid assessment of the amount demanded of her, so as to constitute that sum to be a debt due by the plaintiff capable of being levied by the defendants by process of law as a good and valid tax. There seems to me to be no point here made that the payment was made voluntarily, and for that reason not recoverable, whether the sum demanded as a tax was duly imposed or not. The payment is referred to solely as amounting to, as is contended, a recognition and admission of the validity of the assessment, which it cannot be, as it appears to me, if in truth the assessment was invalid, for an admission by implication of an assessment being valid, which in fact and in law was invalid, would, as it appears to me, to be so clearly erroneous as to constitute the payment, from which the admission by implication is claimed to arise, a pay-

ment made in error within the provision of Article 1,047 of the Civil Code.

The 192nd section of the Act of the Legislature of the Province of *Quebec*, 37 *Vic.*, ch. 51, intituled: "An Act to revise and consolidate the charter of the City of *Montreal*, and the several Acts amending the same" enacts that:

It shall be lawful for the Council of the said City, to order by resolution the construction of flagstone or asphalt sidewalks or street grading in the said city, and to defray the cost of the said works or improvements out of the city funds, or to assess the cost thereof, in whole or in part, as the said Council may in their discretion deem proper, upon the proprietors or usufructuaries of the real estate situate on each side of such streets, public places or squares, in proportion to the frontage of the said real estate respectively; and in the latter case it shall be the duty of the City Surveyor to apportion and assess in a book to be kept by him for that purpose, the cost of the said works or improvements or such part thereof as the said Council may have determined, should be borne by the said proprietors or usufructuaries upon the said real estate according to the frontage thereof as aforesaid, and the said assessment when so made and apportioned shall be due and recoverable, the same as all other taxes and assessments before the Recorder's Court.

The interposition of the Recorder's Court is for the sole purpose, as appears by the 88th section, to enable the City Treasurer upon the expiration of fifteen days from demand made upon each proprietor or usufructuary, for the amount so charged to him by the City Surveyor, in case of default being suffered in payment of such demand, to obtain a warrant to issue out of the Recorder's Court, authorizing the levy of the amount by seizure and sale of the goods and chattels of the party charged.

Now, can it be possible that, and must we hold that, when the Legislature authorized the Corporation to impose upon the owners of property in the city, so heavy a tax, as, judging from the amount charged to the plaintiff upon the two streets, upon which the property of which she is usufructuary for life is situate,

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the tax relied upon in this case as having been legally imposed is, it contemplated that the resolution or order authorizing the construction of the flagstone sidewalks, and assessing the owners of the adjoining properties for the whole of the cost of such sidewalks, or for such part thereof as the Council of the city in their discretion should deem proper, should be less certain as to the nature and extent of the work authorized, and as to the amount of the liability, in the nature of a tax to be imposed upon the owners of property in respect thereof, than if the work had been authorized and the tax had been imposed by law? In which case the parties would be apprised of the proceedings being taken in the Council to tax them.

Can it be possible that the Legislature contemplated that the proceedings of the Council to impose a special tax, in the interest of the public, upon a particular portion of the ratepayers of the city, should be so conducted, as to leave it in the power of the City Surveyor, or of any other person or persons other than the Council itself, to determine the width and character of the sidewalks to be constructed, and to leave it in his or their power to determine, and in his or their discretion to vary, the amount of the tax for which the owners of property subjected to the special rate should be liable? Can it be possible that the Legislature contemplated that the discretion which the Council was called upon to exercise, in order to determine the amount of the cost of a contemplated work to be assessed upon the owners of the adjacent properties, should be exercised without any notice whatever being given to the parties to be affected, informing them of the amount contemplated to be assessed upon them for the work contemplated, so as to enable such parties to press their views before the Council before the resolution binding them should be passed, in order to give

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a proper direction to the discretion which the Council was called upon to exercise, and to enable it intelligently to exercise that discretion ?

Can it be possible that the Legislature contemplated that the Council should have the power of imposing a burthen exceeding, as in this case, $3,200 upon the usufructuary for life, of unproductive property, wholly behind the back of the party to be affected, and by a mode of procedure admirably adapted to keep such party in ignorance of what was being done as affecting his interests, until he should be served with a demand, irreversible in its nature, which, unless paid, would in fifteen days mature into an execution, against the levying under which no cause could by possibility be shown ?

Can it be possible that the Legislature contemplated that a proceeding which was given the force and effect of an irreversible judgment should be taken against any one without any notice whatever being given to such person until after the judgment should be obtained, and that the notice then given should be that an irreversible judgment had been obtained against him ?

In my humble judgment the language of this 192nd section does not warrant us in imputing to the Legislature an intent so contrary to the plainest principles of natural justice. So autocratic an administration of a democratic institution never could have been contemplated. I profess not to prescribe any *particular* course of procedure as necessary to be taken by the Council prior to passing a resolution having the effect of imposing so heavy a burthen upon individuals ; but, in my judgment, some notice should be given to the parties to be affected by the resolution about to be proposed of the contemplated intention of the Council, which would give to such parties the opportunity to have their views

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brought under consideration of the Council to guide them in the exercise of their discretion. The case of the present plaintiff is such as to seem to me to give great force to this opinion, for it does seem to be a great hardship, and one which by reason of the course adopted by the Council was most probably unknown to them, and which, if known, might have affected the conclusion they would have arrived at, that a person being usufructuary only for life of property incapable of being, from the nature of her estate, made productive during her life, should be exposed to so grievous a burthen as that insisted upon as having been imposed upon her by a resolution of the intention to pass which she had no notice, and from the effect of which she can have no relief, if the burthen has for its imposition the sanction of law, and this, although she can derive no possible benefit from the work for which she is so called upon to pay, otherwise than as one of the general public having occasion to use the sidewalks of the City of *Montreal*. But whether a party be or be not peculiarly benefited by such a work, I am of opinion that the passing by the Council of an order or resolution purporting to have the effect of imposing upon proprietors or usufructuaries of real property in the City of *Montreal*, the whole or any portion of the cost of making flagstone sidewalks on the streets upon which such property is situate, without some prior notice of the contemplated intention of the Council to make such order or resolution, is not in terms authorized by the act, and that such a proceeding is so contrary to the principles of natural justice that a resolution passed without such notice and opportunity being given to the parties to be affected, of being heard upon the matter, cannot, in the absence of express legislation, in unequivocal terms depriving them of their right to have such notice and opportunity, be given in a Court of Justice the sanction and authority of law.

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But the objections of the learned counsel for the appellant to the validity of the charge sought to be imposed upon the plaintiff do not rest here; his argument, as I understood it, raises what appear to me to be two other very important questions, namely: First —What is the proper construction to be put upon the report of the Road Committee of the Council, which is set out verbatim in the declaration? And, secondly— What was the effect of the resolution of the Council which simply adopted that report? The short substance of the report of the committee, appears to me, to be that they believe the time has come when an effort should be made to inaugurate a new system of good and substantial sidewalks in the city, and that, as it would of necessity require many years before practical effect can be given to such a system, by having the sidewalks laid under it generally throughout the city, they recommend that a commencement be made in the year 1875 by applying the system in the first instance to certain streets named, and that the cost should be defrayed as follows, namely, one half by the Corporation and the other half by the proprietors or usufructuaries of the real estate on each side of such streets by means of a special assessment to be imposed and levied according to law, and in proportion to the frontages of their properties respectively, and they further recommend that an appropriation of $79,623 be made to the committee for the purpose.

Now, it is an essential element of every good tax that it should be made to bear equally upon all persons similarly situated. When, therefore, the committee recommended that part of the system, which they proposed should be introduced, should consist of a tax imposed upon the owners of property abutting on the sidewalks, it was very natural that they should recommend, as the first thing to be done, the adoption or inauguration or

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introduction by the city council of a new system in conformity with which the making of flagstone sidewalks throughout the city should be regulated. The committee, however, enters into no details of the system—that is left to the city council if it should be of opinion, with the committee, that the time for the inauguration or introduction of a new system had arrived. The report, therefore, makes no suggestion as to what should be the width of the flagstone sidewalks to be laid in some streets and what in others. Naturally some, as for example the most public thoroughfares, would require wide sidewalks; in less frequented streets, narrow ones might be sufficient, and the amount of the tax to be imposed upon the owners of property by the council would necessarily vary in proportion to the width of the flagstone sidewalk ordered in front of his property. The recommendation of flagstone sidewalks being laid, in the particular streets named by the committee, at the charge to the owners of property of one-half of the cost thereof, except as a part of a system to be adopted, which should have the effect of imposing the tax equally upon all persons similarly situated, when from time to time the council should order flagstone sidewalks to be made, would be manifestly unjust. For example, if the council in one year should order that a part of a street should have flagstone sidewalks laid at the whole and sole cost of the owners of property abutting on such sidewalk, and the council in another year should order that the flagstone sidewalks should be continued for a further distance on the same street, for which the owners of property adjoining should pay only one-fourth of the cost, and the council in another year should extend the sidewalks in the same street at the cost to the owners of property along such extended part, of one-half, and the council in another year should extend them still further, and defray the cost of such

extension out of the general funds of the city, that is to say, at the charge of all the ratepayers of the city; or if the Council should order in one year that in a particular street a sidewalk of stone should be constructed at the sole cost of the owners of the adjacent property on the street, and the council in another year should order that in other streets equally public thoroughfares similar sidewalks should be laid at the cost to the owners of property in one street of one-third, in another of one-half, and in another of one-fourth of the total cost, and the balance to the general ratepayers; and if the council in another year should order that a similar sidewalk should be laid in an equally public thoroughfare, for which payment should be made wholly out of the general funds of the city, that is to say, at the cost of the ratepayers at large, such works could not be said to be done in pursuance of any system, and such a mode of procedure being in its result so unequal in the charge imposed upon the several owners of property in the respective streets, would not have in it the essential element of a just tax; but what the report of the Road Committee contemplates plainly, as it appears to me, is the introduction of a system for the regulation of the laying flagstone sidewalks; that is to say, a plan or method, constant and uniform in its operation, and which, when applied, should bear equally upon all persons similarly situated, upon whom a tax for carrying it into operation should be levied.

The recommendation therefore, in the Report of the road committee, as to the streets upon which they suggest that the sidewalks should be made in the year 1875, must, in my opinion, be read as a recommendation that the new system, the inauguration of which they recommend, if, and when, it should be inaugurated by the council, should be applied in the first instance to the streets named, but the inauguration of the system with

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all its details as to the width of flagstones, accordingly as the streets should be great public thoroughfares or otherwise, and all other details are left by the Report of the committee, which is silent upon these points to the council to suggest and adopt.

The true construction of the Report, therefore, in my opinion is that it recommends a new system, plan or method to be adopted by the council for the regulation in the future of all flagstone sidewalks, to be laid in the City of *Montreal*, and as part of such system that when it shall be applied to any street, the owners of property on such street shall be assessed for one-half the cost thereof, but all other details of the system to be adopted are left to the Council to devise. Such a system should, in my opinion, provide for notice being given to the owners of property on the line of the contemplated improvement, of the nature and cost of such contemplated sidewalk, and of the amount to be charged in respect thereof to such owners for their half share respectively in such cost, so as to enable the parties to be affected to be heard, in case they or any of them should have any objection to offer to the passing of a resolution bringing the street upon which their property is situate within the adopted system, which objections when heard by the Council might have the effect of causing it, in the exercise of its discretion, to defer putting the system into operation in the particular street then under consideration.

Then, secondly, what is the effect of the resolution of the Council which simply adopts that report without more? Doubtless as is urged by the defendants in their plea, all acts of the Council of the City of *Montreal* as of all municipal corporations authorizing work to be done at the cost of the Municipality, and especially such acts as are intended to have the effect of imposing a special tax or burthen upon a particular portion of the

community, are in their nature legislative, and for that reason, to be properly conducted, should be conducted in a manner as analogous as circumstances will admit to that in similar cases adopted in Legislative Assemblies, and where a municipal council adopts in practice a proceeding taken from the practice of a Legislative Assembly such proceeding should, in the municipal council, have the the same effect and only the same effect given to it as the like proceeding would have given to it in the Legislative Assemby from whose practice the proceeding is taken. Now, in no Legislative Assembly, as far as I have been able to learn, is the adoption of the report of a committee regarded as a resolution ordering that to be done which the report recommends should be done. It amounts to no more than a concurrence in the recommendation, and an undertaking that the members of the council adopting the report will pass the resolutions and give the orders and take all proceedings necessary to give effect to the recommendation of the committee. The adoption of a report of a committee by the council would not, as would an order and resolution in due form passed ordering to be done that which was recommended in the report, be binding upon the Council of the next year. The adoption, therefore, by the city council of 1875 of the report of the road committee in the present case amounts, in my my opinion, to no more than this: that the council concurred with the opinion of the committee that the time had arrived for the adoption and inauguration of a new system regulating the laying of sidewalks in the City of *Montreal;* but it left for future consideration what that new system in its details should be. The adoption of the report amounted, also, to a declaration of the concurrence of the council in the recommendation of the road committee that it should be part of the new

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system, that an assessment should be imposed upon the owners of the property, in the street where sidewalks should be made, to the amount of the half of the cost of such sidewalks, and that that system should be first put into operation, and in the year 1875, upon the streets named; but by concurring in the recommendation that the owners of property in the streets named should be assessed for the half of the cost of laying flag stone sidewalks on these streets when such should be ordered, it did not in fact assess such property holders for any amount. By concurring in the recommendation that flagstone sidewalks should be laid in the particular streets named, it did not order that the sidewalks should be made of any prescribed width or at all, and width certainly appears to me to be an essential element in a valid order directing a flagstone sidewalk to be laid, a portion of the cost of which was to be charged to the property owners on the street. By concurring in the recommendation of the committee that the sum of $79,623 should be appropriated to the purpose recommended, it did not as it appears to me, make the appropriation so as to require the City Treasurer, upon the mere production of the resolution adopting the report of the road committee, to pay over such sum to anyone. By adopting the report of the road committee, the council did not order the City Surveyor to lay down any sidewalks whatever in the streets named, and the City Surveyor appears to have had no other authority emanating from the council, whatever he may have had from the road committee for laying the sidewalks in question. There is nothing in the resolution adopting the report which can be construed into an order given by the council for the construction of any sidewalks. In so far as any order of the council is concerned, the City Surveyor might have made the flagstone sidewalks, which he did lay down in the streets named, of the width of twelve

feet, or of eight feet, or of four feet at his pleasure; the council prescribed nothing, and what the 192nd section of the act says, is that it shall be lawful for the council to order by resolution the construction of flagstone side-walks, and that it shall be lawful for the council to assess the cost thereof, in whole or in part upon the proprietors of real estate. The duty of the City Surveyor does not come into action until the Council has by resolution ordered the work to be done, and has assessed the cost thereof, in whole or in part, upon the proprietors of real estate. The width of the flagstone appears to me to be an essential element to be stated in a valid order, and as to the assessment, the function of the City Surveyor, as it appears to me, is simply to apportion among the proprietors of real estate the proportion of the cost which the council has by resolution assessed them for, and such assessment should not, as I have already said, be attempted to be imposed without some previous notice to the parties to be affected. The section which authorizes a thing to be done by resolution, which could only previously be done by by-law, cannot be construed as authorizing the council to impose a tax upon particular individuals by a resolution of which they have had no notice. Now, if the council had proceeded by By-Law, as they might have done notwithstanding the 192nd section of 37 Vic., c. 51, the adoption of the report of the road committee, followed by a By-Law read for the first time only, would have no validity to impose a tax upon the plaintiff. How then can the mere adoption of the report, without more, have a greater effect because the council may under the 192nd section of the above act proceed by resolution instead of by By-Law. Surely the power of the council to order a thing to be done by resolution instead of by By-Law cannot give any additional force to the mere adoption by the council of, the report of a

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committee. In my opinion, therefore, the resolution of the council of the City of *Montreal*, adopting the report of the road committee as set out in the declaration, cannot, upon any analogy derived from the proceedings of any legislative body, be said to be an order by resolution within the meaning of the 192nd sec. of 37 *Vic.*, c. 51 authorizing the construction of the particular flagstone sidewalks which have been laid on the streets in question, and an assessment imposing a legal tax or burthen upon the plaintiff for any part of the cost thereof.

The only notice of the imposition of the tax, or of any intention to make plaintiff liable for any part of the cost of the sidewalk, which it appears she ever had, was at the foot of the demands served upon her agent after the construction of the sidewalks in the words following, signed by the City Treasurer :

Take notice that having failed to pay the above mentioned sums within the time prescribed by public notice, you are hereby required within fifteen days from the date hereof to pay the same to me at my office, together with the costs of this notice and service thereof as below ; in default whereof execution will issue against your goods and chattels.

Montreal, 27th Nov., 1877.

| | |
|---|---|
| Costs | $0 10 |
| Notice | 0 20 |
| | $0 30 |

(Signed,) JAMES F. D. BLACK,
City Treasurer.

In my opinion upon receipt of this notice the plaintiff's agent was justified in assuming, and in fact did assume, that the council of the corporation had taken all proceedings necessary to impose upon the plaintiff the obligation to pay the amounts demanded, which could and would be enforced, as threatened in the notice, unless payment should be made ; and having paid under such an impression, which, in my judgment,

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was for the reasons I have given erroneous, she is entitled to recover back the money which under the influence of such error, both of law and fact, she paid to the defendants, who, if my judgment be correct as to the invalidity of what is relied upon as an assessment, the defendants had no legal right to demand of the plaintiff, and as the defendants ought to have known that they had not taken proper proceedings to make the plaintiff liable for the amount demanded, I think she should recover interest from the respective dates of payment. The appeal therefore in my opinion should be allowed with a direction to enter judgment in the Superior Court for the plaintiff for the full amount with interest as above calculated and the costs in all the courts.

*Appeal dismissed with costs.*

Solicitors for appellant: *Barnard, Beauchamp & Creighton.*

Solicitors for respondents: *Rouer Roy.*

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*Nov. 30.

*Dec. 1.

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*May. 1.

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

AND

THOMAS MURRAY AND WILLIAM MURRAY ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

*Agreement, Construction of—Evidence—Question for the Jury—Contract not under seal.*

To an action on the common counts brought by *T.* and *W. M.* against the *C. C. R. Co.*, to recover money claimed to be due for fencing along the line of *C. C.* railway, the *C. C. R. Co.* pleaded never indebted, and payment.

The agreement under which the fencing was made is as

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

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follows: "Memo. of fencing between *Muskrat* river, east, to *Renfrew*. *T.* and *W. M.* to construct same next spring for *C. C. R. Co.*, to be equal to 5 boards 6 inches wide, and posts 7 and 8 feet apart, for $1.25 per rod, company to furnish cars for lumber. "(Signed) *T. & W. M.*
*A. B. F.*"

*F.* controlled nine-tenths of the stock, and publicly appeared to be and was understood to be, and acted as, managing director or manager of the company, although he was at one time contractor for the building of the whole road. *T.* and *W. M.* built the fence and the *C. C. R. Co.* have had the benefit thereof ever since. The case was tried before *Patterson*, J., and a jury, and on the evidence, in answer to certain questions submitted by the judge, the jury found that *T.* and *W. M.*, when they contracted, considered they were contracting with the company through *F.*, and that there was no evidence that the company repudiated the contract till the action was brought, and that the payments made were as money which the company owed, not money which they were paying to be charged to *F.* and a general verdict was found for *T.* and *W. M.* for $12,218.51. On appeal to the Supreme Court of *Canada*—

*Held* (affirming the judgment of the Court below) that it was properly left to the jury to decide whether the work performed, of which the *C. C. R. Co.* received the benefit, was contracted for by the company through the instrumentality of *F.*, or whether they adopted and ratified the contract, and that the verdict could not be set aside on the ground of being against the weight of evidence; [*Ritchie*, C.J., and *Taschereau*, J., dissenting, on the ground that there was no evidence that *F.* had any authority to bind the company, *T.* and *W. M.* being only sub-contractors, nor evidence of ratification ]

2. That although the contract entered into by *F.* for the company was not under seal, the action was maintainable.

APPEAL from a judgment of the Court of Appeal for *Ontario*, discharging a rule *nisi* to set aside a verdict in favor of the respondents and to enter a verdict for the appellants.

This action was brought to recover the value of certain fencing done by the respondents along an "Extension" of the appellants' line of railway between *Renfrew* and

*Pembroke*, during the year 1876, under an agreement made between the plaintiffs and *A. B. Foster* in the month of January, 1876, when the following memorandum, drawn up by *Thomas Murray*, was signed by the respondents and the said *A. B. Foster*, to express the agreement then entered into.

*Renfrew*, 6th January, 1875.

"Memorandum of fencing between *Muskrat* river, "east to *Renfrew*. *T. & W. Murray* to construct same "next spring for the C. C. R. Co., to be equal to 5 "boards, 6 inches wide, and posts 7 to 8 feet apart, for "$1.25 per rod, Company to furnish cars for lumber.

"*T. & W. Murray.*

"*A. B. Foster.*

The appellants pleaded never indebted and payment, and issue was taken upon these pleas.

The cause was tried by a jury before *Patterson*, J., at the *Pembroke* Spring Assizes for 1880, when a verdict was rendered for the respondents for $12,218.51.

In Easter Term, 1880, a rule *nisi* was obtained to set aside the verdict, and enter a verdict for the appellants, or for the entry of a non-suit on the grounds that "the written contract or agreement relied upon, signed by the plaintiffs and the late *A. B. Foster*, was not one made or purporting to be made with the defendants, and that there was no evidence or sufficient evidence of its being or being intended to be a contract with the defendants, and that if it purported to be or was intended to be a contract with the defendants there was no authority or sufficient authority shown in the said *A. B. Foster* to bind the defendants or to contract for them, and that there was no evidence of any ratification or adoption of said contract by the defendants; that the work of fencing was done for, and on the credit of, the said *A. B. Foster*, and under contract with him individually, and that there was no evidence

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or sufficient evidence to render the defendants liable for said work, or fencing, or any part thereof, and that on the facts and evidence or weight of evidence there should have been either a non-suit or a verdict for defendants; or why the verdict should not be set aside and a new trial be had between the parties for misdirection and improper ruling on the part of the learned judge, in not holding the written contract to be one between the plaintiffs and the said *A B. Foster* personally, and also in submitting it to the jury whether the plaintiffs supposed they were dealing with the defendants; or on the ground of the verdict being against law and evidence and the weight of evidence, for the reasons above set forth as grounds for entering verdict for defendants or a non-suit, and that on the evidence and weight of evidence the plaintiffs were not "entitled to recover, and said verdict should have been "for defendants."

After argument the rule was discharged, the Court of Queen's Bench being unanimously of opinion that the verdict was right, and it appears from the judgment of the learned Chief Justice of the Queen's Bench, that the judge who tried the cause concurred in this opinion.

The appellants then appealed to the Court of Appeal for the Province of *Ontario*.

The judges sitting in appeal were equally divided, the Chief Justice of *Ontario* and Mr. Justice *Burton* being of opinion that the verdict was wrong, and should be set aside; Mr. Justice *Morrison* and Mr. Justice *Osler* being of opinion that the verdict was right, and should not be disturbed.

The court being equally divided, the judgment stood affirmed, and the present appeal is from that judgment.

The work was actually performed by the respondents, and the appellants have had the benefit of it. The

evidence relating to Mr. *Foster's* position and to the adoption by the company of the contract is reviewed in the judgments.

Mr. *J. K. Kerr*, Q.C., and Mr. *Walker*, for appellants, and Mr. *Bethune*, Q.C., and Mr. *Deacon*, Q.C., for respondents.

The points argued and cases relied on by counsel are reviewed in the judgments.

RITCHIE, C. J. :—

I think the appeal should be allowed and non-suit entered for reasons to be found in the judgments of *Spragge*, C. J., and *Burton*, J., in the Court of Appeal. I may, however, add that the ownership of property alone will not render the owner liable for work performed upon it without his request, though he receives it knowing that the work has been performed. In this case, in my opinion, no contract was shewn between the plaintiffs and the defendants, nor can I discover any evidence of any authority on the part of *Foster* to enter into any such contract on behalf of the defendants, or that he intended to do so ; nor is there anything, in my opinion, to shew that defendants in any way held out or permitted the plaintiffs to believe in any existing state of things in reference to this contract, or any act of ratification (assuming the company would be bound by a ratification ),precluding them from denying their liability. No payments were, in my opinion, authorized or made, by or in the name of the defendants to the plaintiffs. Those relied on as a ratification, think, were made by the company on account of *Foster*, and not by and on behalf of the defendants. It is said there was no repudiation on the part of the defendants —there was not, that I can see, any necessity for a repudiation.

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On the part of the company, there is not the slightest evidence that the company ever knew that any contract was entered into, or professed to be entered into on behalf of the company, or that the plaintiffs were acting on any supposition that there was a contract binding on the company. There was no evidence to show that they permitted *Foster* to deal with plaintiffs as their authorized agent, or held him out as authorized by them in any way to make such a contract. On the contrary, the evidence is clear that though the fencing may not have been included in the written contract, it was, between *Foster* and the company, well understood that it formed part of the work he was to do under his contract. The plaintiffs, so far from communicating with the defendants that they were under any such impression, on the contrary, appear to have rendered their account for this work against *Foster* personally, they never appear to have rendered any account or made any claim against the company until after the death of *Foster*, which took place on the 1st Novemher, 1877, long after the work had been performed. Had the defendants been notified that plaintiffs were doing the work under a contract made by *Foster* on their behalf as their agent, and he had continued to act as such agent and the plaintiffs continued to fulfil their contract without any repudiation on the part of defendants, it may well be that defendants could become bound to plaintiffs on the contract. But in the absence of any authority on the part of *Foster*, or of any knowledge brought home to defendants, or of any ratification or adoption by the company of the contract, how can a liability be fixed on them? I cannot discover that *Foster* had any express or implied authority or ostensible authority to bind the company. Now, the law as to ratification is clear, and applies equally to cases of contract and of

tort. In the case of the *Phosphate Lime Co.* v. *Green* (1) *Willes*, J., laid down the law as to ratification thus:

The principle by which a person, on whose behalf an act is done without his authority, may ratify and adopt it, is as old as any proposition known to the law. But it is subject to one condition: in order to make it binding, it must be either with full knowledge of the character of the act to be adopted or with intention to adopt it at all events and under whatever circumstances.

*Bramwell*, B., in *Riche* v. *Ash. Car. Ry. Co.* (1), referring to the case of *Phosphate of Lime* v. *Green*, says:

My late brother *Willes* laid down a rule (using the language before quoted) by which I am content to be governed.

I may ask, as *Bramwell*, B., did in the case referred to, "Where is the evidence of adoption?" with intention to adopt it at all events and under whatever circumstances.

FOURNIER, J.:—

I am in favour of upholding the verdict. I have no doubt that the contract was made by the parties with *Foster*, believing they were contracting with the company. It is said in so many words in the writing that the work is to be done for the company. It is true that *Foster* signed his name individually, and that he did not sign it in the quality of an agent, but it was a well known fact that *Foster* had been the general manager of the company. If he was not occupying that position at the time, he had for his own purposes changed his position so often from contractor to general manager, that it was very difficult for the general public to understand what his real position was in a legal point of view. In fact, it was really no change at all, and the jury, in my opinion, were well founded in declaring that he was acting for the company; he was using the cars of the company, the work was being done for the company, and, under

(1) L. R. 7 C. P. 53. (1) L. R. 9 Eq. 239.

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the circumstances, this verdict ought not to have been disturbed.

HENRY, J.:—

This is an action under the common counts in assumpsit for goods sold and delivered, work done and materials provided, and for work done in building fences for the appellants along their line of railway, and for sawed lumber, fence posts, nails and fencing materials furnished by the respondents for the appellants at their request, and the particulars furnished by the respondents of their claim are as follows:

September 1st, 1876.

To 15,678 rods of fencing done by plaintiffs for defendants at their request on line of Canada Central Railway between the village of *Renfrew* and *Graham's Bridge*, over the *Muskrat* river, in the township of *Westmeath*, at $1.25 per rod, as per agreement, $19,597.50.

The appellants pleaded—

1st. Never indebted as alleged.

2nd. That before action they discharged the plaintiffs claim by payment.

The agreement under which the fences in question were made is as follows:

*Renfrew*, 6th January, 1876.

Memo. of fencing between *Muskrat* river, east, to *Renfrew*. *T.* and *W. Murray* to construct same next spring for C. C. R. Co., to be equal to 5 boards 6 inches wide, and posts 7 to 8 feet apart, for $1.25 per rod, company to furnish cars for lumber.

(Signed) *T. & W. Murray,*
*A. B. Foster.*

The agreement was performed by the respondents by the building of the fences, which is fully admitted, and the appellants have had the benefit thereof ever since. It was, however, contended on their behalf, that *Foster* had no authority to bind the company—that the respondents made the agreement with *Foster* personally—that he was under a contract to build the railway,

and that the fences were included in the work to be done by him under his contract, and that therefore the appellants were not responsible to the respondents. The agreement of the respondents is certainly not with *Foster*, but with the appellants. It is signed by him on their behalf. Had he authority to bind them? If he had, our judgment must be for the respondents. No express authority to enter into that particular agreement was shewn; but such express authority is not necessary to be shewn. The evidence is irresistible that he (*Foster*) was to a large extent the company. Such is proved by Mr. *Moffat*, who was a director of the company. He says:

I knew *Foster*. In 1875 and 1876 he was managing director of the company. I may be mistaken that he was managing director in '75. * * * I think he was manager only 1876. He was building the road in 1875 between *Renfrew* and *Pembroke*. * * * He was managing director after he took the contract. * * * As a matter of fact he was manager of the whole thing.

Mr. *Baker*, who was general manager of the railway, and had been for two years, who was also secretary of the company and had the custody of all the books and papers of the company, and was in the employment of the company since 1869, says:

*Foster* had the bulk of the stock—about nine-tenths of the stock of the company. * * * *Foster* elected all the directors. He held proxies for nine-tenths of the stock. * * * He had an overwhelming control of the board of the Canada Central. He elected the directors and the directors elected him managing director, &c.

The whole evidence goes to establish these positions. It is shewn that *Foster* had a contract with the company for the building of the railway on the sides of which the fences in question were erected, in which the work to be done by him thereunder is specially described and stated, but not in any way referring to or including the fencing. *Foster*, whilst engaged in

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performing that contract, and, in fact, while directing and controling the whole operations of the company, knowing that no provision had been made for the erection of the fences, entered into the contract therefor with the respondents. Were the case to rest solely on the question of general authority, I should say there was quite sufficient in the evidence I have cited, taken in connection with the rest of the evidence, to justify the submission of it to a jury. But it is plain that *Foster* and the directors well knew the fencing was not included in his contract. They knew they should be erected before the line would be operated, and it is not unreasonable to assume that *Foster* informed them of the contract, or that he was understood to have the whole control and direction as to all that was necessary to be done for the completion of the line outside of his own contract. The directors, if taking at all any active part apart from *Foster* in the completion of the line, must be taken to have known of the respondents' contract. The agreement is found amongst the records and papers of the company and must be considered as known to the directors. If known to them, they must also be assumed to have known that the respondents were performing it. That assumption would not be an unnatural one without any specific proof, but when we see that the materials for the fences were carried for the respondents by the appellants' cars and distributed, and without exacting payment as their freight regulations in all other cases provided, when payments were being made on account from the funds of the company, are we not bound to conclude that the directors knew all about the contract with the respondents. If they did not, they were remiss in their duty, and in the absence of proof we should not clear the company of a liability to pay for what they got good value for by assuming such a dereliction of duty. If the

directors, therefore, were unwilling to ratify the contract they should have so notified the respondents, but instead thereof by their dealings they gave them unmistakable proof of the ratification of it. If the directors knew not of the contract, or were opposed to it, if they thought that *Foster's* contract included the fencing, or that he personally was the contractor with the respondents, it is a little strange that the record shows no attempt to prove either position, although one or more of the directors gave evidence on the trial. There is no evidence that *Foster* on his own account ever made a claim against the company for the fencing or was paid anything for it. Had it been shewn that he had been paid for it through any mistake, and that those managing the company's finances had by a mistake paid him what was due to respondents, although not a defence, it would at all events have shown that the company had been willing to pay some one; but such evidence is wholly wanting, and the impression is, therefore, not a favorable one. The evidence was fairly submitted to the jury by the learned judge who presided at the trial, and they found a verdict for the respondents. I think the learned judge would have been wrong if he had done otherwise, and I think that, under the circumstances, the verdict should not be interfered with, even were we of opinion that it might have been for the appellants. I am, however, of the opinion that the conclusion of the jury was what both in law and equity the evidence warranted.

I think, therefore, the appeal should be dismissed, and a judgment entered for the respondents with costs in all the courts.

TASCHEREAU, J.:—

I cannot concur in the conclusion reached by the majority of the court. I cannot see that *Murray* ever

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contracted with the company. He simply took a sub-contract from the contractor *Foster*, and I cannot see that the company is to be made liable towards him.

GWYNNE, J.:—

The question before us in this case, for the same reason as was that in the case of *The Dublin, Wicklow and Wexford Ry. Co.* v. *Slattery* in the House of Lords (1), is limited to the enquiry whether there was any evidence whatever to go to the jury. Now, that the learned judge could not have withheld the case from the jury, cannot, I think, admit of doubt, and that it was submitted to them with a charge of which the defendants have no just reason to complain, appears to me to be also free from doubt.

The jury accompanied their verdict for the plaintiffs with a declaration in answer to certain questions put to them by the judge for their guidance—that they found as matter of fact that the plaintiffs, when they entered into the contract sued upon, considered that they were contracting with the company through *Foster*, and that there was no evidence that the company ever repudiated the contract until this action was brought; and further, that certain payments made to the plaintiffs on account were made as money which the company owed, and not money they were paying to charge to *Foster*. When we read the evidence, I confess that I am not at all surprised that the jury should have rendered their verdict for the plaintiffs.

The contract is as follows:

*Renfrew*, 6th January, 1876.

Memorandum of fencing between *Muskrat* river east, to *Renfrew*. *T. W. Murray & Co.*, to construct some next spring for *C. C. R. R. Co.*, to be equal to five boards 6 inches wide, and posts 7 to 8 feet apart, for $1.25 per rod. Company to furnish cars to distribute lumber.

(Signed) *T. & W. Murray.*
*A. B. Foster.*

(1) 3 App. Cases Pp. 1162 and 1200.

The evidence describes this Mr. *Foster*, whose name is set to this paper, as a gentleman who controlled nine-tenths of the stock of the company—whose control of the board of directors was overwhelming—who was, in fact, himself the company; who elected the directors, who in turn elected him managing director; who resigned his office of director and put another in his stead—for the sole purpose of receiving—or rather (in view of his control over the board) of giving to himself a contract to enable him to obtain a subsidy from the *Ontario* Government and to build the road. Who, by his like power of control over the board, had persons in his own private service and employment appointed to be officers and servants of the company, while continuing to be in his own private service and under his control. Who assigned the contract to build the road, which he had given to himself, to one *Haskell*, who does not appear to have ever done anything in performance of it, and procured the board of directors to go through the form of passing a resolution accepting *Haskell* as contractor in his place. Who, thereupon resumed his position at the board as a director, and was appointed formally by the board, but substantially by himself vice-president and managing director, which offices he held for about two years, when he suffered them to merge into the more modest title of manager. Who upon the 2nd December, 1875, in his character of manager of the company received certain debentures to the amount of $50,000, issued by the town of *Pembroke* in favour of the company from certain trustees in whose hands they had been placed to the amount of $75,000 in the whole, upon trust to be handed over to the company upon the fulfilment by the company of certain conditions, and gave a receipt and guarantee therefor to the trustees, as follows;

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*Pembroke*, December 2, 1875.

To Messrs. *Andrew Irving*, *Michael O'Meara* and *Duncan McIntrye*, Trustees of C. C. R. Debentures:—

Gentlemen, in consideration of your handing over to me this day $50,000 worth of debentures of the town of *Pembroke* issued under by-law No. 138, of which you are trustees, I hereby *on behalf of the Canada Central Railway Company*, guarantee that if the extension of the railway from the village of *Renfrew* to the town of *Pembroke* be not fully completed within the time mentioned in said by-law, then that the said Canada Central Railway Company will either return the said municipality the said debentures and coupons attached, or the value thereof in cash.

Yours, &c.,

(Signed,) A. B. FOSTER,
Manager C. C. Railway Co.

Who having taken back to himself from *Haskell* an assignment of the contract to build the road, which about two and half years previously he had assigned to him, procured his agents and nominees, the directors of the company, upon the 14th December, 1875, to pass the following resolution:

A certified copy being produced, signed by *Benjamin A. Haskell* and Hon. *A. B. Foster*, of the retransfer made by *Benjamin A. Haskell*, dated the 21st of October last, to the Hon. *A. B. Foster*, of the two contracts made on the 16th November, 1871, between the Canada Central Railway Co. and Hon. *A. B. Foster*—the said transfer is hereby approved and accepted.

Who, notwithstanding such approval of such retransfer upon the 12th April, 1876, in his character still of manager of the company, received from the trustees of the *Pembroke* debentures the balance of the $75,000 authorized to be issued by the by-law, and gave a receipt therefor as follows:

Received, *Pembroke*, April 12th, 1876, from the trustees for holding of the debentures for the assistance of building the Canada Central road to *Pembroke*, twenty-five thousand dollars worth of debentures, being the balance of the seventy-five thousand dollars granted by By-law No. 138 of the village of *Pembroke*.

(Signed), *A. B. Foster*,
Manager C. C. Railway.

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His name also appears to be subscribed as "managing director" to all the bills of lading in use by the company, and by one of his co-directors he is spoken of as a person who as matter of fact was manager of the whole thing, and that they looked upon him as the owner of the road, and by other witnesses, not upon the board with him, but who had dealings with the company through him, and had the opportunity of observing the manner in which he openly acted before the public, he is spoken of as a person who throughout the country publicly appeared to be, and was understood to be, and acted as, managing director or manager of the company, and that if there was a higher officer than manager he was such officer, that he was upon all occasions the mouth-piece of the company—its soul and body—and, in fact, the company itself.

Upon this evidence, it is to my mind by no means surprising, that a jury consisting of men of common honesty and common sense, should come to the conclusion, not only that the plaintiffs in entering into the above contract might well believe that they were entering into it with the company, acting through an agent having full power and authority to act for the company, but that in fact it was as manager of the company and upon behalf of the company that he procured the plaintiffs to build the fence, for the balance of the cost of which this action is brought, and that the company, with full knowledge of the manner in which he was dealing on their behalf, suffered him to be considered to be a person having full power to bind the company.

But upon behalf of the company it is contended that, as by the resolution of the 14th December, 1875, *Foster* was accepted by the company in the place of *Haskell* as the contractor to build the extension of the railway from *Renfrew* to *Pembroke*, and that, as is alleged by the company, to build the fence was part of the contract,

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and that, as they also allege, *Foster's* appointment as manager was confined to the road already open to *Renfrew*, the jury should have come to the conclusion that it was with *Foster* in his character of contractor, and not with him in his character of manager, that the plaintiffs dealt when entering into the contract.

All that need be said to this, is, that it was for the jury to weigh the evidence; but I must say that, in my opinion and to my mind, it seems by no means surprising that intelligent men, judging the acts and intentions of men as they naturally strike ordinary minds should attach but little weight to this contention, for it does not appear that any means were adopted to inform the public of the internal transactions of the board of directors, or of the change effected by the transfer of the contract from *Haskell* to *Foster*, or of the terms of that contract, or of the change effected by Mr. *Foster* being made manager instead of managing director. There does not appear to be any reasons for supposing that the public or the plaintiffs in particular had upon the 6th January, 1876, any knowledge of the change so recently effected in the status and condition of Mr. *Foster*. The gentleman who succeeded him, and who, at the time of the trial, filled the office of general manager and secretary of the company, and who, as he said, has been in the employment of the company since 1869 as secretary-treasurer, or in some other capacity, tells us that he does not know that anything was done to apprise the public of the change, and he adds that:

> It is not customary to apprise the public of changes of that kind —that the public would know nothing of it without examining the books.

He has not said, but I think it not unlikely that if pressed he might have also said, that if any individual of the public had been so inquisitive as to ask to be permitted

to inspect the books of the company for the purpose of seeing how its internal management was conducted, he would have been politely—or otherwise—shewn his way down stairs. Moreover, all force in the objection is further removed by looking at the contract itself, by which we find that the fencing in question formed no part of the work which any person acting under that contract was required to do; but it is said that although it forms no part of the written contract, it was intended it should form part of the work to be done, and Mr. *Abbott* was called by the company to establish this position—whether his evidence, if closely examined, would establish this it is not necessary to enquire, for if it would, then the evidence was wholly inadmissible, as altering the terms of a contract gravely reduced to writing and deliberately executed under seal. Then again, we see, although the company now contends that the powers of Mr. *Foster* as manager were confined to the road already opened to *Renfrew*, a thing not communicated to the public in any way, he nevertheless acted in the character of manager as regards the extension from *Renfrew*, and for and on behalf of the company, when he received for them the debentures of the town of *Pembroke*, on the 2nd December, 1875, and 12th April, 1876; it is therefore not surprising if, upon this evidence, the jury should have regarded him as acting in his character of manager of the company in his dealing with the plaintiffs on the 6th January, 1876.

Then it appears that, as matter of fact, the company did supply the cars to distribute the lumber as stipulated in the memorandum of agreement that they should. Mr. *McKinnon*, who was superintendent of the company, and who says that he knew nothing of *Foster*, except that he was manager, furnished the cars. He says that he himself directed that the cars should be furnished—that he arranged that the cars of the company

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should carry the lumber and distribute it as they required it. He does not know who gave notice when the cars were required. He furnished the cars for everything required on the extension. Now, during the period that the plaintiffs were building the fence, it appears that Mr. *Foster* was in *England*. He went to *England* in May, 1876, and being still absent in September, this witness, in his capacity of superintendent, the manager being still absent, acting upon behalf of the company, made a contract with the plaintiffs for making four miles more of fencing of the same character as that described in the memo. of the 6th January, 1876, and which was paid for by the company at the same price as that stated in the above memo. The force of this evidence in support of the plaintiffs' contention was attempted to be shaken by the suggestion that the cars were supplied by the company to *Foster* as contractor and charged to him, but this suggestion was so little supported by evidence that it is not surprising that the jury should attach little weight to it. No agreement was attempted to be shewn to have existed between the company and *Foster* to the effect that the company should supply the cars to him and charge them to him, and the evidence falls far short of satisfactory proof that any such charge was ever in fact made. Nor, indeed, was there even anything in the evidence to establish that before going to *England Foster* ordered *McKinnon* to supply the cars, or, if there had been, that he gave the order in any other character than that of manager, in which character alone *McKinnon* says that he knew him. Upon this evidence it was, I think, very natural and very reasonable that the jury should regard the furnishing the cars by the company to distribute the lumber in the terms of the memorandum of agreement of the 6th January, 1876, as an act of the company in adoption of the terms of that agreement.

Then there was abundance of evidence to prove that the secretary-treasurer of the company gave credit to the plaintiffs for money due by them to the company for freight by applying such money as payments made by the company to the plaintiffs on account of the work performed by them under this contract. The force of this fact in support of the plaintiffs' claim was attempted to be shaken by the secretary-treasurer of the company, who said that these allowances were debited to Mr. *Foster* and settled by him.

This gentleman filled the equivocal position of being Mr. *Foster's* general agent in his private business, and at the same time secretary-treasurer of the company. There was no evidence offered to shew that the secretary-treasurer had any authority from the company to charge to Mr. *Foster* the allowances so made to the plaintiffs, nor if there had been, would that fact have in any respect diminished the weight of the evidence, that the fact of the making the allowance to the plaintiffs was an act of the company in adoption of the agreement of the 6th January, 1876. The evidence, however, failed to shew that in fact any such charge against *Foster* was ever made in the books of the company. Mr. *Baker*, who was the general manager and secretary-treasurer of the company at the time of the trial, swore most distinctly that there is no entry in the books of the company of these allowances made to the plaintiffs being charged against *Foster*, and although the next day, after he had an opportunity of conversing with the secretary-treasurer who had applied those monies due from the plaintiffs for freight as a payment to them upon account of this contract, he attempted to explain away this evidence, it is not, I think, surprising that the jury should have thought the attempted explanation unsatisfactory, and that they should decline to accept it, and that they should arrive at the con-

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clusion that when the secretary-treasurer of the company applied moneys due by the plaintiffs to the company, which moneys therefore constituted assets of the company, as a set-off or payment on account of a claim made by the plaintiffs against the company for work done for the company, and of which they received the full benefit, they should hold the company to the position which such act of their officer indicated, namely, that he was acting as their servant and within the authority conferred upon him by the company.

Upon the whole of this evidence, which displays such a singular relation existing between the company and their manager, who also appears to have held a contract under them, and who had such overwhelming control over the company that he appointed all the directors, and was suffered to appear to the public to have full authority to act in every matter on behalf of and for the company—to appear in fact to be the company itself—it is not at all surprising that a jury, consisting of men endowed only with ordinary capacity, should arrive at the conclusion—indeed, I should think it very strange if they had not—that the work performed by the plaintiff under the agreement of January 6th, 1876, and of which the company have received the benefit, was contracted for by the company through the instrumentality of their manager duly authorized in that behalf; or that at least the company, by their conduct, subsequently ratified and adopted his act as their own, and dealt with the plaintiffs upon that footing, and, I must say, that, in my judgment, it would be a great reproach upon the administration of justice if any technical rule of law should stand in the way of the plaintiffs, who have received from the defendants a portion only of their demand, recovering the balance still due to them for work of which ever since its completion, upwards of six years ago, the defendants have enjoyed, and do still

enjoy the benefit. The law, however, as it is administered in modern times, is, in my opinion, open to no such reproach. In *Crampton* v. *Varna Railway Co.* (1), where the claim, being merely for a money demand, was not enforceable in the English Court of Chancery, the Lord Chancellor, Lord *Hatherley*, refers to the power of the court over a company which should receive the benefit of a contract not entered into under their seal and should refuse to pay for the work. He says (2) :

> There might be a contract without seal under which the whole railway was made, and of which the company would reap the benefit, and yet it might be said that they were not liable to pay for the making of the whole line. When such a case comes to be considered, it may be that the court, acting on well recognized principles, will say that the company shall not in such a case be allowed to raise any difficulty as to payment.

Now, by statute law in *Ontario*, the courts of common law, in a common law suit, have the same powers conferred upon them, and the same duty cast upon them, to administer justice upon the same principles of equity as always governed the Court of Chancery in *England* in cases within its exclusive jurisdiction.

For the determination of the case before us, the modern case of *The South Ireland Ry. Co.* v. *Waddle* (3) in the Common Pleas, and in the Exchequer Chamber (4) is ample authority. *Cockburn*, C.J., in delivering the judgment of the Exchequer Chamber in that case, says :

> We are asked to overrule a long series of decisions in all the courts, which, in accordance with sound sense, have held, that the old rule as to corporations contracting only under seal, does not apply to corporations or companies constituted for the purposes of trading; and we are invited to reintroduce a relic of barbarous antiquity. We are all of opinion that the judgment of the Court of Common Pleas ought to be affirmed. It is unnecessary to say more than that we entirely concur in the reasoning and authority of the cases referred to in the judgment of *Bovill*, C. J., which seems to us

(1) L. R. 7 Ch. App. 562.
(2) P. 569.
(3) L. R. 3 C. P. 463.
(4) L. R. 4 C. P. 617.

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to exhaust the subject. In early times, no doubt, corporations could only, subject to the well-known exceptions, bind themselves by contracts under seal. And for some time that rule was applied to corporations which were formed for the purpose of carrying on trade. But the contrary has since been laid down by a long series of cases and may now be considered to be settled law.

Now, the work performed by the plaintiffs was clearly beneficial to the defendants in securing to them the full enjoyment of the railway for the purposes of constructing and working which they were given their corporate powers, and in fact was necessary for the purposes of the defendants in the successful carrying on of the trade for which they were incorporated, and the verdict of the jury has conclusively established as matter of fact that it was with the defendants through the agency of Mr. *Foster*, and not with Mr. *Foster* in his private character, that the plaintiffs contracted, and that the defendants have ratified and adopted the contract by acting under it and making payments to the plaintiffs on account of it. The defendants, therefore, ought to pay the plaintiffs the balance still due to them for the work of which the defendants enjoy the benefit

The appeal, therefore, should be dismissed with costs, and judgment entered for the plaintiffs upon the verdict.

*Appeal dismissed with costs.*

Solicitors for appellants : *Walker & McLean.*

Solicitor for respondents : *Thomas Deacon.*

ELIZABETH RUSSELL.....APPELLANT;

AND

PIERRE LEFRANÇOIS *et al*.....RESPONDENTS

1882
May 2, 3.
1883
Jan'y 11.

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

*Will, validity of—Insanity—Legacy to wife,—Error—False cause—Question of fact on appeal, Duty of Appellate Court.*

*P. L.*, executor under the will of the late *W. R.*, sued *W. C. A.*, curator of the estate of *W. R.* during the lunacy of the latter, to compel *W. C. A.* to hand over the estate to him as executor.

After preliminary proceedings had been taken, *E. R.* (the appellant) moved to intervene and have *W. R's.* last will set aside, on the ground that it had been executed under pressure by *D. J. M.*, *W. R's.* wife, in whose favor the will was made, while the testator was of unsound mind. The appellant claimed and proved that *D. J. M.* was not the legal wife of *W. R.*, she having another husband living at the time the second marriage was contracted. *W. R.*, who was a master pilot, died in 1881, having made a will two years previously. His estate was valued at about $16,000. On the 4th October, 1878, *W. R.* made a will by which he bequeathed $4,000 and all his household furniture and effects to his wife *J. M.*, $2,000 to his niece *E. R.*, $1,000 to *F. S.* for charitable purposes, and the remainder of his estate to his brothers, nephews, and nieces in equal shares. On the 8th of the same month he made another will before the same notary, leaving $800 to his wife *J. M.*, $400 to each of his nieces *M.* and *E. R.*, and $400 to his brother, with reversion to the nieces if not claimed within a year, and the remainder to *E. R.* On the 27th November, 1878, *W. R.* made another, which is the subject of the present litigation, and by which he revoked his former wills and gave $2,000 to *F. S.* for the poor of the parish of *St. Rochs*, and the remainder of his property to his "beloved wife *J. M.*" On the 10th January following *W. R.* was interdicted as a

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

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maniac, and a curator appointed to his estate. He remained in an asylum until December, 1879, when he was released, and lived until his death with his niece *E. R.*, sister of the appellant. Chief Justice *Meredith* upheld the validity of the will, and his decision was affirmed by the Court of Queen's Bench. On appeal to the Supreme Court of *Canada:*

*Held* (1) [reversing the judgments of the courts below, *Ritchie*, C.J., and *Strong*, J., dissenting,] that the proper inference to be drawn from all the evidence as to the mental capacity of the testator to make the will of the 21st November, was that the testator, at the date of the making of the will, was of unsound mind.

(2.) That, as it appeared that the only consideration for the testator's liberality to *J. M.* was that he supposed her to be "my beloved wife *Julie Morin*," whilst at that time *J. M.* was, in fact, the lawful wife of another man, the universal bequest to *J. M.* was void, through error and false cause.

(3.) That it is the duty of an Appellate Court to review the conclusion arrived at by courts whose judgments are appealed from upon a question of fact when such judgments do not turn upon the credibility of any of the witnesses, but upon the proper inference to be drawn from all the evidence in the case (1).

APPEAL from a judgment of the Court of Queen's Bench for the Province of *Lower Canada* (appeal side) affirming a judgment of Chief Justice *Meredith*, of the Superior Court of the Province of *Quebec.*

This was an action by *Pierre Lefrançois*, one of the respondents, as executor to the last will and testament of the late *William Russell*, of the 27th of November, 1878, against *Henry Charles Austin*, to account for his administration as curator of *Russell's* property, who, before his death, had been interdicted for insanity.

The appellant, *Elizabeth Russell*, a niece of the deceased, intervened in the cause, and, both as one of his heirs at law and as a special legatee by a former will, impugned the validity of the will of the 27th of November, 1879, on the grounds:—

(1) Application to the Privy Council for leave to appeal from the judgment of the Supreme Court of *Canada* was refused.

1st That *Russell* was not of sound mind when he made this will.

2nd. That the will did not express his true intentions, but was the result of undue influences exercised by *Julie Morin*, one of the respondents, who, taking advantage of the testator's mental and physical weakness and incapacity, caused this will to be made in her favor.

3rd. Because the will was made through error as to the quality of the universal legatee, *Julie Morin*, who was not the wife of *Russell* but a married woman who lived with him in adultery.

4th. That the will was against good morals.

5th. That the formalities required by law had not been observed.

After the petition of the appellant to be permitted to intervene had been received, *Julie Morin*, the sole universal legatee named in the will, was made a party to the action, and both she and *Lefrancois* separately contested the intervention by a general denial of all the allegations of the appellant's petition.

A great number of witnesses were examined in the cause as to the condition of the testator's mind when he made his will, and the Superior Court came to the conclusion that the will was valid, and dismissing the petition of the appellant, it ordered the defendant *Austin* to render an account of his administration of the testator's estate and property. The will was as follows:

"I will and direct that all my just debts be paid and satisfied as soon as possible after my decease.

"I give and bequeath unto reverend *J. P. Sexton*, priest of *St. Roch* of *Quebec*, to be used as he may deem fit and proper for the benefit of the poor inhabitants of the city of *Quebec*, the sum of two thousand dollars.

"And as to the rest and residue of my said estate of which I may die possessed, I give and bequeath the

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same unto my beloved wife, *Julie Morin*, as her own absolute property.

"I hereby nominate and appoint *Pierre Lefrancois*, of *Levis*, culler, as executor to this my last will and testament, in whose hands I do hereby divest myself of the whole of my said property, giving him power to prolong and carry out the execution of this my said last will beyond the term allowed by law, hereby revoking all former wills and codicils at any time heretofore by me made, and declaring the present to be my only true will and testament."

The evidence is reviewed at length in the judgments hereinafter given.

Mr. *Irvine*, Q.C., and Mr. *Cook* for appellants, and Mr. *F. Andrews*, Q.C., Mr. *Bethune*, Q.C., and Mr *Fitzpatrick* for respondents.

The points relied on and cases cited, appear sufficiently in the judgments.

RITCHIE, C.J.:—

I have given to this case very considerable and anxious consideration, and having had an opportunity of reading the judgment of Mr. Justice *Strong*, with which I entirely concur, I have come to the conclusion that this appeal ought to be dismissed. I cannot discover anything to justify this court in reversing the judgment of the Superior Court and of the Court of Queen's Bench. On the contrary, I concur with Mr. Justice *Strong* that, on the whole evidence taken together, the balance of that evidence is in favor of the capacity of the testator to make the will at the time and in the manner in which he did. I cannot discover from the evidence that the testator was under any delusion that could have influenced the testamentary disposition he made of his estate by his will, nor any-

thing to show that at the time he directed the preparation of the will, and at the time he executed it, he was incompetent to manage his own affairs, or that he did not fully understand the character and effect of what he was doing, nor can I discover any evidence that *Julie Morin* exercised any undue control over him, or that he was in any way unduly influenced or intimidated; on the contrary, the evidence, I think, satisfactorily shows that the making of the will, and the disposition of his property as contained therein, were his own spontaneous acts, and I think that the strong evidence of the notaries before whom the will was executed (they performing a public duty in the preparation of wills), and the evidence of the other transactions before other notaries and with other persons with whom the testator transacted important business involving large amounts before, about the time and after the making of the will, very conclusive.

On this point the case has been so fully discussed and the evidence so thoroughly analyzed, that I have only a few words to add.

I cannot but think that the learned Chief Justice in the Appellate Court below attaches too much weight to the consideration which seems also to have impressed Chief Justice *Meredith*, viz. :– that this will was a very unjust will towards the niece. They do not, it appears to me, give sufficient consideration to the position of *Julie Morin* in reference to the testator. I think there is nothing in this case which could lead the mind of any party to the conclusion that, at the time *Julie Morin* contracted marriage with the testator, either she or the testator had any idea that she was not in a position, free from her previous marriage engagements and in a position to enter into an honest *bonâ fide* and legitimate marriage contract with the testator. I think also they have not thoroughly appreciated the con-

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dition of the testator—that he was a man in years and afflicted with a serious cutaneous disorder of a very aggravated, painful character—some of the witnesses speaking of his sufferings as intense and his sores something horrible to look at—necessarily therefore requiring a great deal of care and attention at the hands of those with whom he was residing They also do not appear to have considered the fact, that when he made his marriage settlement on *Julie Morin*, he only provided for her receiving $400. I think it not unreasonable to assume, in accordance with what is mentioned in several cases, that this small amount was, in all probability, fixed with a view, considering the respective ages of the parties, that the wife might be dependent upon the will he would make and not be altogether independent of her husband, with a view of securing that attention and care he so much needed.

I think also the learned Chief Justice of the Court of Queen's Bench, for whose opinion I have the most profound respect, did not consider sufficiently the just claims of the wife, on the one hand, and on the other, that the conduct of the niece to this old man was not such as to secure a continuance of his favor, but that, on the contrary, he had ceased to retain his affection for her; and while there is not a particle of evidence in this case to show that there was the slightest unfair control used by *Julie Morin* over the testator, the evidence of the parties as to the execution of the will in favor of the niece shows the direct opposite. The niece on that occasion was received kindly by the uncle, who evidently had, if the testimony is true, just cause of complaint against her, because she had, contrary to his commands, introduced into his house, as an associate, a person towards whom, he, rightly or wrongly, thought he had cause to entertain feelings of great hostility, and who also, no doubt, felt much annoyed at her opposi-

tion to his marriage—notwithstanding which, when she comes to him he receives her kindly, gives her $500, and then seeks that she shall become reconciled to *Julie Morin*, who was living with him and believed by him to be his wife. Instead of responding to the wishes of her uncle, she, on the contrary, exhibits the greatest hostility and reluctance to any compromise or any terms of friendship with *Julie Morin*, and while apparently willing to make a will in her favor, he did not wish to do so without the consent of his wife.

Naturally enough, she, for whom provision had been made only to the extent of $400 by the marriage settlement, does not appear to have approved of the contemplated will, but though disapproving, she does not appear to have interposed any obstacle to the execution of the will, or attempted in any manner to control or intimidate the testator.

*Miss Russell's* account of what then occurred is as follows:—

After the will had been read to Mr. *Russell*, he said: "I must ask my wife's permission to sign it." He went into the kitchen and spoke to Mrs. *Robitaille*. He came back and said, "She will not permit me to sign that will." I said, "What was the use of bringing Mr. *Austin* here and giving him all that trouble, if you did not intend to sign it." He went back again and spoke to Mrs. *Robitaille*. I heard her say to him "Je ne veux pas, laissez moi tranquille." My uncle returned and said she would not allow him. I said, "Well, uncle, will you not do something for me, you know I am not strong and cannot work." He then took the pen and said, "I do not care, I will sign it." My uncle took the pen and signed the will in presence of Mr. *Austin* and Mr. *DeBeaumont*.

After it was executed, he again tries to bring about a reconciliation between his wife and his niece, but the niece shows no disposition to conciliate the old man, but actually refuses to shake hands with *Julie Morin*. Miss *Russell's* description of the last scene of that interview is as follows:—

My uncle went into the kitchen and seated himself along-

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side of Mrs. *Robitaille*. He asked me to go into the kitchen and speak to Mrs. *Robitaille*. I told him I would not. He said: "Come and speak to her for my sake, for she will punish me for what I have done to-day." I was all alone with my uncle. I went into the kitchen. I found Mrs. *Robitaille* there, and her sister Madame *Roy*, and also my uncle. He asked me to shake hands with Mrs. *Robitaille*. I refused. He insisted upon my doing so. I said: "I will do so to please you." Mrs. *Robitaille* said, reaching out her hand: "On ne refuse pas de donner la main à un chien." She gave me her hand and I took it. I kissed my uncle, and on going away, I said: "Will you permit me to come back and see you, as you are ill?" He said, "I will see." That is all that took place in the kitchen.

It is not wrong for a person in *Julie Morin's* position, by reasoning or persuasion, to obtain a will to be made in her favor, if she does not coerce the testator, she has a right to exercise legitimate influence by persuasion to induce him to make a will in her favor, though there is no evidence that such took place in this case. And was it not more reasonable that a will should be made in her favor, than that a will should be made to cut her off with a nominal sum, she who for days, nights and years cared for him when suffering from that grievous, loathsome disease, not only painful to him, but trying and offensive to the nurse? Can it be said that a will in favor of a wife so situated was unnatural or unreasonable? Who had the most claim on him, the niece or the wife? If there is any balance, in my opinion, the weight is decidedly in favor of the person who believed herself, and whom he believed to be, his wife, and who appears to have faithfully discharged towards him the duties of a wife. I think, under all the circumstances, considering the way in which the will was made, not made when she was present, but made before men whose sworn duty it was not to permit the testator to execute a will if they saw the least sign of insanity or incapacity to make the will, or had any reasonable grounds for

supposing that such insanity or incapacity existed, and considering that, although the appellant is now setting up that the testator was incapable to make a will in favor of *Julie Morin*, she is contending, notwithstanding, that a few days previous he had perfect capacity to make a will and give his property to the niece, when all this evidence, on which they now seek to establish incapacity, was just as patent and known to them as it is to-day; the will may have been the result of regard for *Julie Morin*, or of gratitude for the care and attention bestowed on him by her, or it may have been the result of persuasion on her part, or possibly all combined; but I can discover no evidence of illegitimate influence or pressure, overpowering or controlling the will of the testator, nor any kind of coercion or fraud practiced on him. On the contrary, he appears to have acted freely and independently, as his own will and pleasure dictated, and while his niece may have had strong claims on his affection and bounty, the disposition in favor of his wife to her exclusion was certainly a will in favor of one having a primary legitimate claim to his gratitude and testamentary consideration and bounty, and, as Chief Justice *Meredith* suggests, may be fairly attributable to the care and devotion with which it is proved she nursed, night and day, for a period of more than a year, a person sick and suffering, and whom she regarded as her husband; and such a will cannot be said to have been made to the exclusion of the natural object of the testator's bounty.

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I can come to no other conclusion than that, upon the whole testimony, there was evidence of a disposing capacity, and that, at any rate, there is no such overwhelming evidence of incapacity as would warrant this court, under the authorities, in reversing the judgment of the Superior Court, confirmed, as it is, by four out of the five judges of the Court of Queen's Bench.

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In addition to this, I agree entirely with my brother *Strong*, in his view of the law which should govern this case. I think, also, if there was "error," it is not competent on the record in this case for this court now to reverse the judgment on that ground.

I am sorry to differ with the majority of the court, on a case of this kind, but I must conscientiously express the honest conclusion to which my mind has been brought, after a careful consideration of all the circumstances.

I do not feel it necessary, as I said before, to refer to any of the other evidence, because it has been so elaborately gone into in the courts below, especially by the learned Chief Justice of the Superior Court.

STRONG, J.:—

I am unable to concur in the judgment of the majority of the court. The learned and experienced judge before whom this cause was heard in the court of first instance, and in whose presence several of the witnesses were examined, found that the testator, *William Russell*, when he made the will of the 27th November, 1878, which has been impugned by the appellant, was possessed of sufficient mental capacity for the performance of that act, and that the will he then made was not the result of any fraudulent practices, solicitations, or suggestions.

In the Court of Queen's Bench that judgment was affirmed by four of the five judges of whom that court was composed The question regarding the testamentary capacity of the testator being entirely one of fact, and depending altogether on the appreciation of the evidence of witnesses whose testimony was conflicting, I am of opinion that we ought not, sitting in a second Court of Appeal, to disturb the finding of the primary court, confirmed, as it has been, by a large majority of

the first Court of Appeal. In the case of *Gray* v. *Turnbull*, (1) Lord *Chelmsford* most distinctly affirms this principle as one applicable to appeals to the House of Lords in cases from *Scotland*. He says:

If there is to be an appeal on questions of fact (and I regret that there should be such) I think this principle should be firmly adhered to, namely: that we must call on the party appealing to show us irresistibly that the opinion of the judges on the question of fact was not only wrong, but entirely erroneous.

In *Hay* v *Gordon* (2) the Judicial Committee of the Privy Council recognise the same rule as applicable to that jurisdiction. They say:

Their lordships are not unmindful that they have on more than one occasion laid it down as a general rule, subject to possible exceptions, that they should not reverse the concurrent findings of two courts on a question of fact.

In *Lambkin v. S. Eastern R. Co.* (3), the Judicial Committee re-affirm the same principle as follows:

With respect to the verdict being against evidence, it appears to their lordships, as indeed they have before intimated, that the question of negligence being one of fact for the jury, and the finding of the jury having been upheld, or at all events, not set aside, by two courts, it is not open under the ordinary practice to the defendants.

In the case of the *Picton* (4), the learned Chief Justice of this court in giving judgment states the rule just adverted to with approbation, and applies it in a case not nearly so strong as the present. In that case the Chief Justice also refers to several authorities collected from English reports in admiralty and other appeals, affirming the rule in question. *Santacana Y. Aloy* v. *Ardevol* (5); *Reid* v. *Steamship* Co. (6); *Penn* v. *Bibby* (7); *Ball* v. *Ray* (8); The *Glannibanta* (9); *Bigsby* v. *Dickson* (10). And in the same case the judgment of Mr. Justice *Gwynne* contains the following passage:

(1) L. R. 2 Sc. App. 53.
(2) L. R. 4 P. C. C. 348.
(3) 5 App. Cases 352.
(4) 4 Can. S. C. R. 648.
(5) 1 Knapp 269.
(6) L. R. 2 P. C. 245.
(7) L. R. 2 Ch. App. 127.
(8) L. R. 8 Ch. App. 467.
(9) 1 Prob. & Adm. D. 283.
(10) 4 Ch. Div. 24.

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Sitting in a Court of Appeal we should be satisfied beyond a doubt of the incorrectness of this finding before we should reverse it.

Such an interference upon a second appeal cannot be justified by any presumption that the second appellate court is in any better position to give a judgment than were the two preceding courts, for that presumption is, as regards the original court at least, entirely the other way, and therefore the policy of the law should be to discourage appeals on questions of fact, where there is anything like a balance of testimony, as useless and vexatious. Speaking for myself, I recognise in the rule laid down in the cases referred to in the Privy Council and House of Lords, one binding upon this court, and one which I shall feel compelled to follow, until the court of last resort adjudges otherwise. The unsatisfactory consequences which a contrary practice may lead to, are sufficiently exemplified in the result of the present appeal. The effect of the judgment now pronounced by this court being that this cause, the decision of which depends altogether on the credit to be accorded to one set of witnesses rather than to another, is ultimately decided for the appellant by the judgments of five judges against those of seven (including the judge who presided at the trial) whose finding is in favor of the respondent.

Whilst relying on the rule I have adverted to, I quite agree that there may be cases of gross error in drawing inferences from facts established by evidence beyond dispute, in which even second courts of appeal may be warranted in reversing, but it is only in such a class of cases that the jurisdiction should be exercised. A case, like the present, depending entirely on the weight of evidence, when there is anything like a balance of testimony, can never be said to form an exception to the general rule, which has for its support the great weight of authority already mentioned.

Further, I am of opinion, after the most attentive consideration which I have been able to give to the facts of the case as they appear in proof, taken in connection with the law, as laid down in the passages from *Laurent* and *Demolombe* referred to in the judgment of Mr. Justice *Cross*, and in the case of *Banks* v. *Goodfellow* in the English Court of Queen's Bench (1), that the conclusion of the learned Chief Justice of the Superior Court was entirely right, and if I were compelled to try over again the issues of fact, which he had to dispose of, I should unhesitatingly find, as he has done, that the appellant has wholly failed in establishing the testamentary incapacity of *William Russell*, at the time he made the impeached will of the 27th November, 1878.

But, entertaining the opinion already expressed, that we ought not to disturb the judgment of the two courts which have already dealt with the questions of facts involved in the appeal, I do not feel called upon to enter upon any analysis of the evidence for the purpose of demonstrating the correctness of these decisions, for I prefer to rest my judgment entirely upon the inadmissibility of any further controversy in this court on the question of the testator's sanity.

It is said, however, that independently of the testator's incapacity, the disposition in favor of the respondent as universal legatee is void upon the ground of error or false cause, inasmuch as the testator describes her as "*Julie Morin*, his dear wife," when she was in truth at that time the wife of another man.

This point does not appear to have been seriously urged before the Chief Justice of the Superior Court, though it was taken in the Court of Queen's Bench, where all the learned judges, except the Chief Justice, agreed in repelling it. I am of opinion in the first

(1.) L. R. 5 Q. B. 549.

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place, that it is inadmissible in the present state of the pleadings. The declaration filed by the appellant, does not libel this as a ground for invalidating the legacy to her, neither does it take any conclusions founded upon this pretension of error or false cause, and at this stage of the action I do not think we ought to permit an amendment of the record for the purpose of raising the objection. Further, it appears to me that the judgment of the Court of Queen's Bench was, for the reasons stated in the opinion of Mr. Justice *Ramsay*, entirely correct. The great preponderance of authority appears to be in favor of the law as stated by *Furgole* (1), who founding himself upon the Digest (2), De Con. et Demonstr. "*sed plerumque doli exceptio locum habebit si probetur alias legaturus non fuisse*," says that when a testator gives a legacy to a legatee or institutes as heir a person whom he describes as a relation, (other than in the case of the institution of a son as heir,) it is not to be presumed that the relation or quality of the person was the final or determining cause, and that, therefore, the disposition is not to be considered as null if the person named afterwards turns out not to be related to the testator in the manner described, though it is open to the parties opposing the will or legacy to *prove* that the erroneous supposition of relationship was the sole determining cause, or, in the words of the text cited, "*alias legaturus non fuisse.*" The case of the institution of a son as heir is said to stand on a different ground

Parce que la fausse opinion de la filiation est présumée la cause finale de l'institution, et que sans cette qualité le testateur n'aurait pas disposé en sa faveur [*Furgole*, loc. cit ]

This distinction of the case of the son is, I apprehend, to be explained by the consideration, that the Roman Law, which was the law of the "pays de droit écrit" with reference to which *Furgole* wrote, required for the

(1) Vol. I, c. 15, sec. 4, p 271 et seq. (2) Lib. 35, tit. 1.

validity of the testament that an heir should be instituted, and further made the testament inofficious, if a son was passed over without being instituted, or in express words and for cause disinherited. It is true that *Menochius*, in his treatise, "*de Presumptionibus*," to which my brother *Taschereau* has referred, says presumption of error is applicable in a case exactly like the present, where the testator gives to a person described as his wife who afterwards appears not to have been his wife, but the commentators and writers both on the Roman and French law, who state the rule the other way, including *Muhlenbruch* (1), *Warnhoenig* (2), *Demolombe*, Trait. des Donat. & Test. (3), *Duranton* (4), and *Troplong* (5), (who all agree with *Furgole*), are so clear and decisive in the contrary opinion, and the reasons they give are so strong that, founded as they are on the clear words of the text in the digest, the single authority of *Menochius* ought not to outweigh them.

These writers show that it is not to be presumed from the mere statement of the quality of the legatee that it was the sole and determining cause of the disposition, or, in the words of the law cited from the digest, that otherwise the legacy would not have been given, and further that if the quality is not to be considered as the final cause of the testator's liberality, but if that may have been influenced by personal affection or other causes the error is not to be considered fatal. They further establish that in case of doubt the presumption is to be such as will uphold the disposition *ut res magis valeat quam pereat.*

*Troplong*, particularly in his Commentary on Donations and Testaments, puts this very clearly in the folowing extracts: No. 503:

(1) Vol. 3, pp. 253, 254.
(2) Vol. 3, p. 427.
(3) Vol. 1, Nos. 389, 390, 391.
(4) Vol. 9, p. 335.
(5) See post.

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Mais si la qualité n'avait pas été la seule considération déterminante, si l'affection personnelle s'était mêlée à la libéralité, on ne pourrait plus dire qu'il y a eu erreur fondamentale dans la disposition.

No. 384:

*Menochius* semble croire qu'il suffit que la cause soit exprimée pour qu'elle doive être considérée comme finale. Cette opinion est avec raison repoussée par *Furgole* qui s'appuie sur les termes mêmes de la loi 7280 déjà citée. D'ailleurs, dans le doute il faut toujours se décider pour la parti qui tend à faire valoir la disposition. Or, la cause impulsive est plus favorable puisque malgré sa fausseté elle ne porte pas atteinte aux legs. Il semble donc que la cause doit être réputée impulsive, à moins qu'il ne résulte clairement qu'elle est finale.

Applying these principles of interpretation to the present case we must presume that the proposed relationship was not the sole cause which induced the testator's liberality, but that he was also influenced by his personal affection for the respondent. I come therefore on this part of the case also to the same conclusion as that arrived at by the Court of Queen's Bench. Although I admit English authorities ought not to be decisive on this head, so far as any question of law is involved (for, in that respect, it must of course depend entirely upon the rule of the French as derived from the Roman law,) yet, as it has been shown to be a question of interpretation, rather than one of law, it is not immaterial to notice that the English Court of Chancery has adjudged the question which arises here, the legacy to a person described by the testator as his wife and afterwards proved not to be his wife, in the same way as *Troplong* decides it, namely: that error is not to be presumed and the legacy is not vitiated by the false description of the legatee. This was the decision of the Master of the Rolls in the case of *Re Pett's* Will (1); See also *Schloss* vs. *Stiebel* (2); *Giles* vs. *Giles* (3); Theobald on Wills (4).

(1.) 27 Beav. 576.
(2.) 9 Sim. 1.
(3.) 1 Keen 685.
(4.) Ed. 2, p. 214.

Further, the appellant, *Elizabeth Russell*, sueing as she does, not as one of the testator's co-heirs, but merely as a particular legatee under the will of the 8th October, 1878, is not qualified to raise this objection. A decision in favor of the appellant founded on this pretence of error or false cause alone, of course supposes the will of the 27th November, 1878, to be in other respects a good will, for, on no principle that I can understand could it be said that the invalidity of the disposition in favor of *Julie Morin*, as universal legatee, contained in the will of the 27th November, on the ground of false cause or error, rendered the whole of that will null, so as to avoid the legacy to the Rev. Mr. *Sexton* and the clause of revocation contained in it; certainly the whole will could not for this reason be set aside in the absence of the Rev. Mr. *Sexton*, who is not a party to the action. And if this be so, it revokes all former wills, thus leaving this pretension one which can be only set up by the heirs *ab intestato*. Then it does not appear of what persons this class of heirs is composed, and at all events they are not all before the court as they ought to be, before we could declare the nullity of the legacy to the respondent for the cause alleged.

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

FOURNIER, J., concurred with *Taschereau*, J.

HENRY J.:

After a full consideration of the circumstances in evidence in this case, I have arrived at the conclusion that on two issues raised, the appellant is entitled to the judgment of the court. I had some difficulty in arriving at that conclusion during the argument; but,

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after a very careful consideration of the evidence, I think that it sustains the position, which has been taken by my brother *Gwynne*, as to the incapacity of the party to make the will in favor of *Julie Morin*, which is set up in this action. I need not repeat what my learned brother has so well and so exhaustively stated in regard to the position of *Russell* at and before the time when he made the will. Although on the occasion he appeared to the learned gentlemen in whose office the will was made, as being perfectly sound, he made a remark before he got to his own house, to a party, which would show clearly that he was not at all right in his mind. He was asked, had he made his will? He said he had. He was asked why he had made it, and he answered that, if he did not do so, his life was not safe. Here is a fact stated immediately on his making the will, which to a certain extent, goes to confirm the testimony that is given to sustain the position that when he made it he was not in his right mind, or that he was acting under coercion from fear of personal consequences. I take the same view precisely in regard to his conduct in his dealings with *St. Michel* that my learned brother has taken, and, taking it in all its bearings, I think that he was not, at the time of making his will, in his right mind. Now, if the evidence ended here, we might possibly entertain some doubt, but when in a very short time afterwards, we find that, on the application of *Julie Morin*, he was himself taken up as a lunatic and confined as such, we can easily trace back from that circumstance to the transactions which he was concerned in previously, and come to the conclusion that, at the time he made the will, he was not in his right mind. It is a principle in the law of evidence, that, if it is once shown that

a party is not in his right mind, in reference to a future transaction, the onus is thrown upon the party who wants to sustain the validity of that transaction to show that, although not at one time in his right mind, he had recovered and was *compos mentis*. Now, the evidence on behalf of *Julie Morin*, not only does not show this, but shows the very opposite. I need not repeat what has been so well said in regard to the evidence which has been given on this point.

In reference to the other point, viz.: admitting *Russell* was in his right mind when he made the will, is that will binding, and did it convey to *Julie Morin* the property which she claims under it? -- It appears to me, from a reference to the authorities, both those that are binding in *Quebec* and those that have been considered binding in *France*, and even going back to the Roman authorities, that a legacy made to a party whom the testator considered to be his wife at the time, but who was not, is not valid in law. We are not called upon to decide this case upon any principles of English law, but according to the law in force in *Quebec*; and I have arrived at the conclusion that, according to that law, even if the testator were in his sound mind when made his will, and bequeathed a legacy to one whom he honestly believed to be his wife at the time, but who was not, such legacy is void.

For these reasons, I think the appeal should be allowed, and that the judgment of this court ought to be in favor of the appellant. There are equities in the case in favor of *Julie Morin*, and a great deal might be said why it would be desirable that our decision should be otherwise, but we are not entitled to take them into consideration, if we come to the conclusion that the law prevents our consideration of them.

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TASCHEREAU, J. :—

L'action en cette cause fut instituée par l'intimée *Le François*, en sa qualité d'exécuteur du testament du défunt *William Russell*, en date du 27 Nov. 1878, réclamant la succession du dit *Russell* contre *Henry Charles Austin*, curateur à la personne et aux biens du dit *Russell* qui avait été interdit pour insanité d'esprit. Après le retour de cette action en Cour, la présente appelante obtint la permission d'intervenir pour contester la validité du dit testament, et mit en cause par son action *Julie Morin*, une des intimées, qui était instituée légataire universelle par ce testament.

Le jugement de la Cour Supérieure rejeta la contestation de la présente appelante et déclara le dit testament bon et valide. Ce jugement fut confirmé par la Cour du Banc de la Reine. Le Juge en Chef, Sir *A. A. Dorion*, différant.

Les raisons invoquées devant nous, contre ce testament et le legs universel fait à *Julie Morin* par icelui sont virtuellement réduites à deux, savoir : 1° L'insanité d'esprit du testateur ; 2° L'erreur du testateur quant à *Julie Morin*, *Russell* la croyant, lors de la confection de ce testament, son épouse légitime, tandis qu'en fait elle ne l'était pas, le premier mari de la dite *Julie Morin* étant alors encore vivant.

Le legs universel fait par ce testament du 27 Novembre 1878, (et le testament lui-même peut-être) sont-ils nuls par erreur ? C'est-à-dire *Russell* a-t-il testé en faveur de *Julie Morin* parce-qu'il la croyait sa femme ? A-t-il testé en faveur de madame *Russell* son épouse, ou bien en faveur de madame *Robitaille* ? A-t-il sciemment donné ses biens à la femme de *Robitaille*, commune en biens avec son mari, c'est-à-dire, a-t-il voulu donner ses biens à *Robitaille* ? Eût-il, lui, *Russell*, testé en faveur de cette femme, si *Robitaille*, son mari, fut survenu le 27 Novembre au

matin? Ou, en d'autres mots, quand *Russell* dit dans son testament: "Je donne à mon épouse bien aimée, *Julie Morin*" doit-on voir là apposée à sa libéralité la condition que cette *Julie Morin* est vraiment son épouse? Peut-on dire que si cette *Julie Morin* n'était pas alors et n'a jamais été son épouse légitime, *Russell* aurait ainsi testé en sa faveur? Il me semble que ces questions doivent se résoudre en faveur de l'appelante.

Sans doute comme le disent *Furgole* et *Demolombe*, sur l'erreur comme cause de nullité des testaments, on ne peut être trop prudent et trop réservé pour l'admission de cette cause de nullité, et il faut démontrer que le disposant n'aurait pas fait la libéralité s'il n'eût pas été dans cette erreur. Mais, ici, il me semble qu'il ressort de toute la cause, et du testament lui-même, que *Russell* n'a fait cette libéralité à *Julie Morin* qu'uniquement parce qu'il la croyait sa femme. Et le fait que lui et elle étaient, lors de la date du testament, de bonne foi, ne me paraît ici d'aucune conséquence. La question de fait à établir par l'appelante est l'erreur de *Russell* sur la qualité de *Julie Morin*, et qu'il a fait ce testament parce qu'il la croyait sa femme.

Le fait que *Julie Morin* était alors aussi dans l'erreur, ne peut affecter la cause sous notre droit civil, les autorités sont unanimes à enseigner que, si, en fait, il est établi que le testateur n'a légué à une personne qu'en considération d'une qualité qu'il lui supposait, qu'il apparaisse que le testateur était dans l'erreur quant à cette qualité de la personne en faveur de qui il a testé, la disposition est nulle (1). Dans *Merlin* (2), la doctrine sur la matière est clairement résumée comme suit.

Après avoir établi, qu'en général, un legs, accompagné d'une fausse démonstration du légataire, n'est pas

(1) Toullier 5, No. 654; Demolombe 1 Don. Nos. 389,391.

(3) Rep. Vo. Legs. Sec. 2, par 2, No. 4.

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rendu nul à cause de cette fausse démonstration, l'article ajoute :

La fausse démonstration pourrait cependant emporter la nullité du legs, si elle avait sa source dans une erreur du testateur, et s'il existait de fortes raisons de croire que celui-ci aurait disposé autrement dans le cas où il eût été mieux instruit. Par exemple que *Titius*, dans la fausse opinion que *Mévius* est son fils, lui fasse un legs conçu en cette forme : "Je donne et lègue telle chose à *Mévius* "mon cher fils ;" il est certain que le légataire ne pourra rien prétendre, parceque le testateur n'a été porté à disposer en sa faveur, que par la persuasion que c'était son fils, et que cette qualité n'existe pas. C'est la décision expresse de la loi 5, C. *de testamentis*, et de la loi, 4 C. *De hæridibus instituendis*. La loi 7 de ce dernier titre dispose de même par rapport à celui qui a institué comme son frère une personne qui ne l'était point ; et, ce qu'il y a de remarquable, elle prouve que l'erreur de droit vicie, aussi bien que la simple erreure de fait, le legs dans lequel elle a causé une fausse démonstration de personne.

Pour concilier ces textes avec ceux qu'on a précédemment cités, il faut, dit *Voët*, distinguer le cas où le testateur a appeler son fils ou son frère, un légataire qu'il savait bien n'être point tel, et qu'il aimait néanmoins comme s'il eût été réellement, d'avec celui où, trompé par de fausses apparences, il a gratifié comme son fils ou son frère, une personne qui n'avait point cette qualité et qu'il aurait passé sous silence s'il avait sû qu'elle lui était étrangère. C'est au premier cas qu'il faut appliquer les loi 58 § 1, de *Heredibus instituendis*, et 33 D. *De conditionibus et demonstrationibus ;* et c'est au second qne s'adaptent les lois 5 C. *de testamentis*, 4 et 5, 1 C, *de Heredibus instituendis*.

Furgole des Testaments (1) ; *Troplong* (2).

Il me semble clair que d'après cette autorité, le testament de *Russell* en faveur de *Julie Morin* ne peut être maintenu. Si la disposition d'un testateur qui, trompé par de fausses apparences, donne à quelqu'un, le croyant son fils ou son frère, uniquement parcequ'il le croyait son fils ou son frère, est nulle et sans effet, pourquoi la disposition de *Russell* en faveur de *Julie Morin* ne serait-elle pas aussi nulle et sans effet ? Peut-on douter, en face des termes de ce testament et des faits de la

(1) Ch. 5, sect. 4, 7 et 15. (2) 1, No. 502.

cause, que c'est à sa femme, et à sa femme seulement que *Russell* entendait léguer, et que s'il eût sû que *Julie Morin* était la femme de *Robitaille* et non la sienne, non-seulement il ne lui aurait jamais fait cette disposition le 27 nov. 1878, mais l'aurait chassée de chez lui et n'aurait plus voulu la voir.

Mr. *Sexton* n'aurait pas voulu lui administrer les sacrements, eut-il su que *Robitaille* était vivant, avant que cette femme eut été éconduite de la maison. Une autorité dans le même sens se trouve dans *Montvalon*, Traité des successions (1). L'auteur y cite un arrêt de 1727, où un legs, conçu en ces termes: "Je lègue à "*François Benoit*, mon petit neveu et filleul" fut déclaré nul, il apparaissant que le testateur s'était trompé en croyant que *François Benoit* était son filleul. La démonstration de filleul fut présumée la cause finale du legs.

Et *Menochius* dit que, si la cause finale d'un legs, celle en considération de laquelle il est fait, se trouve être fausse ou ne pas exister, on ne peut douter que la disposition tombe. *Menochius*, de Presumpt. (2). Et plus loin il ajoute, qu'une cause finale d'un legs est quand le testateur l'a fait à cause de la parenté ou de l'affinité du légataire avec lui ; et que s'il est découvert que cette cause est fausse et n'existe pas, le legs tombe. Ainsi, si quelqu'un, croyant un tel son fils ou son frère, ou son neveu, l'institue son légataire, et qu'il se découvre que le testateur était dans l'erreur, et que le légataire n'est pas ou son fils, ou son frère, ou son neveu, la disposition tombe.

A la première page, au par. 8., *Menochius* cite, en l'approuvant, le passage suivant de *Balde*, qui est d'une application remarquable à la présente cause. "*Quod si testator legavit uxori, vel eam instituit, credens esse legitimam uxorem, si apparet deinde matrimonium nullum,*

(1) T. 1er P. 525. (2) Vol. 2, p. 45. No. 4.

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*dispositio corruit ; nam præsumitur quod si scivisset eam non fuisse uxorem legitimam, non ita legasset, vel hæredem fecisset.*"

C'est bien là le cas actuel, le cas entre *Russell* et *Julie Morin*. Il lui a légué, la croyant sa femme légitime "*credens esse legitimam uxorem.*" Il était dans l'erreur, et elle n'était pas sa femme, le legs qu'il lui a fait est donc nul, car il est présumé, et c'est là, d'après *Menochius* et les autres auteurs cités, une présomption qui ressort des mots "Je lègue à mon épouse bien-aimée" qu'il ne lui aurait pas légué, s'il eût sû qu'elle n'était pas vraiment son épouse. Il ressort d'ailleurs ici, non-seulement des termes du testament lui-même, mais aussi de toute la preuve dans la cause, que c'est à sa femme légitime que *Russell* entendait léguer.

Un article de *Claude Henrys*, avec des observations par *Bretonnier*, adopte entièrement cette doctrine (1). Comme exemple, l'auteur dit que l'institution où le legs fait par le testateur à un étranger qu'il croyait être son frère n'est pas valable, quand l'erreur est découverte, comme le dit *Godefroi* : "*institutus ut frater a fratre errante, recti non est institutus.*"

Et *Duranton* dit (2) :

> Quoiqu'en principe l'erreur sur la qualité du légataire ne vicie pas le legs, néanmoins si l'on devait présumer que c'est cette qualité, crue vraie pour le testateur, qui a déterminé celui-ci à faire la disposition, le legs devait être déclaré nul par voie d'exception, comme fait d'après une fausse cause.

Les lois 4 C. de *Hered. Inst.* et 5 C De *Testamentis*, nous offrent des exemples de ces cas où le legs est nul, et leur décision serait incontestablement applicable dans notre droit.

Dans ce sens, un arrêt de 1812, dans la succession *Pétiot*, cité à *Dalloz* (3), a jugé que le testateur,

(1) Œuvres de Claude Henrys vol. 4, pp. 68, 74 et 76.

(2) Vol 9, No. 345.

(3) Rep. Vol. 16, Vo. Disp. entre-vifs et test, No. 244.

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qui a institué pour son héritier un enfant après l'avoir légalement reconnu, est censé n'avoir agi ainsi que parce qu'il croyait que c'était son enfant naturel, et que, par suite, l'institution n'est pas valable s'il est reconnu que l'institué n'est pas l'enfant naturel du testateur.

"Mais," dit l'intimée, "suivant l'article 163 C. C, le mariage, quoique nul, produit les effets civils, s'il a été contracté de bonne foi, et, en conséquence, j'ai droit au legs à moi fait par le testament de *Russell*." C'est là, il me semble, une erreur grave. Sont-ce les effets civils de son mariage dont il s'agit ici? Le testament de *Russell* est-il un des effets civils de son mariage? Indubitablement non. Or, ce sont seulement les effets civils du mariage, c'est-à-dire, ceux que lui donne son contrat de mariage, ou en l'absence du contrat de mariage, ceux que lui donne la loi, ceux en considération desquels le mariage putatif a été contracté, qui sont donnés à la femme putative par l'article du Code. *Toullier* du mariage (1); *Boileux* (2); *Pothier* (3); *Marcadé* (4).

Mais ici, son mariage n'est pas son titre, son contrat de mariage n'est pas en question. Ce testament, *Russell* pouvait le révoquer, s'il n'eut pas perdu la raison, quand il lui aurait plu de ce faire, et ceci, que *Julie Morin* ou lui fussent de bonne foi ou non sur leur mariage. Et s'il l'eut révoqué, *Julie Morin* pourrait-elle dire "Je réclame ce legs, *Russell* n'avait pas le droit de le révoquer parce que c'est un des effets civils de mon mariage putatif avec lui?"

Je vois que *Bretonnier* (5), adoptant l'opinion d'un commentateur du nom de *Mantica*, est de l'avis que la femme putative, a, dans ce cas, droit au legs à elle fait

(1) Nos. 660, 661.
(2) P. 190 et seq.
(3) Mariage, Nos. 437 et seq.; Communauté, Introd., No. 17.
(4) 1 Vol. p. 525 et seq.
(5) Œuvres de Henrys (loc. cit.)

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par son mari, quoique celui-ci l'ait fait par erreur. Mais je ne puis en venir à cette conclusion.

Pour moi, il me semble clair, qu'étant établi en fait, que *Russell* n'aurait pas légué à *Julie Morin* s'il eût sû qu'elle était la femme d'un autre, en droit la disposition ainsi faite par erreur tombe, et doit être traitée comme non avenue.

On pourrait peut-être remarquer dans le cas actuel que, comme par l'article 838 C. C., la capacité de recevoir par testament se considère au temps du décès du testateur, *Russell* ayant légué à sa femme, et *Julie Morin* n'étant pas sa femme, même putative, lorsque lui, *Russ ll*, est mort, ce legs pour cette autre raison est nul.

Si *Julie Morin* eût cessé d'être sa femme par sa mort naturelle, arrivée avant celle de *Russell*, le legs serait indubitablement nul. Art. 900 C. C. Elle a cessé d'être sa femme même putative et de bonne foi, par le retour de son premier mari, avant la mort de *Russell*. Sur le même principe, le legs à elle fait par *Russell* est nul. La dissolution du mariage putatif a eu lieu lors du retour du véritable mari de *Julie Morin* (1). Lorsque *Russell* est mort, elle n'était donc pas même sa femme putative. Mais il n'est pas nécessaire dans cette cause de considérer la question sous ce rapport ; ce legs serait nul quand bien même *Robitaille* ne fût revenu ou découvert qu'après la mort de *Russell*. Ce legs, je le répète, ne peut pas être un des droits civils résultants à *Julie Morin* de son mariage, un droit acquis par son mariage, puisqu'il ne s'ouvre et n'est un droit qu'après la dissolution de son mariage.

Les droits résultants du mariage sont créés par le mariage même, quoiqu'ils ne s'exercent qu'à sa dissolution. Celui-ci a-t-il été créé par le mariage, lors du mariage ? Indubitablement, non. Comment peut-on l'appeler un droit civil du mariage, s'il n'a pas été créé

(1) 1er Marcadé No. 703, par. 3.

lors du mariage, s'il n'a pas été co-existant avec le mariage, s'il n'a dépendu, durant le mariage, que de la volonté de *Russell* seul. Si *Russell* eût dit tout simplement : "Je lègue à ma veuve," *Julie Morin* eût-elle jamais pu se prétendre légataire en vertu de ces mots ? Voir *Morin* vs. *La Corp. des Pilotes* (1). Où s'il eût seulement dit : "Je lègue à ma femme" sans la nommer, *Julie Morin* eût-elle pu réclamer le legs ?

Je ne fais pas allusion au fait que le mariage putatif de *Russell* avec l'intimée n'a pas été déclaré nul par une cour de justice, parce que cette objection n'a pas été soulevée par l'intimée en cette cause. Elle n'aurait d'ailleurs pu l'être. Mr. le Juge *Casault* a démontré clairement, dans la cause de la présente intimée contre la Corporation des Pilotes ci-dessus citée, pourquoi elle ne peut invoquer un tel moyen, et ce qu'en dit le Juge *Casault* s'applique entièrement à la présente cause, où dès avant la mort de *Russell*, et ce à la poursuite de l'intimée elle-même, la preuve de la constatation judiciaire de l'existence de son mari a été aussi produite. D'ailleurs, c'est encore comme épouse de ce même *Robitaille* qu'elle est en cause et qu'elle se défend ici ; et elle-même, dans cette instance traite son mariage avec *Russell* comme nul, et n'ayant jamais existé.

L'intimée a soulevé devant nous l'objection que toutes les parties intéressées ne sont pas en cause. Cette objection vient trop tard. Comme le dit le juge *Loranger*, dans la cause de *Guyon* dit *LeMoine* contre *Lymais* (2) :

> Le défaut de mise en cause de quelque partie au litige ne peut pas être invoqué comme moyen tendant à faire rejeter une demande. La partie qui l'invoque ne peut que demander à l'autre partie de mettre en cause celle dont l'absence paraît préjudiciable à l'adjudication sur le litige.

Et cette objection doit être prise *in limine*. Après avoir lutté contre l'appelante seule pendant deux

(1) 8 Q. L. R. 222, (2) 2 Rév. Lég. 398.

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ans, devant deux cours, l'intimée a mauvaise grâce à vouloir aujourd'hui empêcher cette cour de juger le fond de la contestation entre elle et l'appelante, sur une objection technique de cette nature. Elle a bien voulu engager cette contestation avec l'appelante seule, elle ne peut maintenant se plaindre de l'absence des autres parties intéressées. Il est sans doute regrettable que, dans une affaire de cette nature surtout, on n'ait pas vu à faire une cause telle que tout litige ultérieur sur ce testament fut impossible. Il était, il me semble, du devoir de l'exécuteur testamentaire de ce faire, et de voir à ce que toutes les parties intéressées fussent en cause. Faute par lui de ce faire, l'intimée pouvait elle-même les y appeler. Enfin la cour de première instance aurait peut-être dû elle-même l'ordonner. Nous avons cependant à prendre la cause telle qu'elle nous est soumise, et telle qu'elle a été devant les deux cours inférieures. Les parties souffriraient une criante injustice si nous refusions maintenant d'adjuger sur le litige pour un tel motif. Dans la cause de *Richer* v. *Voyer* (1), le Conseil Privé disait sur une objection semblable prise devant lui :

> Their Lordships would be most reluctant to dismiss this suit for want of parties at this final stage, unless it was clearly demonstrated that they ought to do so.

Ici, il n'est pas absolument nécessaire que toutes les parties intéressées à cette succession soient présentes pour que nous décidions de la contestation que le demandeur, l'intervenante et la défenderesse *Morin*, ont bien voulu lier ensemble en l'absence des autres. Notre jugement ne pourra, il est vrai, affecter en loi ceux qui ne sont pas en cause ; mais il est à espérer, cependant, qu'il mettra virtuellement fin à toute contestation sur ce testament.

L'objection a été prise de la part de l'intimée que,

(1) 5 Rev. Lég. 600.

si le legs à *Julie Morin* est déclaré caduc, la révocation du testament du 8 octobre, fait par le testament du 27 novembre, n'en subsiste pas moins, et qu'alors l'intervenante appelante, *Elizabeth Russell*, n'a pas de *locus standi* dans cette cause, parce qu'elle ne repose, dans son intervention, ses droits à la succession de *Russell* que sur le testament du 8 octobre. Ceci est encore une objection que cette cour ne peut que voir que d'un mauvais œil à cet étage de la cause. Il serait bien malheureux qu'après une contestation si longue et si coûteuse, le litige entre les parties fût tout à recommencer par suite d'une objection de cette nature prise au dernier moment par *Julie Morin*. Dans la Cour du Banc de la Reine, on semble avoir cru, qu'en fait, c'était et à titre d'héritière et à titre de légataire, que l'intervenante demandait la nullité du testament du 27 novembre. Ceci a été nié devant nous par l'intimée, et, en référant à l'intervention et à la déclaration de l'appelante, il me paraît de fait incorrect. Ce n'est qu'à titre de légataire, par le testament du 8 octobre, que l'appelante est en cause. Si nécessaire, il faudrait donc lui donner le droit d'amender son intervention et sa déclaration contre *Julie Morin*, de manière à la mettre dans la cause comme héritière en loi de *Russell*. Ou bien encore, il serait possible pour elle de prétendre que l'erreur de *Russell* quant à *Julie Morin* rend le testament du 27 novembre nul en son entier, et que *Russell* n'a révoqué son testament du 27 novembre, que parce qu'il croyait que cette *Julie Morin* était son épouse légitime. Voir *Demolombe* (1). Cependant, comme j'en suis venu à la conclusion que ce testament du 27 novembre est aussi nul sur l'autre chef, c'est-à-dire pour cause d'insanité du testateur, je ne crois pas nécessaire de chercher à prévoir quelles seraient les conséquences dans l'hypothèse où il serait conclu que

(1) 5 Donat. p. 127.

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le legs à *Julie Morin* est nul, mais non les autres parties de ce testament du 27 novembre.

Une autre objection soulevée par l'intimée est que l'appelante dans son intervention, ses moyens d'intervention ou sa déclaration, n'a pas allégué l'erreur de *Russell* sur la qualité de l'intimée comme sa femme, et n'en a pas faite dans ces documents un de ses griefs contre le testament du 27 novembre 1878.

Cette objection ne peut prévaloir ici.

Devant la Cour Supérieure, (c'est l'intimée elle-même qui nous le dit,) l'appelante a invoqué ce moyen d'erreur.

At the trial, (dit l'intimée dans son factum devant la Cour d'Appel,) the intervening party urged in addition to the question of insanity the three following objections :

1st.....

2nd.....

3rd Assuming *Russell* believed *Julie Morin* to be his wife, which she knew she was not, the will is void for error.

Il appert aussi, par les notes du savant Juge en chef *Meredith*, que ce moyen de nullité contre le testament a été pris devant lui, et il prononce sur ce moyen. Devant la Cour du Banc de la Reine, le factum de l'appelante, page 107 du dossier ici, invoque aussi clairement ce moyen. Le factum de l'intimée, devant la même cour, répond à ce moyen, sans objecter qu'il n'est pas invoqué dans les documents écrits. La majorité des juges de la Cour du Banc de la Reine donnent aussi leur jugement sur ce moyen d'erreur. Il y a plus : ici même, devant cette cour, l'intimée, dans son factum, le traite comme un des points dans la cause, et le discute sans aucune objection à son admissibilité. Il n'y a qu'à l'audition finale que l'intimée a la mauvaise foi de soulever l'objection que ce moyen n'est pas invoqué par l'appelante dans son intervention et sa déclaration. Si cette objection eut été prise devant le juge en chef *Meredith*, l'appelante aurait certainement obtenu

la permission d'amender son intervention et sa déclaration de manière à couvrir ce point. Et en vertu du statut qui régit cette cour en pareille matière, nous devons ordonner maintenant un amendement dans ce sens, et traiter la cause comme si tel amendement était fait. L'intimée ne peut avoir ici une cause différente de celle qu'elle a eue devant les autres cours. Elle a obtenu un jugement sur ce chef d'erreur des deux cours provinciales, elle ne peut s'objecter à ce que cette cour aussi prononce sur ce chef. Ce serait encourager la mauvaise foi dans les procès que de permettre à une partie de surprendre son adversaire de cette manière. Il n'est pas question, je l'ai déjà remarqué, de la bonne foi ou de *Russell* ou de l'intimée sur leur mariage. Que *Russell* fut de bonne foi, c'est clair, qu'il fut dans l'erreur, est aussi clair.

Maintenant, si l'intimée eut été de mauvaise foi, si elle eût su que son premier mari était vivant, il n'y aurait plus lieu à contestation sur ce chef: elle n'aurait droit ni aux droits civils résultant de son mariage, ni à un testament qui alors aurait été obtenu par fraude. Mais je la traite comme si elle avait épousé *Russell*, croyant vraiment que son premier mari était mort; et, je dis que même, sur ces circonstances, le testament de *Russell* est nul, parce qu'il ne l'a fait que parce qu'il croyait que l'intimée était son épouse. Je traite ce testament comme s'il eut dit: "Je lègue à *Julie Morin*, parce qu'elle est mon épouse légitime, ou si elle est mon épouse légitime." Or, il appert que *Julie Morin* n'était pas son épouse légitime. Le fait qu'elle croyait l'être ne peut affecter le résultat de la cause. Je le répète, c'est parce que *Russell* était dans l'erreur, et ne lui aurait pas légué s'il n'eut été dans l'erreur que l'appelante doit réussir, et le fait que *Julie Morin* était aussi dans l'erreur n'affecte pas cette cause. Si d'un autre côté, *Russell* lui, n'eut pas été dans l'erreur, s'il eût su que

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*Robitaille* vivait, il n'y aurait non plus lieu à litige, il aurait bien eu droit de léguer à Madame *Robitaille* et de l'appeler sa femme, quoiqu'il sût qu'elle ne l'était pas, et personne ne pourrait s'en plaindre.

Je passe maintenant à la question de l'insanité du testateur, invoquée par l'appelante contre la validité du testament en litige.

A la page 641 du dossier, je remarque que l'un des savants juges de la Cour du Banc de la Reine dit sur cette question d'insanité :

> Again it is a question of appreciation of fact wholly in the discretion of the primary tribunal.

Et cite, à l'appui de cette proposition, deux arrêts de la cour de Cassation, où il a été décidé qu'en *France* un arrêt qui décide, en fait, qu'un testateur était, ou n'était pas, sain d'esprit lors de la confection de son testament, ne donne pas ouverture à cassation. Je crois que c'est une erreur de comparer dans cette cause la juridiction et les devoirs de la Cour du Banc de la Reine et ceux de cette cour à ceux de la Cour de Cassation, pour la simple raison, qu'en *France* la Cour de Cassation n'est pas une cour d'appel sur le fait, mais bien seulement sur le droit, tandis qu'ici, et à la Cour du Banc de la Reine et à cette cour, appel est donné, et sur le fait et sur le droit.

Sans doute, et c'est là, j'en suis certain, ce que le savant juge de la Cour du Banc de la Reine, dont j'ai cité les paroles, a voulu dire :

> Upon a question of fact, an appellate tribunal ought not to be called upon to decide which side preponderates on a mere balance of evidence. To procure a reversal, it must be shewn irresistibly that the judgment complained of, on a matter of fact, is not only wrong, but entirely erroneous (1).

Mais ce dictum, et autres du même genre, ne veulent

(1) *Gray* v. *Turnbull* L. R. 2 Sc. App. 54.

pas dire que, sur une question de fait, une cour d'appel, devra toujours suivre l'opinion du tribunal de première instance. La loi eût été absurde, si tout en donnant droit d'appeler du jugement du tribunal de première instance sur une question de fait, elle eut dit ou supposé que la Cour d'Appel, sur toute question de fait, s'en rapportera à la décision du juge *a quo*. Aussi, le Conseil Privé disait dans une cause de *Canepa* v. *Larios* (1):

The judicial committee is not bound by the decision of the court below upon a question of evidence, although in general it will follow it.

Et dans "The *Glannibanta* (2)," la Cour d'Appel disait :

That the parties were entitled to have the decision of the Court of Appeal, on questions of fact as well as on questions of law, and that the court could not excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions. Though it should always bear in mind that it has not heard nor seen the witnesses, for which due allowance should be made. The court added that, as a rule, a court of appeal will be disinclined to interfere, when the judge hearing the witnesses has come to his decision upon the credibility of witnesses as evinced by their demeanor, but otherwise, in cases where it depends upon the drawing of inferences from the facts in evidence.

Et dans *Bigsby* v. *Dickinson* (3), la cour décide que :

Although the Court of Appeal, when called on to review the conclusion of a judge of first instance after hearing witnesses *vivâ voce*, will give great weight to the consideration that the demeanor and manner of the witnesses are material elements in judging of the credibility of the witnesses, yet, it will in a proper case act upon its own view of conflicting evidence.

Dans cette dernière cause *James*, L. J., disait :

Of course, if we are to accept as final the decision of the court of first instance in every case where there is a conflict of evidence, our labours would be very much lightened, but then that would be doing away with the right of appeal in all cases of nuisance for there never is one brought into court in which there is not contradictory evidence.

(1) 2 Knap. 276. (2) 1 P. and Ad. Div. 283.
(3) 4 Ch. Div. 24.

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Et *Bramwell*, L. J., ajoutait :

The legislature has contemplated and made provision for our reversing a judgment of a Vice-Chancellor where the burden of proof has been held by him not to have been sustained by the plaintiff, and where he has had the living witnesses and we have not. If we were to be deterred by such considerations as those which have been presented to us, from reversing a decision from which we dissent, it would have been better to say at once that, in such cases, there shall be no appeal.

Et dans *Jones* vs. *Hough* (1), *Bramwell* et *Cotton* L. JJ. disaient :

First, I desire to say a word as to our jurisdiction. If, upon the materials before the learned judge, he has, in giving judgment, come to an erroneous conclusion upon certain questions of fact, and we see that the conclusions are erroneous, we must come to a different conclusion, and act upon the conclusion that we come to and not accept his finding.

I have not the slightest doubt such is our power and duty. A great difference exists between a finding by the judge and a finding by the jury. Where the jury find the facts, the court cannot be substituted for them, because the parties have agreed that the facts shall be decided by a jury; but where the judge finds the facts, there the Court of Appeal has the same jurisdiction that he has, and can find the facts which ever way they like. I have no doubt, therefore, that it is our jurisdiction, our power and our duty: and if, upon these materials, judgment ought to be given in any particular way different from that in which *Lindley*, J., has given it, we ought to give that judgment.

Dans la présente cause, aucun des témoins de l'appelante n'a été entendu devant le savant juge qui a rendu le jugement en cour de première instance, et il lui a fallu former son opinion, comme nous avons à le faire, sur la simple lecture des dépositions de ces témoins. Sous ces circonstances surtout, cette cour siégeant ici en appel de ce jugement, serait, il me semble, oublieuse de ses devoirs, si elle négligeait de former son opinion sur les faits de la cause d'après la preuve qui se trouve au dossier. Car, il ne s'agit pas ici de la crédibilité ou non crédibilité des témoins,

(1) 6 Ex. Div. 122.

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mais seulement d'une inférence de fait des faits prouvés, c'est-à-dire que, sur cette issue, la question à résoudre est : Faut-il inférer des faits prouvés le fait que *Russell* n'était pas *compos mentis* lorsqu'il a fait le testament attaqué. Nous ne devons pas manquer de prendre en considération, sans doute, que, sur cette question, l'intimée a, en sa faveur, l'opinion du savant Juge en Chef de la Cour Supérieure et de quatre des savants Juges de la Cour du Banc de la Reine. Nous ne pouvons oublier, non plus, qu'il ne suffit pas à l'appelante de créer des doutes dans notre esprit, mais qu'il lui faut nous convaincre qu'il y a erreur dans le jugement dont elle se plaint. Mais il n'est pas moins certain, que si, d'après nos propres lumières, et d'après l'examen de la preuve produite, nous en venons à la conclusion qu'il y a erreur, l'appelante a droit à un jugement en sa faveur de notre part. Le fait que deux tribunaux ont déjà décidé contre elle ne peut nous exempter de la responsabilité de décider d'après notre propre jugement. La loi nous en impose le devoir, en décrétant que, sur une question de fait, il y aura appel à la Cour Suprême des jugements de ces deux tribunaux, même lorsque tous deux ils en seront venus à la même conclusion. Elle nous ordonne de rendre ici, sur cette question de fait, le jugement que, dans notre opinion, formée d'après la preuve produite par les parties, la Cour du Banc de la Reine aurait dû rendre, quand bien même l'on trouverait dans la cause contre l'appelante le jugement du juge de première instance.

Sur cette question de l'insanité du testateur, lors de la confection du testament en litige, je me contenterai d'adopter en son entier le raisonnement du savant Juge en Chef de la Cour du Banc de la Reine L'exposé des faits de la cause, tels qu'ils ressortent de la preuve, et des principes de droit qui régissent la matière, est

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donné si complètement par le savant Juge que ce que je pourrais en dire ne serait qu'une répétition oiseuse. Je n'ai donc que quelques remarques à faire sur cette partie de la cause.

Le savant Juge en Chef *Meredith* dit en terminant son jugement :

> Before closing these remarks I desire to advert to the statement sworn to by the Plaintiffs, that he and Madame *Robitaille* were anxious that Mr. *Russell* should make some provision for his niece. And now that the charge that Madame *Robitaille* caused the will to be made by fraudulent practices and suggestions has been declared unfounded, I allow myself to hope that they may, if permitted, give effect to the very reasonable wish so expressed. If not, and if Madame *Robitaille* should attempt to retain that part of the estate which represents the industry and good management of Miss *Russell* during the best part of her life, the case will, I presume, be taken before a higher tribunal, and there the adversaries of Madame *Robitaille* will be able to say that they formed a truer estimate of her character than I have done.

L'intimée, en faveur de qui le savant juge a rendu son jugement quoique avec tant de regret et d'hésitation, ne peut plus invoquer ce jugement pour se donner un caractère de droiture et d'honnêteté, et sur l'autorité du savant juge, " Her adversaries are able to say that they formed a truer estimate of her character than he, the learned Judge, did."

L'intimée a voulu soutenir devant nous, pour affaiblir le témoignage d'*Ellen Russell*, que quand ce témoin jure que *Russell* et l'intimée ont vécu en concubinage avant son mariage putatif elle a juré ce qui est faux et n'est pas corroboré. Pour ma part je crois que ce que le témoin a dit là-dessus est parfaitement vrai. Il est de principe que si quelqu'un, intéressé à contredire un fait prouvé dans la cause par son adversaire, néglige d'amener un témoin qui a nécessairement une connaissance personnelle de ce fait s'il existe, il admet que ce témoin prouvera aussi ce fait, tel que son adversaire l'a prouvé, surtout quand ce témoin est son ami ou lui est

favorablement disposé. Ici le demandeur sur l'issue entre lui et l'appelante pouvait amener *Julie Morin* comme témoin, et l'examiner sur le fait juré par *Ellen Russell*. Si *Julie Morin* eût pu jurer qu'elle n'avait pas vecu en concubinage avec *Russell*, *Lefrançois* l'aurait entendue comme témoin. C'est parce qu'elle se sentait coupable qu'elle n'a pas été amenée. L'intimée a voulu aussi diminuer la force du témoignage d'*Ellen Russell* en essayant à démontrer qu'elle était contredite sur plusieurs points par Mr. *Sexton*. A la simple lecture du témoignage de M. *Sexton* l'on voit que ce témoin a si peu de mémoire, tout respectable que soit son caractère, que son témoignage ne peut être d'aucun poids dans la cause. Il suffit de remarquer qu'il ne se rappelle pas à qui il a donné le certificat qui se trouve annexé au testament du 27 Novembre, et qu'il jure, à un endroit, qu'il était au confessional dans la sacristie quand on l'a appelé pour lui demander ce certificat, et qu'en un autre endroit, il jure qu'il était en haut, c'est-à-dire, chez lui, dans le presbytère, puisqu'il dit :

Some person came and asked for me and I came down stairs.

Puis, la raison qu'il donne pour jurer que ce n'est pas à l'intimée à qui il a donné ce certificat peut bien être appelée pour le moins extraordinaire.

*Question.*—Is it not a fact that Mrs. *Robitaille* called for that certificate at the church, and informed you that it was for the purpose of being handed to the Notary who was going to draw up the will in her favor?

*Answer.*—No. I do not remember that at all.

*Question.*—Will you swear that that did not occur?

*Answer.*—I will form the conclusion that I do not know what effect it would have if she had mentioned it?

*Question.*—That is your only reason?

*Answer.*—Yes.

Dans tout son témoignage, ce témoin ne peut que répondre " Je ne me rappelle pas."

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Tant qu'au témoin *St. Michel*, l'on comprend quel intérêt il a, pour sa propre réputation, à ce que *Russell* ne soit pas dit avoir été fou avant décembre 1878. Cet intérêt perce dans tout son témoignage, et le frappe d'incrédibilité.

Il me paraît impossible de mettre de côte le témoignage du Dr. *Russell*, le Juge en Chef *Dorion* me semble l'avoir démontré clairement, et ce témoignage, étant admis, la cause est claire et l'insanité de *Russell*, et avant et après et le jour même de la confection de ce testament, est entièrement établie.

C'était d'ailleurs clairement aux intimés à prouver que *Russell* était *compos mentis* le jour en question. Qu'il ait été fou auparavant, qu'il ait été fou peu de temps après, ne laisse pas de doute. Or, sous ces circonstances, il doit être présumé avoir été fou ce jour-là jusqu'à preuve du contraire. La règle en pareil cas, en *Angleterre* comme pour nous, est que :

If it be shown that the testator was insane at any time prior to the date of the will, or within a few days after that date, the burthen of establishing his capacity to have made the will in question will be shifted on the propounding party (1).

Telle est aussi la règle du droit français : "Toutefois si le demandeur prouvait que soit avant, et surtout *peu de temps avant* la disposition, *soit après, et surtout peu de temps après*, le disposant n'était pas sain d'esprit ; notre avis est que l'espace intermédiaire s'y trouverait compris ; car enfin, on ne doit pas non plus exiger l'impossible, et la vérité est qu'il serait souvent impossible au demandeur de prouver l'insanité d'esprit du disposant au moment précis et rigoureux, où il a fait la disposition."

Et dans ce cas c'est au défendeur qui soutient la validité de la disposition qu'il incombe de prouver qu'elle a été faite par le disposant dans un intervalle lucide. *Demolombe* (2), et autorités y citées. Non-seule-

(1) Taylor on Evidence, vol. 1, sec. 342 and cases there cited.

(2) 1 Donat p. 388, 389.

ment les intimés n'ont pas, tel que le démontre le Juge en Chef *Dorion*, prouvé que *Russell* fut *compos mentis* le jour de la confection du testament en question, mais l'appelante a établi positivement qu'il était *n n compos mentis* ce jour-là.

Il est à remarquer que *Julie Morin* elle-même, dans sa requête pour faire interdire *Russell*, en janvier 1879, allègue que les faits qui indiquent l'insanité chez *Russell* sont que :

That he walks into the street half dressed and desires to be sent to jail, that he continually speaks of his money losses, his fear of poverty and starvation, and fear of eternal damnation; he threatens to destroy every thing in the house, and is continually giving away his wearing apparel and other effects.

Or, ce sont là précisément les symptômes qui d'après la preuve existaient en grande partie chez *Russell* dès avant le 27 novembre précédent l'interdiction. Il semble d'ailleurs qu'un homme qui se promène dans les rues avec un certificat dans ses poches qu'il n'est pas fou, ou qui a recours à un tel certificat pour faire ses transactions, tel que *Russell* a fait le 27 novembre même, est un fou. Je n'ai rencontré que dans une visite à un asile d'aliénés, quelqu'un qui m'ait offert un tel certificat. C'était à *Brattleboro*, d'un interne qui me suppliait de le faire mettre en liberté, et appuyant sa supplique d'une douzaine de certificats qu'il n'était pas fou.

Comme le juge *Dorion* le remarque, un fou peut bien faire un acte de sagesse, et peut bien dissimuler son insanité. Le fait que les notaires ne se sont pas aperçus que *Russell* était fou lors de la confection du testament en question n'a pas l'importance que l'intimée voudrait nous y faire voir.

"Les notaires n'ont pas reçu de la loi l'attribution, le pouvoir, de constater la sanité d'esprit du disposant (1). "Suffit-il donc, pour être sage," disait d'*Aguesseau*

(1) Demolombe Don. No. 355.

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"d'avoir fait un acte de sagesse." L'intimée irait jusqu'à dire que parce qu'un homme met son chapeau pour sortir dans la rue, il n'est pas fou.

Quand au testament du 27 novembre, comme le Juge en Chef *Dorion*, et le Juge en Chef *Meredith*, lui-même l'ont démontré, loin d'être un acte de sagesse, c'est un acte d'inique cruauté envers *Ellen Russell*; c'est un acte si contraire aux intentions si souvent exprimées de *Russell* qu'on ne peut l'expliquer que comme il l'a expliqué lui-même au témoin *Brown*, quand il dit: "I could not help it, because I was frightened she was going to poison me." "Ceci n'est pas vrai," dit l'intimée, "et il n'est nullement prouvé que j'ai jamais fait aucune menace à *Russell* pour en obtenir ce testament." Sans doute il n'y a rien de tel prouvé, mais le fait que *Russell* le croyait, le fait que ce pauvre homme avait dans l'esprit que sa femme voulait l'empoisonner, quand absolument rien n'était intervenu pour lui mettre une telle chose dans l'idée, ne démontre-t-il pas qu'il était fou halluciné, "*non compos mentis*." Et ce témoin *Brown*, un pilote comme *Russell*, un de ses amis, un homme qui le connaissait parfaitement bien, est un des témoins les plus respectables entendus dans la cause, un témoin désintéressé, qui lui n'a pas, comme *St. Michel*, profité de la faiblesse d'esprit de *Russell* pour s'enrichir. Tout ce que ce témoin jure je le crois entièrement. J'en dis autant du docteur *Russell*. Leurs témoignages sont intelligents, éclairés, désintéressés, vraisemblables, et d'ailleurs parfaitement corroborés. Une autre remarque, *Brown* jure que *Russell* a appelé l'intimée: "a damned prostitute," et ceci le 27 novembre même. *Russell* était alors sobre et ne buvait pas depuis longtemps. L'intimée peut-elle nier que pas autre chose que l'hallucination et la folie ont pu faire dire une telle chose à *Russell*?

Il me paraît futile d'essayer à faire croire que c'est

parce que la conduite d'*Ellen Russell* avec *Gilchen* lui avait déplu qu'il l'a déshéritée, puisque longtemps après les faits qui auraient pu lui déplaire, savoir le 8 octobre 1878, il a testé en sa faveur. Ceci démontre qu'il lui avait bien pardonné ce qu'elle pouvait avoir fait pour lui déplaire.

Les témoignages des *Lefrançois* ne peuvent peser dans la balance. Ils se sont ligués contre l'appelante en faveur de cette *Julie Morin*. Le père n'a de fait pris la présente action que pour *Julie Morin* et dans son intérêt. L'intimée a cité l'article 335 du Code Civil et prétend que ce testament ne peut être annulé parce que l'insanité de *Russell* n'existait pas notoirement lorsqu'il a fait ce testament. Ceci est une erreur. Cet article ne s'applique pas au testament (1). Il n'y a aucun doute là-dessus.

En conséquence je suis d'avis, avec la majorité de cette cour d'infirmer le jugement dont est appel. L'action de *Lefrançois* sera déboutée, et celle d'*Elizabeth Russell* contre *Julie Morin* maintenue. Quant aux frais, *Julie Morin* devra être condamnée à payer à *Elizabeth Russell*, ceux faits sur les issues entre elles : comme de raison, ceux de *Julie Morin* elle-même restent à sa charge. Quant à ceux d'*Elizabeth Russell* contre *Lefrançois*, ce dernier n'y peut être condamné qu'en sa qualité d'exécuteur testamentaire, et comme il serait inutile de prononcer une telle condamnation en cette qualité, puisqu'il n'a pas et n'aura pas les biens de la succession *Russell* entre ses mains, c'est contre *Austin*, *ès qual.*, que la condamnation à ces frais doit avoir lieu en faveur d'*Elizabeth Russell*. Ceux faits par *Lefrançois* lui-même, et de son côté, devront aussi être pris sur la succession, et nous avons cru devoir aussi entrer une condamnation contre *Austin*, *ès qual.* pour iceux : il sera par là condamné à les payer à *Lefrançois* ou à ses

(1) Grenier Donations, p. 289; Demolombe 1 Donat. Nos. 355-356,

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procureurs. Les frais d'appel, et dans la Cour du Banc de la Reine et ici, doivent être considérés comme faits moitié par *Julie Morin* et moitié par *Lefrançois*, et aussi comme faits par *Elizabeth Russell*, moitié contre *Julie Morin*, et moitié contre *Lefrançois*.

Nous avons accordé la distraction des frais demandée en Cour Supérieure suivant *Morency* et *Fournier* (1).

GWYNNE, J. :—

To the judgment of my brother *Taschereau*, which I have had the opportunity of carefully considering, and in which I entirely concur, and to the admirable analysis of the evidence, and to the application of the law to that evidence, appearing in the very able and exhaustive judgment of the learned Chief Justice, Sir *A. A. Dorion*, I find it to be impossible for me to add anything. I desire, however, in connection with some observations appearing in the judgment of one of the learned judges of the Court of Queen's Bench in appeal, to say: that in my judgment this is a case in which there can be no doubt that it is not only competent for us, but that it is a duty imposed upon us to form and express our own independent judgment upon the questions of fact involved and upon the evidence given in relation to those facts; and if that evidence leads our minds to a different conclusion from that arrived at by the learned Chief Justice of the Superior Court, it is our duty to give full expression to our opinion. This is not a case which, in the judgment of the learned Chief Justice of the Superior Court, who rendered the original judgment in the case, turned upon the credibility of any of the witnesses; indeed all of the witnesses were not examined before him. The case before him turned, and still turns, upon a question as to the proper inference to be drawn from all the evidence, as to the mental

(1) 7 Q. L. R. 9.

capacity of the testator to make the will of the 27th March, 1878, which is impeached. In such a case, to hold that we should be concluded by the judgment of the learned Chief Justice of the court of first instance, or by the judgment of the Court of Queen's Bench in appeal, affirming his judgment, would be in effect to declare that in such a case there is no appeal.

So to hold would have relieved us from much labor and anxiety in this case, but would deprive the parties of a right which the law confers upon them. The fact, that a majority of the learned judges constituting the Court of Appeal, in the province of *Quebec* has affirmed the judgment of the learned Chief Justice of the Superior Court, only enhances the gravity of the duty imposed upon us to take care not lightly to reverse those judgments, nor without a thorough conviction in our own minds that they are erroneous.

Fully sensible of the great gravity of the duty thus imposed upon me, I am bound to say that the evidence which has been so exhaustively analysed by the learned Chief Justice of the Court of Queen's Bench in Appeal, has convinced my mind that, at the time of the execution by the testator of the will of the 27th November, 1878, he had not that sound and disposing mind and understanding which are necessary to make a good will and valid in law; indeed, I am convinced that his mental incapacity dates back to a period anterior to the transaction between the testator and *St. Michel* of the 2nd October previous, but as there is no issue before us, in this case, as to the validity of the wills of October, 1878, and as judgment against the validity of the will of November cannot set up, as valid, any previous will, it will be only necessary for us to treat here of the will of the 27th November, but in so doing we cannot lay out of our consideration evidence of the acts and conduct of the testator evincing the state of his

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mind in the month of October. If the testimony of Dr. *Russell*, the only medical man who has been examined upon the subject—for his father only speaks of a much later period—be at all reliable, there seems to me to be no doubt of the testator's incompetency at the time of the execution by him of the impeached will. The learned Chief Justice *Meredith*, in the judgment delivered by him, does not treat the certificate given by Dr. *Russell*, on 11th November, for the purpose of giving effect to the *St. Michel* transaction, as detracting from Dr. *Russell's* credibility upon the ground of its being inconsistent with his oral evidence as to the testator's mental incapacity to make the impeached will; he rather, as it seems to me, accepts the doctor's explanation of the circumstances attending his giving that certificate and the object of giving it, and proceeds to refer to various business matters transacted by the testator during the month of November and to the impressions as to his capacity formed in the minds of divers persons during that month, and especially in the minds of the notaries who drew and attested the execution of the impeached will for the purpose, as it seems to me, of justifying the conclusion which the learned Chief Justice arrived at, that at the time of the execution of that will upon the 27th November, the testator had a sufficiently sound and disposing mind.

The learned Chief Justice, after referring to the certificate and to the Doctor's explanation of the circumstances under which it was given, says:

> But whatever may have been Dr. *Russell's* intention in giving that certificate, it may be presumed that it would not have been asked for, had not grave doubts been entertained as to *Russell's* sanity in some quarters, at the time; and the same remarks apply to the certificate obtained from the Rev. Mr. *Sexton* upon the 26th November, the day before the making of the will in question.

The learned Chief Justice then proceeds to draw attention to the other matters which led his mind to

the conclusion, that on the 27th November, the testator was of a sound and disposing mind, but he admits that, notwithstanding this being his opinion, the case is still not free from difficulty. Some of the Judges constituting the majority of the Court of Queen's Bench in Appeal, seem to have wholly set aside Dr. *Russell's* oral evidence, treating it as so contradicted by his certificate as to be wholly unworthy of belief. Mr. Justice *Ramsay*, upon this head, says:

> Dr. *Russell's* intentions may have been excellent, but I must necessarily set his testimony upon a matter of opinion, so contradicted, entirely aside.

From this remark of that learned Judge I conclude that he entertained the opinion, which I confess I entertain myself, that unless the testimony of Dr. *Russell* be wholly set aside and eliminated from the case, it is difficult, if not impossible, to maintain the validity of the will.

Before wholly eliminating from the case the only medical evidence given upon a subject, which is peculiarly within the range of the studies of the medical profession, we should be well satisfied of the necessity of shutting our eyes to evidence coming from a quarter from which we should naturally expect most light; while we must admit that as a point of casuistry the doctrine that the end justifies the means is unsound, and while viewing the question in that light, as a matter of conscience, it may appear to us, that it would have been better if the doctor had not given this certificate, even though his withholding it might, under the circumstances, have hopelessly embarrassed the case beyond all possibility of being rectified, and might have so affected the weak mind of his patient as to have aggravated his disease and have precipitated his death, still before we wholly reject the oral testimony of the doctor, as so incredibly inconsistent with the

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certificate, and so contradicted by it, as to make him unworthy of belief, we should put ourselves in his place, and, judging the matter from his point of view, enquire whether the rejection of all the doctor's evidence as to the testator's mental incapacity is in reality the reasonable and logical sequence of his having given the certificate.

Upon the threshold of this enquiry, we find the doctor's reason, for interfering at all in the *St. Michel* transaction was his confirmed belief in the mental incapacity of his patient, and in the fact that such incapacity had been taken advantage of by *St. Michel*. The doctor gives his reasons for his belief in the then mental incapacity of his patient *Russell*, and these reasons are confirmed by very many other persons intimate acquaintances of *Russell*, of whom St. *Michel* himself is one.

Thoroughly convinced in his own mind that advantage had been taken of his patient's mental incapacity, the doctor spoke freely upon the subject among *Russell's* friends and acquaintances, saying:

*St. Michel* has taken *Russell's* house from him and *Russell* is out of his mind, it is not a legal transaction.

The rumor of the transaction, and of the doctor's observation upon it, having got abroad, brought *St. Michel* to him, and to an enquiry by *St. Michel* whether he considered *Russell* to be in a fit state to transact business, the doctor replied: "No, that house is not yours."

Thereupon *St. Michel* said that he had paid upwards of $1,000.00 on the building of the house, that it was worth about $1,100.00, and he added,

If you will give me a certificate to allow this transaction to be completed, I will give *Russell* the balance $400.00.

In reply to this proposition the doctor assented to give the certificate, upon condition that Mr. *Austin*,

*Russell's* own notary, should be employed, because the doctor knew that *Russell's* interest would be safe in his hands. He felt, no doubt, that *Austin* would not assent to the transaction being confirmed, unless the amount to be paid by *St. Michel* should be the fair value of the property. The doctor accordingly went to *Russell* and told him of *St. Michel's* offer, and that he would give $400.00 to *Russell*, if he, the doctor, would give the required certificate. *Russell*, as the doctor says, was very anxious to get the $400, and that the doctor should give the certificate, and he seemed then clearly enough to understand the particular matter so explained to him, by his medical adviser, although for the transaction of business generally, the doctor says, he was not at all sane, and could be easily led in any direction.

The papers to give effect to the *St. Michel* transaction having been prepared by M. *Austin*, and the $400 paid by *St. Michel*, the doctor, for the sole purpose of enabling that particular transaction to be perfected, gave the certificate. I confess that it appears to me rather singular that a man, so perfectly sane, as to be fit to transact any business, should be exceedingly anxious to get the doctor's certificate of his being sane, in order to get a particular transaction completed, which transaction consisted in the enforced rectification in the interest of *Russell*, brought about by the doctor, of a contract of sale, a few days previously entered into by *Russell*, whose mental capacity was not then sufficient to enable him to look after and protect his own interests. Now, from this evidence, which we must look at for the purpose of seeing under what circumstances the certificate was given, it is apparent to my mind, that notwithstanding what is contained in it, the doctor was well satisfied that his patient's mind was very seriously diseased, and that he was quite incompetent for the management

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of his affairs generally, and that he gave the certificate for the special purpose of enabling a transaction to be consummated so as to secure to *Russell* the full value of the property in question, and which could not have been consummated without the certificate, and which, if not consummated, would have been attended with very great pecuniary loss to *St. Michel*, and might have involved *Russell* in a litigation which in his then state of health, might have been disastrous.

These then being the circumstances attending the giving the certificate, although in the minds of casuists, and when examined into, *in foro conscientiæ*, the doctor's conduct may be open to censure, I find it impossible to hold, as a legal proposition, that a certificate asked for because of a pretty generally prevailing belief in *Russell's* mental incapacity, and because of his doctor's remonstrances, that such his mental incapacity had been taken advantage of by *St. Michel*, and given to prevent *St. Michel* incurring the risk of losing the $1,000 already paid by him to the builder, or some portion thereof, and the costs of a possibly protracted litigation, and given, too, upon the express promise and condition that he should pay to *Russell*, the further sum of $400, which, with the $1,000 was considered the fair value of the property, should be taken as conclusive evidence of the then perfect mental capacity of the person whose alleged mental incapacity and the wrongful advantage taken of such incapacity constituted the moving causes for giving the certificate, and that we should therefore reject all the evidence given by the medical man who gave that certificate having a tendency to establish the mental incapacity of *Russell* to make the will which is impeached, made a fortnight subsequently to the day upon which the certificate was given.

The doctor in his evidence proceeds to say, that immediately after the day on which the certificate was

given *Russell* got worse daily, and that on the 27th November he was quite incompetent to make a will, that he continued growing worse, until early in January following he was interdicted and confined in an asylum as insane, the evidence of the doctor himself, that the symptoms of his insanity dated back three months, having been used by *Julie Morin* (the party maintaining the will of the 27th November) for the purpose of procuring the interdiction.

It is not, however, upon the evidence of the doctor alone, that my judgment is based. The evidence given by him, confirmed by numerous witnesses, relates to acts and conduct of the testator, betraying unmistakable symptoms of an enfeebled mind, such acts and conduct being identical with those which, in works treating of general paralysis of the insane, are declared to be invariable and unmistakable symptoms of the presence of a mental disease which in comparatively modern times has been termed and known as paresis, a disease which in its early stages may easily escape the observation of non-professional men, and even of professional men, who have not had much experience of it, and which, although for short periods, and for isolated matters, the patient suffering under it may be able to apply some trifling degree of mental faculty, nevertheless, so enfeebles the mind as to deprive it of that comprehensive grasp of subjects, that power of concentration and of continuous thought, the power of comparing, compounding and uniting the several parts of any subject under consideration, in short of that integrity of the mental faculties which is essentially necessary for the conduct of the general business of life, and more especially for the sane execution of that last great act of life, the disposition of property by will.

The evidence in the case does not appear to have been given with the view of determining, with scien-

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tific accuracy, what is the particular medical term for the mental disease under which *Russell* was suffering —its symptoms singularly correspond with those laid down as unerring symptoms of paresis, but whatever may be the appropriate scientific name of the disease, the evidence leaves no doubt upon my mind, that from at least the period of the *St. Michel* transaction, the mental capacity of *Russell* was so enfeebled as to render him quite incapable of managing his affairs, as a sane man, and of making the will which is impeached. The evidence relating to matters transacted by *Russell*, during the month of November, has no effect upon my mind, some of those transactions are quite consistent with the existence of that feeble condition of mind to which the doctor and other witnesses bear testimony, while as to the moneys relied upon as received by him during the month, we know nothing of their disposition.

I am more impressed with the significance attaching to the giving to *Russell* of Mr. *Sexton's* certificate by the person who obtained it from him. That it was obtained for the purpose of being delivered to *Russell* to be used in the precise manner in which it was used, we can, I think, have little doubt, and such use of it appears to me rather to indicate the act of a person under an influence which his feeble mind feared to thwart or resist, than of a person in the full possession and enjoyment of his mental faculties unimpaired.

*Appeal allowed with costs out of Estate.*

Solicitors for appellant: *W. & A. H. Cook.*

Solicitors for respondents: *Andrews, Caron, Andrews & Fitzpatrick.*

HENRY J. SHAW .....APPELLANT; 1882

*Nov. 23,24.

AND 1883

JEAN BAPTISTE ST. LOUIS, FILS.....RESPONDENT. *May. 1.

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

*Appeal—Judgment by Court of Appeal, partly final paatly Interlocutory—Effect of—Experts. reference to.*

*St. L.* claimed of *S.* $2,125.75, balance due on a building contract. *S.* denied the claim, and, by incidental demand, claimed $6,368 for damages resulting from defective work.

The Superior Court, on 27th March, 1877, gave judgment in favor of *St. L.* for the whole amount of his claim, and dismissing *S's.* incidental demand. This judgment was reversed by the Court of Review, on the 29th December, 1877. *St. L.* appealed to the Court of Queen's Bench, and on the 24th November, 1880, that court held that *St. L.* was entitled to the balance claimed by him, from which should be deducted the cost of rebuilding the defectively constructed work, and in order to ascertain such cost, the case was remitted to the Superior Court, by whom experts were appointed to ascertain the damage, and, on their report, the Superior Court, on the 18th June, 1881, held that it was bound by the judgment of the Court of Queen's Bench, and deducting the amount awarded by the experts from the balance claimed by *St. L.*, gave judgment for the difference. This judgment was affirmed by the Court of Queen's Bench, on the 19th January, 1882.

*Held*,—On appeal that the judgment of the Court of Queen's Bench of the 24th November, 1880, was a final judgment on the merits and that the Superior Court when the case was remitted to it rightly held that it was bound by that judgment, and that *St. L.* was entitled to the balance thereby found due to him.

*Per Fournier*, J.—1. That the judgment of the 24th november, 1880, though interlocutory in that part of it which directed the refe-

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

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rence to experts, was final on the other points in litigation, and could therefore have properly been appealed from as a final judgment.

2. That although on an appeal from a final judgment an appellant may have the right to impugn an interlocutory judgment rendered in the cause, yet he loses this right if he voluntarily and without reserve acts upon such interlocutory judgment.

APPEAL from a judgment of the Court of Queen's Bench for *Lower Canada* (appeal side), rendered at *Montreal*, on the 19th of January, 1882, which confirmed partially and varied the judgment of the Superior Court of 18th June, 1881, rendered in favor of the present respondent, for $1,515.75, with interest from the 21st July, 1873, and dismissed the incidental demand of said appellant, with all the costs.

The facts and pleadings sufficiently appear in the judgments hereinafter given.

Mr. *Kerr*, Q.C., for appellant, Mr. *Doutre*, Q.C., for respondent.

FOURNIER, J.:—

L'intimé en cette cause, demandeur en cour inférieure, poursuivait l'appelant pour la somme de $2,125 75, balance du prix de certains ouvrages de construction de bâtisses faits en vertu d'un contrat. L'appelant plaida non-seulement qu'il ne devait rien, mais qu'au contraire, l'intimé lui devait la somme de $6,368.00, dommages lui résultant de ce que les ouvrages entrepris par l'intimé avaient été mal faits. Il se portait demandeur incident pour cette somme. Par un premier jugement rendu sur cette contestation par l'honorable juge *Caron*, l'action de l'intimé fut maintenue et la demande incidente renvoyée.

La cause fut ensuite portée en révision et le jugement de l'honorable juge *Caron* infirmé en entier. Sur appel le jugement de la cour de révision fut infirmé par celui de la cour du Banc de la Reine en date du 24 novembre

1880. Les considérants de ce jugement, après la citation du marché fait pour la construction des ouvrages qui ont donné lieu à la contestation, sont comme suit :—

And whereas in the construction of a portion of the said wall, to wit: the south-west gable wall, the work was insufficient and it became necessary to demolish and rebuild the same, and Considering, that by law, the said *Jean-Baptiste St. Louis*, fils, is liable for the insufficiency of the said wall;

And, Considering that the said *Jean-Baptiste St. Louis*, fils, is not responsible for the cost of the demolition and the re-building of the brick wall constructed on the top of that portion of the said wall, constructed by the said *Jean-Baptiste St. Louis*, fils, which has proved insufficient, or of any damage to spouts or roofing, inasmuch as the said brick wall was not properly built, and should not have been built without first ascertaining the state of said stone wall, and its sufficiency, to bear such brick wall.

And, Considering further that the said *Jean-Baptiste St. Louis*, fils, is not responsible for any loss of rent, inasmuch as the said *Henry J. Shaw*, in fact, did not suffer any damage, by loss of rent, owing to the acts of the said *Jean-Baptiste St. Louis*, fils.

And, Considering that there is no evidence, in the record, to establish the precise amount which the said *Henry J. Shaw* has been obliged to pay, for the removing and re-building of that portion of the said gable wall so built by the said *Jean-Baptiste St. Louis*, fils, and that the amount to be refunded by the said *Jean-Baptiste St. Louis*, fils, the said *Henry J. Shaw*, or to be deducted from the balance still due him, on his said contract, can only be properly established by expert;

And, Considering that there is error in the judgment rendered by the Judges of the Superior Court, sitting in Review at *Montreal* on the twenty-ninth day of December, eighteen hundred and seventy-seven.

Comme conséquence de ces considérants le jugement ordonne ensuite que par experts à être nommés en la manière indiquée, après avoir entendu les parties et leurs témoins, il sera fait à la cour Supérieure, à *Montréal*, rapport sur les faits suivants :—

What is the amount which the said *Henry J. Shaw* has expended to remove and replace that portion of the said wall built by the said *Jean-Baptiste St. Louis*, fils, with the costs of any repairs to the flooring and plastering and other repairs required by the rebuilding

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of that portion of the said wall but no portion of the superstructure, the said Experts taking into consideration the value of the materials, furnished by the said *Jean-Baptiste St. Louis*, fils, which were used in rebuilding that portion of the said gable wall, and basing their estimates on the proportionate cost, which that portion of the said wall bears to the sum paid by the said *Henry J. Shaw* to rebuild the whole gable wall, the said Experts to make their report to the said Superior Court, as may be ordered by the said Court, or a Judge thereof, in order that further proceedings may be had thereon as to law and justice may appertain.

En exécution de ce jugement le dossier en cette cause fut remis à la cour de première instance, devant laquelle il fut procédé à la nomination d'experts conformément au dit jugement. Les experts nommés ayant entendu les parties et leurs témoins firent leur rapport à la cour Supérieure présidée par l'honorable juge *Taschereau* qui, par son jugement confirma le rapport des dits experts, estimant à $590.00 le montant des dommages que l'intimé doit payer à l'appelant. Déduction faite de cette somme sur le montant de la demande, l'honorable juge *Taschereau* se considérant lié par le jugement de la cour du Banc de la Reine ordonnant cette expertise, rendit en conséquence jugement pour la somme de $1,515.00. Ce dernier jugement ayant aussi été porté en appel, il fut confirmé par la cour du Banc de la Reine à l'unanimité, le 19 janvier 1882, sur le principe qu'il était conforme à l'interlocutoire (jug. du 24 nov. 1880) rendu par cette cour et devait par conséquent être confirmé.

C'est de ce jugement que le présent appel est interjeté à cette cour. L'intimé, tout en soutenant le bien jugé à soulevé deux objections contre l'existence du droit d'appel de ce jugement : la première, que le montant du jugement étant au-dessous de $2,000, il n'y a pas d'appel ; la deuxième, que le jugement du 19 janvier 1882, n'étant que l'exécution du jugement interlocutoire du 24 novembre 1880, dont il n'y a pas eu

d'appel dans les délais prescrits, ce jugement est passé en force de chose jugée et qu'il ne peut plus y avoir lieu à réviser les questions qu'il a finalement décidées, —ou en d'autres termes, sur l'appel du jugement du 19 janvier 1882, " l'appelant est-il encore à temps pour faire valoir ses moyens à l'encontre du jugement interlocutoire du 24 novembre 1880 ? "

La réponse à la première question est que le montant de la demande principale étant de $2,105.75, c'est ce montant qui doit régler le droit d'appel. Cette question de savoir lequel du montant de la demande ou de celui du jugement doit servir à déterminer la question du droit d'appel à cette cour ayant déjà été plusieurs fois décidée, il est inutile d'y revenir.

La seconde question est beaucoup plus sérieuse et offre plus de difficulté. Sa solution dépend en grande partie du caractère que l'on doit attribuer au jugement du 24 novembre 1880. Est-ce un jugement final ou un interlocutoire laissant ouvertes et sans préjugé les questions principales en contestation, ou bien encore est-ce un jugement tout à la fois final dans une partie et interlocutoire dans l'autre ?

Quoique notre code de procédure civile n'ait pas, en propres termes, adopté la classification des jugements suivie dans le code français, en jugements définitifs, préparatoires et interlocutoires, elle s'y trouve toutefois en substance. Sous ce rapport notre code en diffère peu.

L'art. 1115 C. P. C. dit qu'il y a appel à la cour du Banc de la Reine de tout jugement final rendu par la cour Supérieure.

D'après l'art. 1116 il y a également appel de tout jugement interlocutoire dans les cas suivants : 1°. Lorsqu'il décide en partie le litige ; 2°. Lorsqu'il ordonne qu'il soit fait une chose à laquelle il ne peut

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être remédié par le jugement final ; 3°. Lorsqu'il a l'effet de retarder inutilement l'instruction du procès.

L'art. 1119 après avoir prescrit le mode d'appeler d'un jugement interlocutoire, déclare que " cette demande doit être faite dans le terme qui suit immédiatement la prononciation du jugement et ne peut être reçu ensuite, sauf néanmoins à la partie de faire valoir ses moyens à l'encontre du jugement interlocutoire, sur appel ou pourvoi contre le jugement final.

Le jugement final est sans doute celui qui met fin au litige en réglant toutes les contestations soulevées entre les parties, *Carré* et *Chauveau* (1), le définit ainsi ;

> Le jugement définitif est celui qui statue sur toute la cause et la termine. Mais il y a aussi des jugements qui ne la décidant qu'en partie, sont tout à la fois définitifs et interlocutoires.

A laquelle de ces catégories appartient le jugement rendu le 24 novembre 1880 ?

Les questions en débat étaient la responsabilité de l'intimé comme constructeur et le montant des dommages que pouvait réclamer l'appelant en conséquence de la mauvaise qualité des ouvrages. L'une et l'autre ont été formellement décidées,—le jugement déclare l'intimé responsable pour l'insuffisance du mur (*south-west gable*) et ordonne que les frais de sa reconstruction seront estimés par experts. C'est le seul point sur lequel il restera à statuer après le rapport des experts, —tous les autres ont été décidés finalement. Ainsi il déclare que l'intimé n'est pas responsable pour la démolition et reconstruction du mur en brique qui avait été construit sur le mur de pierre érigé par lui,— ni pour aucun autre dommage soit à la couverture soit aux dalles. Il est aussi déclaré que l'appelant n'a pas droit à des dommages pour perte de loyer de sa bâtisse. Tous les points en litige sont décidés en fait et en droit,

(1) T. 1 p. 565 Not. 1er 4e.

un seul n'est décidé qu'en droit : celui qui reconnaît le droit de l'appelant d'obtenir une indemnité pour la reconstruction du mur de pierre.

La question de responsabilité sous ce rapport est décidée en droit,—mais ne l'est pas en fait, parce que la preuve n'était pas suffisante. C'est pour cette raison que le jugement est interlocutoire dans la partie ordonnant l'expertise.

Que devait faire l'appelant en présence d'un jugement qui rejetait toutes ses prétentions, moins une, sur laquelle il pouvait avoir gain de cause pour une faible partie de sa demande en faisant la preuve exigée ? En appeler à cette cour, car ce jugement a tout le caractère d'un jugement définitif. Pouvait-il espérer que la cour du Banc de la Reine reviendrait plus tard sur son jugement ? Certainement non. Il ne pouvait pas demander aux juges de cette cour de se déjuger, ils étaient *functi officio*. Ils n'avait plus juridiction sur les points finalement décidés par eux.

Le jugement du 24 novembre 1880 quoique ne terminant pas toute la contestation n'en devait pas moins être traité comme un jugement définitif d'après l'autorité de *Carré* et *Chauveau* (1) :

> Nous avons fait remarquer que certains jugements qui ne terminent par la contestation peuvent néanmoins être considérés comme définitifs, par rapport à leur objet et que tels étaient par exemple ceux qui prononcent séparément sur un incident, une exception, une nullité, une fin de non recevoir, etc. Dans ces circonstances, en effet, les contestations sur lesquelles le jugement prononce sont considérées comme formant autant de procès séparés qu'il termine.

Quoique notre code de procédure n'ait pas fait en propre terme la distinction admise par le Code de procédure français entre les jugements qui doivent être considérés simplement comme préparatoires et dont il ne

(1) T. 4 p. 66.

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peut y avoir appel avant le jugement définitif, et les jugements interlocutoires dans lesquels cet appel est facultatif, comme dans notre Code, cependant les cas dans lesquels l'appel est permis par notre art. 1116, seraient tous considérés dans le code français comme interlocutoires dont il peut y avoir appel.

Les autres jugements nécessaires à l'instruction de la procédure, doivent être considérés comme préparatoires seulement et traités comme tels. On peut donc dans ces circonstances faire application à notre procédure des principes du droit français concernant ces jugements. On verra par la définition donnée par l'auteur déjà cité (1) que le jugement du 24 novembre 1880, n'est pas seulement interlocutoire :

Le jugement interlocutoire est donc celui qui, sans juger positivement la question, laisse entrevoir l'opinion qu'en a conçue le juge, et d'après laquelle il la décidera plus tard, non pas *certainement*, mais *probablement*.

L'appel en est permis avant le jugement du fond parce qu'on peut vouloir éviter cette tendance qu'on redoute ; mais on est admis à retarder cet appel parce qu'on peut espérer que le préjugé sera abandonné avant d'avoir produit ses derniers résultats.

La difficulté se résume donc à distinguer le jugement qui juge, de celui qui ne fait que préjuger.

Réduite en ces termes, elle peut être décidée par des principes qui nous semblent positifs.

Qu'est-ce qui constitue la chose jugée dans une décision émanée des tribunaux. C'est le dispositif de leur jugement et pas autre chose. Mais aussi ce que contient ce dispositif ne doit jamais être considéré comme l'expression sans valeur d'une opinion que l'on puisse abandonner plus tard. Le dispositif est chose jugée sauf les moyens légaux de réformation.

.....

On voit donc qu'il n'y a pas de jugement qui soit purement interlocutoire ; car tout jugement a un dispositif, et le dispositif n'est pas un simple préjugé. C'est une chose définitivement jugée sur laquelle le juge ne peut plus revenir. Le caractère d'interlocutoire ne convient qu'à la partie du jugement qui offre un préjugé sur les questions non décidées.

(1) P. 71, iii.

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A la page 74 l'auteur conclut ainsi sa dissertation :

De tout ce que nous venons de dire sur la distinction des jugements interlocutoires et définitifs, il est facile de conclure que ceux qui prononcent sur un incident soit en rejetant une exception, soit en annulant un acte de procédure, ou dans toute autre circonstance, sont des jugements définitifs desquels on peut interjeter appel avant le jugement sur le fond.

Suit une longue énumération de jugements interlocutoires, qui doivent être considérés comme définitifs. En faisant au jugement du 24 novembre 1880, application des principes développés par *Carré* et *Chauveau*, il n'est pas douteux que le jugement doit être considéré comme définitif et que les juges qui l'ont rendu doivent se considérer comme liés par ce jugement.

Il y a, avons nous dit, (*Carré* et *Chauveau* (1),) dans tout jugement qui prend le titre d'interlocutoire, deux parties distinctes, le dispositif qui juge, qui par conséquent est définitif, qui épuise le pouvoir du juge en ce qu'il prescrit, sur lequel par conséquent, il ne peut pas revenir, auquel il se trouve inévitablement lié. Il y a outre cela, la partie qui préjuge ce qui n'est pas encore l'objet de la sentence, mais qui, ne faisant que le préjuger, n'a pas le caractère d'un jugement et laisse au juge le droit de revenir sur ce qui n'est que la manifestation anticipée d'une opinion.

Ainsi par quoi le juge est-il lié ? Par la partie définitive, par la partie qui porte jugement.

Par quoi n'est-il pas lié par la partie interlocutoire, par la partie qui ne contient qu'un simple préjugé ? * * * * *

*L'intercolutoire ne lie pas le juge.* Comment pourrait-il le lier, puisque ce n'est qu'un préjugé ? Le juge peut-il être lié autrement que par son jugement. Mais le dispositif de tout jugement, quel qu'il soit, lie le juge ; car il ne peut juger qu'une fois.

Voir aussi *Bioche*, Dict. de Procédure (1).

Le même auteur ajoute (1).

Le jugement peut être mixte ; cela arrive lorsqu'il contient des dispositions difinitives et des dispositions interlocutoires, par exemple si le tribunal decide qu'il y a société, mais ordonne qu'un compte sera probablement rendu. Le jugement est tout à la fois

(1) P. 81.

(1) Vo. Appel p. 352, No. 375.

(1) Vo. Jugement p. 58.

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définitif en ce qui touche l'existence de la société et interlocutoire quant à la reddition préalable du compte.

65. Le tribunal qui a rendu un jugement définitif ne peut en général, ni le changer, ni le corriger.

59. Est définitif 1° le jugement qui ordonne une expertise, pour l'appréciation d'un dommage éventuel. Cass. 21 janv. 1839, (art. 1562, Pr.)

60. 2° Celui qui prononce définitivement et explicitement des condamnations formelles en soumettant leur qualité éventuelle à une expertise. Rennes, 30 mai 1818; Metz 3 juillet 1818, pp. 14, 255, 904.

61. Peu importe que le jugement impose une condition à remplir par l'une des parties, (Turin, 9 avril 1811, p. 9, 248,) ou ne fixe pas le montant des condamnations, et qu'il préserve pour le faire des mesures préparatoires. Nimes, Niv. an 13, p. 4, 342. Ainsi le jugement qui ordonne une expertise pour déterminer le mode d'exercice d'un droit, et les dommages et intérêts résultant de sa privation est définitif, en ce sens qu'il ne reconnait l'existence du droit, et ne laisse en suspens que le mode de l'exercice. Cass. 12, Germ an 9, 16 avril 1883. Div. 1, 444; 387.

*Pigeau* (1):

Le jugement définitif est celui qui lie même les contestations (définitives qui termine) soit en adoptant les prétentions des parties, soit en les modifiant, soit en les rejetant.

Un jugement peut être définitif que sur un ou plusieurs chefs, et et non sur le surplus.

Un jugement peut contenir en même temps une disposition définitive et un avant faire droit.

Voir aussi *Boncenne*, Théorie de la Procédure Civile (2).

Le jugement du 24 novembre 1880 qualifié d'interlocutoire est donc un jugement définitif dont il aurait dû y avoir appel.

En le considérant même comme un de ces interlocutoires que l'on peut encore attaquer sur l'appel du jugement final, l'appelant peut-il dans les circonstances de cette cause être admis à faire valoir ses moyens contre ce jugement. Il est évident que l'art. 1119 accorde à celui qui n'a pas jugé à propos d'appeler d'un interlocutoire dans le terme qui a suivi immédiatement la prononciation du jugement, la faculté d'atta-

(1) P. 580. (2) 2 Vol. p. 361,

quer encore ce jugement sur l'appel contre le jugement final. Cette disposition est conforme à celle du Code de procédure français, et à l'autorité de *Carré* et *Chauveau* (1) :

Quand le jugement définitif, est rendu, il devient comme le résumé de toute la procédure qui a eu lieu, les jugements d'instruction qui avaient été précédemment rendus ne font qu'un avec celui qui termine la cause. Nous en concluons avec M. Merlin, Quest. de Droit vo. Testament § XIV, Poncet L. 15 p. 264 ; Talandier p. 121, et avec la Cour de Nancy, 25 mars 1829, 3 Av. L. 37 p. 283, que par l'appel du jugement définitif, le jugement d'avant faire droit se trouve lui-même implicitement soumis à l'examen du juge supérieur, au moins dans ce qui contient d'étroitement lié avec le fond, en ce sens du moins que le juge peut ne tenir aucun compte du résultat de la mesure d'instruction qui avait été ordonnée.

Ainsi, en supposant que le jugement du 28 novembre 1880, n'eut pas eu un caractère définitif, il aurait donc pu être revisé sur l'appel du jugement final, mais encore aurait-il fallu pour cela que l'appelant n'y eut pas acquiescé. Car il en est de même pour un jugement interlocutoire que pour un jugement final,— pour pouvoir en appeler il ne faut pas l'avoir exécuté volontairement ni y avoir acquiescé d'une manière formelle ou tacite. Dans le cas actuel, la partie interlocutoire du jugement du 24 novembre 1880, celle qui ordonne l'expertise, a été volontairement exécutée par l'appelant. Il est comparu devant les experts, et y a produit et fait entendre ses témoins, sans aucune réserve ni protestation quelconque. Après cette exécution volontaire peut-il se plaindre encore de ce jugement ? Cette question de l'acquiescement au jugement interlocutoire et de son effet sur le droit d'appel est traitée par les auteurs déjà cités aux pages 78, 79 et 80. Leur dissertation à ce sujet est trop longue pour être citée en entier. Je n'en citerai que les conclusions

(2) T. 4, p. 85,

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faisant voir que l'acquiescement est un obstacle au droit d'appel. A la page 79, voici ce qu'ils disent :

Ainsi nous croyons pouvoir ici nous séparer de *M. Poncet*, quoique son avis soit aussi celui de *M. Talandier*, (1) et décider avec *MM. Boitard* (2) et *Thomine Desmazures* (3) que l'acquiescement et, par conséquent, l'exécution volontaire, pure et simple, non justifiée et sans réserves, telle enfin que nous l'avons caractérisée dans nos observations aux notes de la quest. 1584, rend la partie non recevable à interjeter appel.

Après avoir signalé la différence qu'il y a à cet égard entre les jugements préparatoires et les interlocutoires, les auteurs continuent ainsi :

Il n'en est pas de même, comme on l'a déjà vu plusieurs fois, des jugements interlocutoires ; l'art. 451 (dans notre code, art. 1119) prend soin de nous avertir que l'appel peut en être interjeté immédiatement après sa prononciation. La partie peut donc toujours par cet appel, éviter l'exécution ou s'y opposer. Si elle ne l'a pas fait, si, au contraire, elle *a prêté les mains à cette exécution*, et *ans faire aucune* RÉSERVE, il est clair qu'elle n'est pas excusable, et qu'elle ne peut se soustraire à la présomption d'acquiescement.

La loi a permis et a dû permettre que la partie gardât le silence sur le jugement interlocutoire d'où résulte contre elle un préjugé, parce qu'elle peut espérer que ce préjugé n'aura pas de suite ; elle a dû lui réserver néanmoins le droit d'élever ses réclamations, lorsque le préjugé qu'elle ne redoutait pas a produit des effets inattendus ; mais, si le silence n'empêche pas de conserver ce droit, la renonciation expresse ou tacite doit le faire perdre.

Or cette renonciation résulte, soit de l'acquiescement formel, soit de l'exécution qui en a le caractère.

Ces autorités sont d'une application évidente à la position que l'appelant s'est faite en exécutant volontairement le jugement ordonnant l'expertise, et il doit être en conséquence considéré comme n'étant plus recevable à se plaindre même de la partie interlocutoire de ce jugement Ainsi l'appel du jugement du 19 janvier 1882, n'a pu dans aucun cas donner lieu à la révision par cette cour des questions decidées par l'interlocutoire du

(1) P. 112 et suiv. (2) L. 3, p. 91.
(3) L. 1, p. 689 et suiv.

24 novembre 1880. Le seul jugement qui puisse nous être soumis est celui du 19 janvier 1882, confirmant celui de la cour Supérieure, homologuant le rapport fait par les experts nommés en vertu de l'interlocutoire du 24 novembre 1880. Après l'examen de ce rapport et de la preuve faite par les deux parties, il est impossible d'en venir à une autre conclusion que celle adoptée par la Cour supérieure et par celle du Banc de la Reine dont le jugement doit être confirmé.

Ce n'est qu'après avoir formé mon opinion sur le mérite de la cause que j'ai examiné les autorités sur la question du droit d'appel et que j'en suis venu à la conclusion qu'il devait être limité au bien ou mal jugé sur l'homologation du dernier rapport d'experts. Bien que j'aie adopté une opinion qui doit mettre fin à l'appel, je crois cependant devoir dire que sur le mérite de la cause, j'aurais été plus disposé à adopter le premier jugement rendu par la cour Supérieure, en date du 27 mars 1877, que celui de la cour du Banc de la Reine. Car je considère la démolition des contre-forts et des murs de refente comme ayant eu l'effet de relever l'intimé de sa garantie comme constructeur. Quant à l'effet du climat sur les bâtisses construites en hiver je ne suis pas prêt non plus à admettre que les conséquences en doivent être portées, dans tous les cas, par le constructeur, surtout lorsque c'est le propriétaire qui, comme dans le cas actuel, a insisté à faire construire en hiver.

En résumé je suis d'avis que le jugement du 24 nov. 1880, quoique interlocutoire dans une partie, celle qui ordonne l'expertise, est définitif sur tous les autres points en contestation, et qu'il y aurait dû y avoir appel du jugement comme d'un jugement final. 2o. Que bien que sur l'appel du jugement final une partie puisse être reçue à se plaindre d'un interlocutoire, elle perd ce droit, si, comme dans le cas actuel, elle a (volontairement et

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sans réserve) exécuté cet interlocutoire. Pour ces motifs le présent appel doit être renvoyé avec dépens.

TASCHEREAU, J. :—

On the 27th March, 1877, the Superior Court gave judgment in favor of the plaintiff *St. Louis*, for the whole amount of his demand, dismissing *in toto Shaw's* incidental demand.

*Shaw* then inscribed the case for review, and the Court of Review, on the 29th December, 1877, reversed the judgment of the Superior Court, dismissed *in toto St. Louis'*, the plaintiff's claim, based upon his contract for the construction of the said wall, and maintained *Shaw's* incidental demand against the said *St. Louis* for the whole amount he claimed on the said incidental demand, $6,368.

*St. Louis* then appealed to the Court of Queen's Bench from this judgment of the Court of Review, and the said Court of Queen's Bench, on the 24th November, 1880, reversed the judgment of the Court of Review, and determined that *Shaw* was not entitled to the damages he claimed for loss of rent, and the demolition and rebuilding of the brick wall, but that, as the stone wall built by *St. Louis* was insufficient, and it had become necessary to demolish and rebuild the same, he, *Shaw*, was entitled to the cost of such demolishing and rebuilding of this said stone wall. The said court further ordered that, as the cost of such demolishing and rebuilding the stone wall could not be ascertained by the evidence on record, an *expertise* should take place for that purpose, under the authority of the Superior Court.

The record was accordingly remitted to the Superior Court, when three experts were appointed, in accordance with the said judgment of the Court of Queen's Bench, to ascertain the value of demolishing and rebuild-

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ing the stone wall constructed by *St. Louis*. These experts unanimously reported that the cost of such demolishing and rebuilding amounted to $590.

Thereupon, the case was heard before the Superior Court, and on the 18th June, 1881, that court held that, as it was bound by the judgment of the Court of Queen's Bench of the 24th November, 1880, it had only to deduct from the plaintiff's demand the sum of $590 reported, by the last expertise, as being the cost incurred by the defendant for demolishing and rebuilding the said stone wall, and then, to give the said plaintiff judgment for the balance, dismissing the defendants incidental demand for loss of rent and for the cost of rebuilding the brick wall, as decreed by the Court of Queen's Bench.

*Shaw*, the defendant, appealed to the Court of the Queen's Bench, from this last judgment of the Superior Court. The Court of Queen's Bench, however, on the 19th January, 1882, dismissed his appeal, on the ground that the Superior Court, having strictly followed what the said Court of Queen's Bench had ordered by its judgment of the 24th November, 1880, had so rendered the only judgment it could possibly give. It is from this last judgment of the Court of Queen's Bench of the 19th January, 1882, that *Shaw* now appeals to this court.

I am of opinion to dismiss his appeal.

The judgment of the Superior Court of the 18th June, 1881, was undoubtedly right. As it holds in one of its *considérants*, its hands were tied by the previous judgment of the Court of Queen's Bench.

Though the Roman law says that:—

It often happens that the Appeal Court's judgment is the wrong one, and that he who judges the last does not always judge the best (1),

(1) Digest Book 49 tit. 1, No. 1.

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Still it must be conceded that the relative functions of courts of first instance and of appeal cannot be so inverted as to have authorized the Superior Court, in this instance, to reverse the judgment of the Court of Queen's Bench. It had to, unreservedly, submit to it, as it did, and to accordingly dismiss *in toto Shaw's* incidental demand, and give judgment in favor of *St. Louis* for the amount of his demand, less the $590 found by the second *expertise* to have been the cost of the re-building of the stone wall.

It had no alternative.

The maxim "*l'interlocutoire ne lie pas le juge*" cannot have any application to an interlocutory judgment given by an Appeal Court and transmitted to the Superior Court for execution. This maxim applies to the very tribunal that rendered the interlocutory judgment, that is to say, if the Superior Court, for instance, renders a purely interlocutory judgment, it may, in certain cases, at the final judgment, not be bound by this interlocutory.

But to extend this doctrine to the judgment of a Court of Appeal, and make it say "*l'interlocutoire de la Cour d'appel ne lie pas le tribunal de première instance*" seems to me untenable.

Il est impossible d'admettre, says *Boitard* (1), que, quand une Cour Impériale, sur l'appel de l'interlocutoire, aura confirmé le jugement de première instance, le tribunal reste encore maître de statuer contrairement à cet arrêt, et détruisant ce qu'il a fait et ce qu'a fait aussi la Cour Impériale, de décider que l'enquête n'était pas admissible dans l'espéce.

Upon this principle, it seems to me clear, the judgment of the Superior Court of 1881 was the only one it could give, as it had to obey purely and simply the judgment of the Court of Appeal, even if that judgment had been of a purely interlocutory nature.

But this judgment of 1880, by the Court of Appeal,

(1) 2 vol. p. 41.

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was even not a purely interlocutory judgment. It was as final as it could ever be as to the dismissal of *Shaw's* claims for loss of rent and for the rebuilding of the brick wall, as well as to the condemnation of *St. Louis* for the cost of the rebuilding of the stone wall, though it had to order an expert to ascertain to what sum amounted this rebuilding of the stone wall. The court, it is true, did not, by their judgment, dismiss *Shaw's* incidental demand, or give *St. Louis* any judgment against *Shaw*, but that was because it could not, with the evidence in the record ascertain the cost of the re-building of the stone wall. It might have happened that the amount accruing to *Shaw* for such re-building, would have been sufficient to entitle him to the dismissal of the plaintiff's whole action, and to a balance on his incidental demand. So the Court of Queen's Bench could not then decide whether *St. Louis'* action should be maintained or dismissed, or for what amount it should be maintained (if any), or whether *Shaw's* incidental demand should be maintained or dismissed. But what it did decide and finally determine was, that *Shaw* was on the one hand entitled to the cost of the re-building of the stone wall, and on the other hand, was not entitled to what he claimed for rent, the rebuilding of the brick wall. There was no *avant faire droit*, no *jugement préparatoire* as to this, but a final determination: not absolutely final of the action, it is true, but final of all the respective demands and claims of both parties.

It is only of the judgments altogether interlocutory that the maxim *l'interlocutoire ne lie pas le juge* applies, such as, for example, are described as follows in *Ancien Denizart* (1).

Interloquer ou rendre une sentence interlocutoire, c'est ordonner qu'une chose sera prouvée ou vérifiée avant qu'on prononce sur le fond de l'affaire.

(1) Verbo *Interlocutoire*.

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Or, *Guyot* (1):

C'est un jugement qui n'est point définitif, c'est-à-dire qui ne décide pas le fond de la contestation, mais seulement ordonne quelque chose pour l'instruction ou l'éclaircissement de cette contestation. Tout interlocutoire est un préparatoire et un préalable à remplir avant le jugement définitif. Mais il diffère du simple préparatoire en ce que celui-ci ne concerne ordinairement que l'instruction, au lieu que l'autre touche aussi le fond.

In the present case, for example, the judgment of the Superior Court ordering the first *expertise* was a *jugement préparatoire* or purely interlocutory. But the judgment of the Court of Appeal, ordering the second expertise, was *après faire droit*, if I may use that expression. It settled definitively the contestation between the parties. The amount of the judgment only remained to be ascertained. It was equivalent, for instance, to a judgment in the Admiralty Court, holding a vessel liable for the consequences of a collision, but leaving to the assessors to establish the amount of the judgment. It is clear, then, that the Superior Court's judgment of 1881, in submitting to this judgment of the Court of Appeal and executing it, was perfectly right and altogether unimpeachable.

Now, if that judgment was right, the Court of Queen's Bench last judgment now appealed from, confirming it, must also have been right. A Court of Appeal cannot say: "considering that in the judgment appealed from, there is no error, yet we reverse it," and say: "we proceed to give the judgment which the said court ought to have given," when it is of opinion that the said court gave the only judgment it could have given.

The Court of Queen's Bench, in 1880, had reversed the judgment of the Court of Review, and had dismissed *in toto*, *Shaw's* claim for loss of rent, and the re-building of the brick wall. Can it be contended that the same court had the power, at any time afterwards, to entirely

(1) Verbo. *Interlocutoire.*

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reverse its said own judgment of 1880, and, virtually confirming the judgment of the Court of Review, which it had at first so reversed, to determine that *Shaw* was entitled to his said claim for loss of rent and the re-building of the brick wall? No. Not more than it would have had the right, on an appeal by *St. Louis* from that judgment of 1882, to reverse that part of the said judgment of 1880 determining that *Shaw* was entitled to the cost of the re-building of the stone wall. The judgment of 1880, by the Court of Appeal, bound not only the Superior Court but the Court of Appeal itself which rendered it.

A judgment, in an analogous case, is reported in the first part of first vol. of *Devilleneuve et Carette* (1). There, the Court of Appeal had, by a first judgment, reversed the judgment of the Superior Court and ordered an *expertise*. Upon the report of this second *expertise*, the same Court of Appeal, virtually reversing its own judgment, had confirmed the judgment of the Superior Court, which it had at first reversed. But the *Cour de Cassation* held:

Attendu que le tribunal qui a rendu le jugement attaqué, avait par un premier jugement contradictoire et en dernier ressort, infirmé le jugement dont était appel, lorsque depuis et par celui dont la cassation est demandée, il a confirmé ce même jugement, et qu'ainsi il s'est élevé contre l'autorité de la chose jugée * * * Casse, &c., &c.

and the reporter, in a note, says:

C'est évident: ce serait là de la part des juges d'appel, se réformer eux-mêmes, ce qu'ils peuvent pas faire.

The principle by which the Cour de Cassation was guided, in that case, must guide us here, and we have accordingly to hold that the judgment of the Court of Appeal of 1882, now appealed from, is the only one hat could then be given, and consequently that the appeal therefrom must be dismissed.

(1) Recueil d'arrêts, re Vanloock, I Vol. p. 639.

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We cannot reverse a judgment which must be admitted to have been right. When of opinion that the court appealed from erred, we have the power, nay, it is our duty, to give the judgment that, in our opinion, ought to have been given. But when we come to the conclusion that the judgment appealed from is the only one that could have been given, we surely cannot entertain the appeal.

The judgment, if any, that *Shaw* has to complain of, is the judgment of 1880; but, on an appeal from the judgment of 1882, he is precluded from impeaching this judgment of 1880, and this whether or not he had the right to appeal to this court from the said judgment of 1880. If he had no right to appeal, there is *chose jugée;* if he had a right to appeal, but did not exercise his right, there is also *chose jugée.* There is here no question of a suspended right of appeal, or of *chose jugée* provisionally only. If the judgment appealed from is right, we must confirm it, and it is right because it confirmed a judgment of the Superior Court which is the only one that court could give.

The authorities on the questions of law raised here are numerous. I quote the following:

Les jugements interlocutoires sont tous ceux d'instructions ..... On appelle jugements définitifs, ceux qui décident le fond de la contestation. *Guyot* (1).

Le préteur peut réformer, détruire, renouveler les sentences interlocutoires qu'il a prononcées. Il n'en est pas de même des sentences définitives. (2)

*Non desunt tamen interlocutoriæ sententiæ quæ vim definitivæ habent dum irreparabile damnum infert earum executio vel definitivæ ex juris necessitate ad eas sequi debet* * * * *

*Quales interlocutorias vim definitivæ habentes etiam post pronunciationem corrigi vel retractari non posse, verius est maxime si ab eis appellatum fuerit.* (3)

(1) Rep. Verbo jugement p. 635.

(2) Digest, Liv. 42, til 1 (traduction Hulot).

(3) Voet *ad pandectas, liv.* 42, *til.* 1, *No.* 4.

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Cette maxime, que " l'interlocutoire ne lie pas le juge," qu'il peut toujours s'en écarter, *judex ab interlocutoris discedere potest*, n'est vraie qu'à l'égard des simples jugements interlocutoires qui se bornent à ordonner une mesure d'instruction préjugeant le fond, et qui ne contiennent aucune décision définitive sur tous ou quelques uns des chefs du débat. Ce sont les seuls qui ne soient pas susceptibles de passer en force de chose jugée. Il convient donc de distinguer entre les divers jugements interlocutoires, et même dans chaque jugement interlocutoire proprement dit, les décisions qui n'ont pour objet qu'une simple mesure d'instruction, et celles au contraire par lesquelles il est statué à certains égards d'une manière définitive. Les décisions de cette dernière espèce passant à raison de leur caractère définitif, en force de chose jugée, aussi bien que les jugements ordinaires, qui n'ont aucun caractère interlocutoire. (1)

Tout jugement n'a pas l'autorité de chose jugée. La présomption de vérité qui est attachée aux jugements, implique qu'ils décident une contestation * * * * De là la conséquence que la chose jugée ne résulte que des jugements qui statuent définitivement sur la contestation. Il ne faut pas entendre le principe en ce sens que l'autorité de chose jugée ne soit attribuée qu'au jugement qui met fin au procès. Il peut, dans une même affaire, intervenir plusieurs jugements définitifs, en ce sens, qu'ils décident définitivement certains points débattus entre les parties. Tous ces jugements ont l'autorité de chose jugée * * * * * * *

Quand un jugement, interlocutoire en apparence, décide réellement un point contesté entre les parties, il est définitif, et il a, par conséquent, l'autorité de chose jugée (2).

*Pigeau* (3) says :

Quelque fois le jugement est interlocutoire et définitif en même temps, c'est lorsque les juges se trouvent en état de statuer définitivement sur un chef et ont besoin d'éclaircissement sur un autre.

I refer also to *Beriat de St. Brix* (4), and to *Boitard* (5); *Duranton* (6); *Toullier* (7); *Merlin* (8); *Poncet*, des jugements (9).

(1) Larombière, 5 vol., page 212.
(2) Laurent, 20 vol., Nos. 22, 25 et seq.
(3) Vol. 1, page 390.
(4) Procédure, vol. 2, page 459.
(5) Vol. 2, page 36 et seq, 10me édition.
(6) Vol 13th, No 451, et seq.
(7) Vol. 10th, Nos. 95 & 115.
(8) Rep. *v.* Chose Jugée, et Quest. *v.* appel.
(9) Nos. 75 à 109.

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On the 5th December, 1860, in the Cour de Cassation, *re Feesler* (1), it was held that:

Le jugement d'une cour de première instance qui, statuant sur la question de savoir laquelle des deux parties a la propriété exclusive d'un terrain, décide en premier lieu, que le titre produit par le demandeur établit cette propriété à son profit, mais permet au défendeur de faire la preuve de la possession sur laquelle il appuie un plaidoyer de prescription acquisitive du dit terrain, est définitif sur le chef déclarant que le demandeur a établi son titre à la dite propriété, et interlocutoire sur l'admission de la preuve du plaidoyer du défendeur, et que ce jugement, n'ayant point été frappé d'appel, a acquis l'autorité de *chose jugée* sur le chef qu'il a jugé définitivement (2).

In another case, cited in *Dalloz* (3), it was held that:

Attendu que si, en principe, le juge n'est pas lié par l'interlocutoire qu'il a ordonné, c'est en ce sens que, quelque soit le résultat de la mesure prescrite *avant faire droit*, il reste absolument libre sur la décision du fond; mais que les dispositions d'un jugement interlocutoire n'en sont pas moins susceptibles d'acquérir l'autorité de la chose jugée, et par suite de lier le juge (4) * * * * * *

Voir aussi:

*Re Beaugrand* (5). *Re Abbadie* (6). *Re Vanaud* (7).

In *Dalloz* (8) a note of the reporter is as follows:

La jurisprudence a souvent reconnu à un même jugement le double caractère d'une décision définitive et d'une décision interlocutoire; le caractère d'une décision définitive en ce sens que le jugement reconnaît le droit, qu'aucune partie prétend à une chose à déterminer ou à une somme à liquider, et le caractère d'une décision interlocutoire en ce que, pour arriver à cette détermination ou à cette liquidation, le jugement prescrit une expertise ou toute autre mesure d'instruction.

Au point de vue de la chose jugée, on distingue les deux décisions que contient ainsi un même jugement. *La première lie le juge qui*

(1) Devilleneuve 1861, 1444.
(2) Voir aussi:
Dev. 1852, 1 805.
" 1854, 1 777.
" 1856, 1 721.
" 1878, 1 459.
et *re Verrière*, Bulletins civils, *Cassation* 1878, page 158.
(3) (1873,) 1486.
(4) Cassation, 11 juin, 1872.
(5) *Dalloz*, 1870, 1, 31.
(6) *Dalloz*, 1870, 1, 32.
(7) *Dalloz*, 1875, 1, 135, et la note du rapporteur à cette dernière cause.
(8) 1869, 1345.

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*ne peut plus nier le droit qu'il a reconnu.* La seconde ne lie pas le juge qui peut toujours déterminer ou évaluer l'objet du droit contrairement aux conclusions de l'expertise * * *

On peut dire d'une manière générale que le juge est toujours lié par les définitions qu'il donne du droit qu'il reconnait avant d'en fixer l'évaluation. Tel est aussi le cas des jugements qui déterminent les bases du compte ou du partage qu'ils ordonnent (des arrêts et autorités sont ici citées par le rapporteur)

I may add that, by art. 1116 of the code of procedure, it is impliedly admitted that the maxim "*l'interlocutoire ne lie pas le juge*" is not applicable to all interlocutory judgments, since it provides for the interlocutory judgments which cannot be remedied by the final judgments, and which consequently *lient le juge*. See *Cheney* v. *Frigon* (1) and also that the second paragraph of art. 1119 evidently, it seems to me, must be read as applying only to judgments purely interlocutory.

I refrain from expressing any opinion as to the various decisions in *Wardle* v. *Bethune* (2), and the cases of that class They rest entirely on the interpretation to be given to the statutes, or articles of the code, relating to the appeal of interlocutory judgments from the courts of first instance to the Court of Queen's Bench, and it is obvious, raise questions the solution of which is unnecessary for the determination of the present cause.

I may add also that a case of *Archie* v. *Lortie* (3) has not escaped my attention. It is there said as an *obiter dictum*, by Chief Justice *Meredith*, that the judge who renders the final judgment can reverse all interlocutory judgments; but this, I have no doubt, the Chief Justice intended to apply to purely interlocutory judgments only. That great lawyer did not, I am sure, mean to say that, for instance, if a dilatory exception asking security for costs is dismissed, the judge, by the final

(1) 15 L. C. Jur. 5.

(2) 6 L. C. Jur. 220.

(3) 3 Q. L. R. 159.

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judgment, after all the costs have been incurred, after the whole case has been tried, or, the Court of Appeal itself, on an appeal from this final judgment, can review the judgment dismissing this dilatory exception and order security for costs. Neither did he mean to say that the court of first instance is not bound by the interlocutory judgment of the Court of Appeal.

*Ritchie*, C. J., *Strong*, *Henry* and *Gwynne*, JJ., concurred with *Taschereau*, J.

*Appeal dismissed with costs.*

Solicitors for appellant: *Kerr, Carter & McGibbon.*

Solicitors for respondent: *Loranger, Loranger & Beaudin.*

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*March 6.

*June 18.

WALTER REED.....APPELLANT;

AND

THE HONORABLE JOSEPH A. MOUSSEAU, ATTORNEY GENERAL..... } RESPONDENT.

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

*Constitutional law—Tax upon fylings in Court—Indirect tax—Jurisdiction of Provincial Legislature—43 and 44 Vic. ch. 9, s. 9 (Que.)*

By the *Quebec* Act 43 and 44 *Vic.* ch. 9, sec. 9, it is enacted that "A duty of ten cents shall be imposed, levied, and collected on each promissory note, receipt, bill of particulars, and exhibit whatsoever, produced and fyled before the Superior Court, the Circuit Court, or the Magistrates' court, such duties payable in stamps." The Act is declared to be an amendment and extension of the Act 27 and 28 *Vic.* ch. 5, "An Act for the collection by means of stamps, of fees of office, due and duties, payable to the Crown

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

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upon law proceedings and registrations." By section 3, ss. 2, the duties levied are to be "deemed to be payable to the Crown." The appellant obtained a rule *nisi* against the prothonotaries of the Superior Court of *Montreal* for contempt in refusing to receive and fyle an exhibit unaccompanied by a stamp as required by the Act. Upon the return of the rule the Attorney General for the province obtained leave to intervene and show cause.

*Held*,—Reversing the judgment of the Court of Queen's Bench for *Lower Canada* (appeal side), (*Strong* and *Taschereau*, JJ. dissenting), that the Act imposing the tax in question was *ultra vires*, the tax being an indirect tax and the proceeds to form part of the consolidated revenue fund of the province for general purposes.

Per *Strong* and *Taschereau*, JJ. (dissenting).—Although the duty is an indirect tax, yet, under secs. 65, 126 and 129 of the B. N. A. Act, the Provincial Legislature had power to impose it (1).

APPEAL from a judgment of the Court of Queen's Bench for *Lower Canada* (appeal side) reversing a judgment of the Superior Court for the Province of *Quebec*.

The appellant wishing to test the legality of the taxes imposed by the 43 and 44 *Vic.*, ch. 9 (*Quebec*), obtained a rule *nisi* for contempt against the prothonotaries of the Superior Court of the district of *Montreal*, for refusing to receive and fyle an exhibit unaccompanied by stamps to the amount of ten cents.

After the return of this rule the Attorney-General for the Province of *Quebec* obtained leave to intervene, to sustain the legality of the tax.

The Superior Court held that the tax was unconstitutional, and declared the rule absolute against the prothonotaries, who were condemned to be imprisoned in the common gaol of the district for a period of six months, unless they sooner accepted and fyled the exhibit offered by the appellant. The prothonotaries were further condemned to pay the costs.

(1) Leave to appeal to the Privy Council has been granted.

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From this judgment the Attorney-General appealed to the Court of Queen's Bench, which court reversed the judgment of the Superior Court.

On appeal to the Supreme Court of *Canada*, the sole question submitted was the constitutionality of section 9 of the said Act, 43 and 44 *Vic.*, ch. 9, (*Quebec*).

The Act is entitled: "An Act to amend and consolidate the different acts therein mentioned in reference to stamps."

Section 9 reads thus: "There shall be imposed, levied and collected a duty of ten cents on every writ of summons, issued out of any county circuit court, magistrate's court, or commissioner's court in the province; and a duty of ten cents shall be imposed, levied and collected on each promissory note, receipt, bill of particulars and exhibit whatsoever, produced and fyled before the superior court, the circuit court, or the magistrate's court—such duties payable in stamps."

Mr. *Maclaren* for appellant:

As to whether the tax in question should be considered an indirect tax, cited: *Mills* on Political Economy (1); *McCullough* on Taxation (2); Encyclopædia Britannica (3); *Atty.-Gen. of Lower Canada* v. *Queen Insurance Co.* (4); *Say*, Traité d'Economie Politique (5); *Favard de Langlade* (6): *Loughborough* v. *Blake* (7); *Veazie Bank* v. *Fenno* (8); *Glascow* v. *Rouse* (9); *Turner* v. *Smith* (10); *Severn* v. *The Queen* (11).

But the Hon. Mr. Justice *Cross* sustained the tax on

(1) Book 5, ch. 3.
(2) P. 1.
(3) 7 Ed. Vo. Taxation.
(4) 3 App. Cases 1090.
(5) Ch. 10, p. 516.
(6) Rep. Vo. Contributions Indirectes.
(7) 5 Wheat. 317.
(8) 8 Wall. 533.
(9) 43 Mo. 479.
(10) 14 Wall. 533.
(11) 2 Can. S. C. R. 70.

entirely different grounds, viz., under the provisions of sec. 32 of ch. 109 of the Consolidated Statutes of *Lower Canada*, by which the Governor in Council was authorized to impose a tax upon legal proceedings to form part of the building and jury fund in each district.

This ground had been previously well disposed of by Judge *Mackay* in the Superior Court, as follows: "It has also been said that this stamp tax might have been imposed by an Order in Council under *C. S. L. C.*, ch. 109, sec. 32, entitled 'An Act respecting Houses of Correction, Court Houses and Gaols.' But it has been imposed, not by the Lieutenant Governor in Council, but by another body, the Legislature, and its proceeds are to go, not to the building and jury fund, but to the consolidated revenue fund! The question before me is as to the power of the Legislature, not of the Governor in Council."

Judge *Mackay* has also pointed out that the Stamp Act, 27 and 28 *Vic.*, ch. 5, relied upon by the Attorney General, was to apply to the taxes imposed under *C. S. L. C.*, ch. 109, sec. 32, only so long as such fees continue to form part of the "Officers of Justice Fee Fund" or "The Building and Jury Fund" or either of them (sec. 4, ss 2).

Section 126 of the *B. N. A. Act* does not apply to the building and jury fund. The Legislature of *Canada* before Confederation had not, properly speaking, the power of appropriation over it, as the monies levied under it formed a special local fund in each district, which was administered and appropriated by the sheriff for the objects indicated for the benefit of the inhabitants of the particular district and no others. Again, it is not by the *B N. A. Act* reserved to the Government or Legislature of the Province of *Quebec*, and if it is not a direct tax it is not raised in accordance with the

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special powers conferred upon the Provincial Legislature by the *B. N. A Act.*

In addition to the *Quebec* statute referred to by Chief Justice *Dorion* as recognizing the fact that the building and jury fund was not merged by the *B N. A. Act* in the Consolidated Revenue Fund of the province, (41 *Vic.*, ch. 16) appellant would also refer to the *Quebec* statute 45 *Vic.*, ch 25, "An Act respecting the building and Jury Fund." Section 3 of this Act provides that the local municipalities shall not be called upon by the sheriff for their annual contribution of $12 to this fund when the other sources of revenue in the district are sufficient to meet the charges upon the building and jury fund of such district. If the present tax on exhibits is levied under colour of a law authorizing the imposition of a tax for the building and jury fund of the district, and does not go into that fund at all but into the Consolidated Revenue Fund, as appears from the Act itself and the testimony of Mr. *Honey*, it is such a misappropriation as should render the tax entirely null.

Besides, each of the supply bills since Confederation has recognized the separate existence of this building and jury fund.

Its separate existence has also been recognized by the Parliament of *Canada* in the Insolvent Act of 1869 (32 and 33 *Vic.*, ch. 16, sec. 152) and in the Insolvent Act of 1875 (38 *Vic.*, ch. 16, sec. 145). These sections provided that one per cent. of the proceeds of all sales of real estate under these Acts by assignees, should be paid over to the sheriff of the district to form part of the building and jury fund of such district. A number of suits for the recovery of this tax were brought by sheriffs against assignees, one of which is reported, *Chauveau* v. *Evans* (1).

(1) 3 Leg. N. 78 and 24 L. C. J. 343.

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Mr. *Lacoste*, Q. C., for the Attorney General:

To justify the Provincial Legislature's action, I rely on sections 92, 65 and 129 of the *British North America Act*, and believe that under these sections, the legislature had the right of imposing the 10 cents tax.

The paragraphs 2, 14 and 16 are the only ones to which we need refer in section 92.

The first of these paragraphs confers upon the Provincial Legislatures the right of imposing direct taxes, in view of raising a revenue for provincial purposes; the second one gives them the administration of justice, including the constitution and maintenance of tribunals, and the third one includes in their jurisdiction all matters of a local and private nature.

As to paragraph 14, could we not allege that the maintenance of tribunals being left to the local governments, the latter can impose taxes by way of indemnification upon the citizens who claim their intervention?

Taking for granted, for argument sake, that these taxes constitute an indirect tax, section 92, paragraph 2, gives the legislature the right to impose a direct tax for merely local purposes, when there is clearly no interference with the powers of the Federal Government

Under paragraph 16, all matters of a purely local nature fall within provincial jurisdiction. Then, a law concerning the maintenance of tribunals is a purely local matter.

How can there be a conflict with the federal power?

Certainly, nobody will contend that the Federal Parliament would have the right of imposing a tax of such a nature.

Several authors do not classify such duties among regular taxes, and among others M. *de Jacob*, in his treatise on "the science of finances" (1), does not, at least so long as the collection does not exceed the costs of

(1) Paragraph 691.

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judiciary establishment and maintenance. See also *Esquirou de Parieu*, in his "Traité des impots" (1).

Taxes imposed on legal procedures are not taxes, properly speaking; but are, as says *Jules Mallein*, in his Considérations sur l'enseignement du droit administratif (2) "accidental dues paid as compensation for the direct service rendered by the State to the pleader." See also *McDonell* in his manual, A Survey of Political Economy (3); *M. J. Garnier*, Elements de finance (4); *Ch. Le Hardy de Beaulieu*, in his Elementary Treaty on Political Economy (5); *M. Villiaumé*, New Political Treaty (6); *Cooley* on Taxation (7).

Supposing that this tribunal does not find a sufficient authority in section 92 of the Act of *British North America* to justify the imposition of the 10 cents stamp tax, we pretend that such a power is given by sections 55 and 129 of said Act.

When Confederation was established, chapters 93 and 109 of the consolidated statutes of *Lower Canada*, as modified by 27 and 28 *Vic.*, ch. 5, were in force, and there existed under these Acts a tariff compelling parties to pay stamps on judiciary procedures.

Under sections 18 and 19 of chapter 93, and section 32 of chapter 109 of the consolidated statutes of *Lower Canada*, the Governor in Council was authorized to change and modify this tariff and to impose new taxes, and under section 65 of the *British North America Act*, these powers of the Governor in Council have passed to the Lieutenant-Governor in Council.

Moreover, it is said in section 129 that the Acts in force can be revoked, abolished, or modified by the Canadian Parliament or by the Provincial legislature, in conformity to the authority of such Parliament or legislature.

(1) Vol. 3, book 6, ch. 6, p. 274.
(2) Paris, 1857, page 240.
(3) P. 349.
(4) P. 68.
(5) 3 Ed. 1862, Vol. 2, p. 246.
(6) P. 5, in note.

Could chapters 93 and 109 of the consolidated statutes of *Lower Canada*, and chapter 5 of 27 and 28 *Vic.*, be abolished or modified by the Federal Parliament? Nobody can say so. They have remained in force for the benefit of the Province of *Quebec*, and they apply to an object exclusively assigned to the Province of *Quebec*—the administration of justice.

It is also objected that the destination of the tax imposed by the 43 and 44 *Vict.*, chapter 9, is not the same as that of the taxes imposed under the authority of the laws in force when Confederation began. Since Confederation all special funds have been merged into one fund only—the consolidated fund.

RITCHIE, C. J.:

In 1875, the Legislature of the Province of *Quebec*, by the Act 39 *Vic.*, ch. 8, for the first time imposed a tax of ten cents on the fyling of every exhibit in a cause. This tax, payable by means of stamps, was to form part of the Consolidated Revenue of the Province of *Quebec* (secs. 1 and 2).

This Act was repealed by the 43rd and 44th *Vic.*, ch. 9, and the same tax of ten cents on fyling of exhibits was re-imposed (sec. 9). Although this Act does not expressly declare that this tax shall form part of the consolidated revenue of the province, as the repealed statute (39th *Vic.* ch. 8) did, yet it enacts that all the duties therein mentioned shall be deemed payable to the Crown (sec. 3, sub-sec. 2), and they necessarily fall under the provision of 31st *Vic.*, ch. 9, sec. 3, which declares that all revenue whatever over which the legislature of the province has power of appropriation, shall form one consolidated fund to be appropriated for the public service of the province.

This special tax has therefore been imposed since the *B. N. A. Act* by the Legislature of the Province of

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*Quebec*, to form part of the consolidated revenue of the province. By the *B. N. A. Act*, 1867, sec. 92, sub-sec. 2, the legislature of each province is authorized to raise a revenue for provincial purposes by means of direct taxation, and from the other sources, such as those mentioned in sub-secs. 5, 10 and 15, which have no application to the present case.

To the Dominion Parliament is given the right to raise money by any mode or system of taxation (sec. 91, sub-sec. 3). This right is exclusive when not coming within the classes of subjects assigned to the provincial legislatures, and as the legislatures of the Provinces are only authorized to raise a revenue by direct taxation and the other sources of revenue already mentioned, it follows that the Parliament of *Canada* has the exclusive right to raise a revenue by means of indirect taxes, and the legislatures of the provinces have no such right.

The terms of the Act seem clear on this point, and the Judicial Committee of the Privy Council have so interpreted them by deciding in the case of the *Attorney General of Quebec* v. *The Queen Insurance Company* (1), that the tax imposed on insurance companies by the Act 39th *Vic.*, ch. 7, of the Legislature of the Province of *Quebec*, was *ultra vires*, as not being a direct tax.

The 43rd and 44th *Vic.*, ch. 9, is clearly a tax act to raise a revenue for provincial purposes, and therefore the only question is—is this a direct or indirect tax?

Stamp duties were introduced into *England* in 1671 by a statute entitled "An act for laying impositions on proceedings at law" for nine years—continued for three years, then expired—revived in 1693, and have always been considered indirect taxes.

This, in my opinion, is clearly an indirect tax levied for no specific purpose, but forms part of the consoli-

(1) 3 App. Cases 1,090.

dated revenue of the province for general purposes. The judgments of *Mackay*, J., and *Dorion*, C. J., are, to my mind, conclusive.

Had this been merely an easy means adopted for the purpose of collecting a fee of office for work actually performed, I might, as at present advised, be disposed to look on the matter in a very different light from what it now strikes me, but this is not a fee or reward for labor, but it is a tax for raising a revenue, pure and simple, and has no more to do with the officer who fyles the paper or with the maintenance of the administration of justice than any other tax or source of revenue of which the consolidated revenue of the province is composed for the support of the government, and to promote the general interests of the people.

I am of opinion the appeal should be allowed and the judgment of the Superior Court affirmed.

STRONG, J. :—

The question presented for our decision by this appeal requires us to determine whether the 9th section of the Act 43 and 44 *Vic.*, ch. 9, was within the powers of the Legislature of the Province of *Quebec*. That section is in these words :

> There shall be imposed, levied and collected a duty of ten cents on every writ of summons, issed out of any County, Circuit Court, Magistrate's Court, or Commissioner's Court in the province, and a duty of ten cents shall be imposed, levied and collected on each promissory note, receipt, bill of particulars, and exhibit whatsoever produced and filed before the Superior Court, the Circuit Court, or the Magistrate's Court, such duties payable in stamps.

A former statute, the 39th *Vic.*, ch. 8, had imposed a similar tax of ten cents for every exhibit filed in a cause. This Act was repealed and its provisions re-enacted and consolidated with other like provisions by the statute now in question, 43 and 44 *Vic.*, ch. 9.

It has been argued that this was a direct tax which

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the legislature had power to impose under sub-sec. 2 of sec. 92 of the *B. N. A. Act*. I am, however, clearly of opinion that this contention must fail. Taxes on legal proceedings are invariably classed by scientific writers on taxation and political economy as indirect, and even though such a tax may not be indirect in the sense that the burthen of it is ultimately to be borne by a person other than he who originally pays it, it is clearly so according to the well founded definition of Mr. *McCulloch* (1), who thus distinguishes direct and indirect taxes:

> A tax (he says) may be either direct or indirect, it is said to be *direct* when it is taken directly from property or income, and *indirect* when it is taken from them by making individuals pay for liberty to use certain articles or exercise certain privileges.

Subjected to this test, which has the sanction of a great number of similar authorities, it is apparent that the tax in question must be classed amongst indirect taxes.

The decision of the Privy Council in the case of the *Attorney General of Quebec* v. *The Queen Ins. Co.* (2) is also conclusively in favor of this view.

It is there said that there is nothing in the *B N. A. Act* prohibiting provincial legislatures from imposing indirect taxes; that all that sub sec 2 of sec. 92 does, is to confer on the provincial legislatures exclusive powers to impose direct taxes, and that it does not follow that the legislatures may not have implied powers of indirect taxation.

To say that the provincial legislatures have powers of indirect taxation, either generally, as an inherent power without reference to any authority derived from the *B. N A. Act*, or as implied from the powers expressly conferred upon them, is to assume that they have, to some extent, concurrent powers with parliament, and that their

(1) McCulloch on Taxation, p. 1. (2) 3 App. Cases 1,090.

powers of legislation are not limited by the subjects particularly enumerated in sec. 92. In other words, that whilst sec. 92 gives certain exclusive powers, it does not restrict provincial legislatures to those subjects. This important question was referred to, but not decided, in the case of *The Union St. Jacques* v. *Belisle* (1), in the Privy Council. I do not think, however, we are called upon to consider it for the purposes of this appeal, for assuming that no such power exists, and that the legislation now impugned cannot be referred either to any concurrent authority to impose indirect taxes, or to a power of taxing incidental to the express authority to legislate on the subjects comprised in sub-secs. 14 and 16 of sec. 92, it appears to me that under other provisions of the *B. N. A. Act*, and apart altogether from those contained in sec. 92, the imposition of this stamp duty on exhibits was not *ultra vires*.

By ch. 109 of the Consolidated Statutes of *Lower Canada*, which was in force at the time the *B. N. A. Act*, 1867, was passed and came into operation, the Governor in Council of the late Province of *Canada* was authorized to impose taxes or duties upon legal proceedings had in any of the courts of *Lower Canada*, and these taxes were to form part of the building and jury fund of the district in which they were collected. Subsequently by an Act passed in 1864 (27th and 28th *Vic.*, ch. 5, sec. 4) it was enacted that these taxes or duties should be paid by means of stamps.

By the 65th sec. of the *B. N. A. Act*, 1867, it was enacted that—

> All powers, authorities and functions which under any Act of the Parliament of *Great Britain* or of the Parliament of the United Kingdom of *Great Britain and Ireland* or of the Legislature of *Upper Canada, Lower Canada,* or *Canada,* were or are before or at the union vested in or exercisable by the respective Governors or with the advice and consent of the respective executive councils

(1) L. R. 6 P. C. 31.

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thereof, or in conjunction with those governors, or with any number of members thereof, or by those governors, or lieutenant-governors individually, shall, so far as the same are capable of being exercised after the Union in relation to the Government of *Ontario* and *Quebec* respectively, be vested in and shall and may be exercised by the Lieutenant Governor of *Ontario* and *Quebec* respectively, with the advice or with the advice and consent of or in conjunction with the respective executive councils or any members thereof, or by the lieutenant governor individually as the case requires, subject nevertheless (except with respect to such as exist under the Acts of the Parliament of *Great Britain* or of the Parliament of the United Kingdom of *Great Britain* and *Ireland*) to be abolished or altered by the respective Legislatures of *Ontario* and *Quebec*.

By the 126th section of the *B. N. A. Act*, it was also provided that:

Such portions of the duties and revenues over which the respective Legislatures of *Canada*, *Nova Scotia* and *New Brunswick*, had before the union power of appropriation, as are by this Act reserved to the respective governments or legislatures of the provinces, and all duties and revenues raised by them in accordance with the special powers conferred upon them by this Act, shall in each province form one consolidated revenue fund to be appropriated for the public service of the province.

It is clear, therefore, that by force of the 65th section, the power which, by Cons. Stats. of *Lower Canada*, ch. 109, was vested in the Governor in Council of the former Province of *Canada*, of imposing taxes and duties on legal proceedings, passed to and vested in the Lieutenant-Governor in Council of the Province of *Quebec*. There cannot be a question as to this; it was originally a power exclusively concerning and relating to that portion of *Canada* which constituted the new Province of *Quebec*, and one the exercise of which did not involve any interference with any other portion of the Dominion, or any extension of authority beyond the territorial limits of *Quebec*, and therefore it was, according to the most strict and narrow construction which could be given to the language of the 65th section, a

power capable of being exercised after the union in relation to the government of *Quebec*. It follows, that prior to and at the time of the passing of the Provincial Act, 39 *Vic.*, ch. 8, the Lieutenant-Governor in Council of the Province of *Quebec* had the power of imposing a tax or duty upon each exhibit filed in the courts pursuant to the authority conferred by Cons. Stats. of *Lower Canada*, ch. 109.

Then, as the produce of such a tax would be in the words of section 125, a duty or revenue reserved by the *B. N. A. Act*, to the Government of the Province of *Quebec*, it would, under the express provision of the last-mentioned section, form part of the consolidated revenue fund of that province. It was therefore up to 1875, when the 39 *Vic.*, ch. 8, was passed, quite within the competence of the Lieutenant-Governor in Council, not merely to impose this tax or duty on the filing of exhibits, but further to provide that the proceeds of the tax, instead of being paid as before confederation, into the jury and building fund of each district, should be paid into the consolidated revenue fund of the province; indeed, it was not merely within the power of the Governor in Council to order the monies so collected to be thus disposed of, but they were by law bound to make such a disposition of them, since the tax would come under the denomination of a tax or duty reserved to the government of the province, and was also a revenue over which the Legislature of the Province of *Canada*, before the union, had a power of appropriation; for there can be no doubt or question that although the building and jury fund was kept apart from the consolidated revenue fund of the Province of *Canada*, and was to some extent a local fund, it was nevertheless a fund produced by taxes payable to the Crown, over which the Legislature of the old Province of *Canada* had absolute powers of

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control and disposition. It can, therefore, be demonstrated that the Lieutenant-Governor in Council could, under the Consolidated Statutes of *Lower Canada*, ch. 109, have done precisely what the legislature did by the Act of 1875 (39 *Vic.*, ch. 8), have imposed a tax of ten cents on every exhibit filed in a cause, such tax to be payable by stamps, and the proceeds of the sale of the stamps to be paid into the consolidated revenue of the province.

Then, can it be said that it was any usurpation on the part of the provincial legislature when they assumed to themselves this same power which the provincial executive could under the express provisions of the Confederation Act have exercised without further legislative authority? The answer to this is also to be found in the very words of the 65th section of the *B. N. A. Act*, which expressly provides that the powers of that section transferred to the provincial governments shall be "subject to be abolished or altered by the respective Legislatures of *Ontario* and *Quebec*." That the transfer from the executive to the legislative department of the government of the authority which had been in the manner already indicated, reserved to the Lieutenant-Governor in Council, was an alteration within the meaning of the authority given to the legislature to alter powers thus vested, is surely too plain to require or even to be susceptible of argument; having the right to abolish the power altogether, it must have been competent to the legislature, under the lesser authority given to alter, to assume the exercise of it themselves, and thus to provide that these functions of legislation and taxation which, in the old Province of *Canada* had been delegated to the Governor in Council, should in the future be attributed to and exercised by the appropriate constitutional depository of such power, the legislature itself. Under the express authority to

alter, contained in the 65th sec, and also under sub-sec. 1 of sec. 92, authorizing constitutional changes, the legislature could therefore have passed an Act expressly and formally revoking the authority given to the Governor in Council by Consolidated Statutes of *Lower Canada*, ch. 109, and providing that thereafter, the taxes, authorized by that statute to be imposed by Order in Council, should only be levied under the authority of the legislature itself. And if it could have thus expressly revoked or transferred the power in question, it could also do so by implication as well; and this it did, when by 39 *Vic.*, ch. 8, and the subsequent statutes 43 and 44 *Vic.*, ch. 9, by which the provisions of the first mentioned Act are renewed and consolidated, it imposed the tax now called in question.

The foregoing is in accordance with the view taken in the Court of Queen's Bench by Mr. Justice *Cross*, in whose judgment I agree in every respect.

I am therefore of opinion that the 9th section of the statute 43 and 44 *Vic.*, ch 9, was not *ultra vires* of the Legislature of the Province of *Quebec*, and that this appeal must consequently be dismissed with costs.

FOURNIER, J.:—

This question has been so fully treated by Sir *A. A. Dorion* that I do not see what I could add. In my opinion this is an indirect tax, and therefore the local legislature had no right to impose it. I also agree with the reasons given by the Chief Justice of this Court.

HENRY, J.:—

Under the *B. N. A. Act*, the local legislatures were not authorized to impose any indirect tax, and it is for us to consider now whether this Act (43 & 44 *Vic.*, ch. 9) and this Act only (for that is the only one before us) was within the powers of the *Quebec* Legislature since 1867. The first question is—is it a direct or an indirect

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tax? I have no hesitation in saying that it is an indirect tax. That tax was not for the payment of juries or other purposes connected with the court, but it was to be paid into the consolidated revenue fund of the province. Now, carrying out the principle that is involved, if that is within the powers of the local legislature, where is the limit to be? We might go on to any extent. The Judicial Committee of the Privy Council have decided in *Attorney General of Quebec* v. *Queen Ins. Co.* (1), that they could not impose a duty by stamps, because it was an indirect tax. This court decided that the Legislature of *Ontario* had no right to levy an indirect tax on brewers, because it is taken indirectly from the pockets of the consumers. Now, this tax is to be taken out of the pockets of suitors and placed in the general revenue of the province. That is to all intents and purposes an indirect tax, and therefore I think the legislature exceeded its powers. As to whether the legislature had that power or not, and many of the matters argued, we have already had under the consideration of this court, and the decisions we have given on this very question, render it unnecessary that I should say much. I think the appeal ought to be allowed, and the judgment below reversed.

TASCHEREAU, J.:—

I am of opinion, with the Superior Court of *Montreal*, and the learned Chief Justice of the Court of Queen's Bench, that the tax in question here is not a direct tax, and that it is by direct taxation only that the provincial legislatures can raise a revenue for provincial purposes. I am also of opinion that the said tax is what the statute itself calls it, really a tax or duty, and not a fee of office under ch. 93 of the *Consolidated statutes L. C.* The fees of the officers of the court have not been increased, and

(1) 3 App. Cases 1090.

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were not intended to be increased by the Act impugned; they do not collect it, neither does it inure to their benefit in any way. On these three points, we are, I believe, unanimous. I am, however, of opinion that the section of the Act 33 and 34 *Vic.*, ch. 9, imposing this duty of ten cents on each exhibit, is not *ultra vires*, and this upon the following ground.

Before confederation the Governor in Council could clearly, under sec. 32, ch. 109, of the C. S. L. C., have imposed such a tax or duty, payable in stamps by the Act of 1864. Under secs. 65 and 129 of the *B. N. A. Act*, this power was continued to the Lieutenant Governor in Council, and under these two sections the exclusive power to repeal or alter the said provisions of the said chapter of the consolidated statutes, or of the said Act of 1864, was vested in the provincial legislature. The provincial legislature, consequently, must have, and alone have, complete control over the building and jury fund created under the said chapter of the consolidated statutes, including the power to abolish it, and to enact that it shall form part of the consolidated revenue. Before confederation, under the union of the two *Canadas*, the consolidated fund was, of course, a fund common to both of these provinces, so that, in order to prevent local revenues raised for special local expenses, expenses personal to one province, from inuring to the benefit of the other province, it was necessary to create special funds of the kind in question. Each province levied such taxes for itself alone, and not at all for the benefit of the other, nor, in other words, for the consolidated general revenue fund, which belonged to the two provinces jointly. But, since confederation, this reason does not exist. The consolidated fund of each province belongs, in its integrity, to that province and is under exclusive provincial control.

And if the Province of *Quebec* has, either expressly

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or impliedly, by the provisions of the 31 *Vic.*, ch. 9, sec. 3, or by those of the particular enactment now impugned, abolished the building and jury fund, and thrown the proceeds of it into its consolidated revenue fund, it has, it seems to me, dealt with nothing but what is under its legislative control, or done nothing but what it had full power to do under the *B N. A. Act.* It has imposed an additional tax, it is true, but has it not the power—and the exclusive power—to do so (not for general provincial purposes, but for the same purposes as those for which the said provisions of the consolidated statutes were enacted) and this, as a consequence of the power to alter or amend them. It might be that, if in a proper case, it was alleged and proved that, for the whole province, the expenses of the administration of justice are more than covered by the duties imposed on the law proceedings, and, if it was demonstrated that the legislature, under pretence of providing for these expenses, has attempted, in evasion of the provisions of the *B. N. A. Act*, to raise a revenue for general provincial purposes by indirect taxation on these law proceedings, the courts would then interfere and declare that these legislatures cannot in violation of the law so enlarge the powers conferred upon them. But there is no issue of that kind raised here. What Mr. *Honey*, the prothonotary of *Montreal*, examined as a witness in this case, says on this subject, does not relate to all the expenses connected with the *Montreal* Court House, and, moreover, has no application to the province at large, in which it is notorious that the deficit in the revenues connected with the administration of justice is very large. Then, it seems to me, the difference between the building and jury fund and the consolidated revenue is merely one of book-keeping. What has been paid to the building and jury fund before confederation, under the Act of

of 1864, was deemed payable to the Crown, though for a special purpose only, and what was due to it was recoverable by the Crown. And that this tax of ten cents is *ultra vires*, because it is also, by the Act imposing it, declared to be deemed payable to the Crown, is what I cannot see. On the contrary, it seems to me clear that the provincial legislature alone had the power to pass an enactment like the one impugned, and to enact, as a matter of procedure, as it did by the same statute, that no exhibit shall be received in the courts of justice if not bearing this ten cent stamp. The Dominion Government has certainly not that power. So, if the Provincial Government did not have it, it would follow that, since confederation there would be no power anywhere to provide for the expenses of the administration of justice in the Province of *Quebec*, on the system and basis existing before confederation. It would follow that if a new procedure was introduced as, for instance, has been done by the introduction of the writ of injunction in 1878, the province would have no power to impose any duty on that particular proceeding or act of procedure, or that if a new court was created, as was, for instance, the District Magistrates Court, all the proceedings in that court would be entirely free from all such tax.

These Acts of the consolidated statutes and of 1864 formed part of what was, at confederation, known as the Acts concerning the administration of justice in the province and the procedure in civil matters in the courts of the province, and as such they have been by the *B. N. A. Act* left under the exclusive control of the provincial legislature.

The Act 31 *Vic.*, ch. 2, imposed for the building and jury fund before confederation, repealed by the Act now impugned, re-enacted that all such duties and taxes were to be deemed payable to the Crown. Then before

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confederation, the Act of 1864, as to these very duties, is entitled: "An Act for the collection, by means of stamps of fees of office, dues and duties payable to the Crown"—and its preamble says: "Whereas it is expedient that all fees and charges payable to the Crown." By sec. 9 thereof, "it specially enacted that all the fees, dues, duties, taxes and charges payable under the said Acts and parts of Acts (including those for the building and jury fund) shall be considered to be fees, dues, duties, taxes and charges payable to the Crown for the purposes of this Act." Is it not clear that all these duties, since they have been first enacted, have always been considered to be deemed payable to the Crown? They are received and paid to certain officers, but these officers receive it for the Crown; what is so paid them is paid to the Crown.

And the argument, that because 31 *Vic*, ch. 9, sec. 3, enacts that all revenues subject to provincial control are to form part of the consolidated fund, this new tax must also fall in that fund, seems to me, untenable. Ever since the 9 *Vic.*, ch. 114, confirmed by 10-11 *Vic.*, ch. 71, of the Imperial statutes (ch. 14, of the *Consolidated Statutes of Canada*) it had been likewise for the old provinces enacted that all revenues subject to provincial control should form a consolidated revenue fund. Yet this did not and could not prevent the Legislature of *Canada* (before confederation) from creating for the Province of *Quebec* the building and jury fund and its revenues. If the appellant's contention that this new tax is illegal simply because it is declared to be deemed payable to the Crown was to prevail, it would follow that all such taxes of the same kind levied since confederation are also illegal, and have been illegally levied, since they also were all deemed payable to the Crown, and I do not believe that the appellant would be prepared to go so far.

As a matter of fact, I may remark here, both the *Quebec* Provincial Legislature and the Dominion Parliament have, since confederation, recognized the existence of this building and jury fund, the former by, amongst others, 41 *Vic.*, ch. 16, and 45 *Vic.*, ch. 25, and the latter by the Insolvency Act of 1869, sec. 152, and the Insolvency Act of 1875, sec. 145.

It must also be observed that this Act 43 and 44 *Vic.*, ch. 9, is under one of its special provisions (sec. 20) to be read as forming part of the said Stamp Act of 1864, which, in its turn, must be read in connection with the said ch. 109 of the Consolidated Statutes. But whether or not this building and jury fund has been abolished seems to me immaterial. I say that if it still exists, the proceeds of this new tax must go to it, though they are, by the Act, deemed payable to the Crown the same as all similar taxes imposed before confederation, which, though also deemed payable to the Crown, go to that fund; and if there is now no such special fund, it is no objection to the legality of this tax that it goes to the consolidated revenue, wherein that special fund has merged, the same as similar taxes imposed before confederation, which, must now all go to that consolidated fund.

As to the ground that this is a new or an additional tax, I have already said:

1st. That, although an indirect tax, it is not a tax for the general revenue of the province.

2nd. That the provincial legislature has the power, under secs. 65 and 129 of the *B. N. A. Act* to alter amend the Acts under which similar taxes existed on law proceedings at confederation.

3rd. That, consequently, the provincial legislature could impliedly, as it has done by the enactment objected to, (as it can expressly) take away from the Lieutenant Governor in Council the powers he had in virtue of the

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said Acts, and itself exercise these powers; that, therefore, the provincial legislature has the power not only to abolish or diminish the said taxes, or to transfer a particular tax from one proceeding to another, but that it can also legally impose a tax or duty of a similar nature on proceedings or acts of procedure on which none were imposed at the time of confederation, and I presume, though unnecessary to decide for the purposes of the present case, on any new act of procedure created since confederation, provided that the province, in the exercise of this power, confines itself to the raising of a revenue to meet the expenses of the administration of justice, on the system and basis in existence before confederation

GWYNNE, J.:—

The real question involved in this case appears to me to be, whether any limit, and if any to what extent, is set by the *B. N A. Act* to the power of the provincial legislatures to raise revenue by taxation. The scheme of the framers of our Federal Constitution, to provide means for the support of the provincial governments and legislatures, consisted primarily in a subsidy to be paid to each province in proportion to its population, as ascertained by the census of 1861. Accordingly by the 118th sec. of the *B. N. A. Act*, such subsidy is provided to be paid by the Dominion of *Canada* to the respective provinces of *Ontario*, *Quebec*, *Nova Scotia* and *New Brunswick*. By this subsidy, supplemented by such revenue raised by taxation, as is authorized by the 92nd sec. of the Act, together with the public property and assets assigned to each province, all the expense attending the carrying on the several provincial governments must be defrayed. Now, by the second item of sec. 92, the legislatures of each province are authorized to make laws in relation to direct taxation

within the province, in order to the raising of a revenue for provincial purposes; by the 9th item of the same section they are authorized to make laws in relation to shop, tavern, auctioneer and other licenses, in order to the raising a revenue for provincial, local or municipal purposes; and by the 15th item they are authorized to make laws in relation to the imposition of punishment by fine, penalty or imprisonment for enforcing any law of the province made in relation to any matter coming within any of the classes of subjects enumerated in sec. 92. These are the only sections which expressly authorize the raising, by any act of the provincial legislatures, any revenue whatever by any system of taxation. The public property and assets transferred to each province constitute an additional source of revenue, but at present we have to deal only with the power of the respective legislatures to raise by taxation a revenue for provincial purposes.

The express provision made by item 2, which while it authorizes the legislatures to make laws, in order to the raising of a revenue for provincial purposes by taxation, limits the exercise of the authority thus conferred to direct taxation, very clearly excludes, in my judgment, the power of raising a revenue by any species of taxation other than direct; but it is contended that this is not so, and that as there is no express clause in the Act prohibiting indirect taxation, the provincial legislatures have implied power to raise revenue by indirect taxation to defray the expenses attending the exercise of their jurisdiction over each and every subject placed by the 92nd section under their exclusive control, and that the particular tax in question here being a stamp tax on legal proceedings, even though it be not a direct tax, is authorised by the 14th item of section 92, which places the administration of justice, and among other things, the maintenance of provincial courts, under the control

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of the provincial legislatures; the contention being that for the maintenance of the courts and the administration of justice, the provincial legislatures have by force of this item, No. 14, implied authority to raise a revenue by indirect taxation. But that the maintenance of provincial courts and the administration of justice are provincial purposes there can be no doubt, they are therefore comprehended within the purview of item 2 of section 92, which in express terms prescribes direct taxation as the mode of taxation to be adopted for raising revenue for provincial purposes, so that upon the principal of *expressum facit cessare tacitum*, there can be no such implied power involved in this item 14 as is insisted upon; moreover, if the contention were sound, then upon the same principle they could equally pass an Act imposing a special tax of an indirect character for the payment of provincial officers under a power implied under item 4 of this 92nd section, and another Act imposing another special tax, also of an indirect character, to defray the expense attending the establishment, maintenance and management of public and reformatory prisons, under the powers conferred by item 6, and another to defray the expense attending the establishment, maintenance and management of hospitals, asylums, &c., under the powers conferred by item 7; and, as in fact is boldly contended, other Acts imposing indirect taxation to defray the expenses attending the maintenance and management of all matters of a merely local and private nature, and so the effect would be, that this implied power of raising revenue by indirect taxation, which it is contended the legislatures have, being exercised as it might be if they have the power, to raise sufficient revenue to defray all the expenses of the government and legislatures in respect of all the several matters under their control and jurisdiction, it would be quite unnecessary for them to exer-

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cise the power conferred by item 2, raising by direct taxation a revenue for provincial purposes, or to draw upon the revenue created by the subsidy paid by the Dominion or by sale of the public property, or other income arising therefrom, or from the assets assigned to each province, such a contention appears to me to involve so palpable a *reductio ad absurdum* as to carry with it its own refutation ; and indeed the judgment of the Privy Council in the *Attorney General of Quebec* v. *The Queen Insurance Co.* (1), in effect decides that the provincial legislatures cannot by any act of theirs authorize the raising a revenue by any mode of taxation other than direct.

It was further argued that inasmuch as (as was contended) the Lieutenant Governor of *Quebec* could under the 129th sec. of the *B. N. A. Act* impose the very tax which the *Quebec* Statutes 39 *Vic.*, ch. 8, and 43 and 44 *Vic.*, ch. 9, profess to impose, therefore it must be competent for the legislature by an act of legislation to impose a tax which the Lieutenant Governor by an Act in Council could impose. Independently of the objection, which I have already urged, that there being given by the *B. N. A. Act* express power to the provincial legislatures with reference to taxation, and that being of a particular and limited character, no power of a different and an unlimited character can be implied, the contention under consideration, which, however is not, in my opinion, raised before us in this case, proceeds upon the assumption that the Lieutenant Governor could impose the tax in question—a position which as it appears to me requires for its establishment something more than its assumption—for if the legislature of the province has only power to impose direct taxation, and if the tax in question be not a direct tax, it would seem to be inconsistent that the Lieutenant Governor, could since

(1) 3 App. Cases 10, 90.

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confederation, impose indirect taxation as a source of revenue for a provincial purpose which by the Constitutional Charter, under which both Lieutenant Governor and Legislature exist, the Legislature has no power to impose. The question which in such case appears to me to arise is, whether the Acts in virtue of which the Governor General of the late province of *Canada* had, before confederation, power to impose taxes of the nature of the tax in question, can be Acts whose provisions are continued by the 129th sec. of the *B. N. A. Act*, which enacts that *except as otherwise provided* by the *B. N. A. Act*, all laws in force, &c., shall continue, &c., &c., whether in fact, if the legislature is prevented by the provisions of the *B. N. A. Act*, from raising a revenue by indirect taxation, the imposition of such a mode of taxation by the Lieutenant Governor in Council is not prevented also; and whether the provision limiting the power of the legislature to the imposition of direct taxation is not such a provision *otherwise* as would exclude the Act, under which such taxes had been imposed by the Governor in Council before confederation, from the operation of the 129th section of the *B. N. A. Act*? The 65th section appears to me to relate to acts of the Lieutenant Governor, necessary for carrying on the government merely, and that unless the Lieutenant Governor has authority to impose this tax under section 129, he cannot have it under section 65. Unless the law or Act authorizing the imposition is continued by section 129, it is plain the Lieutenant Governor could not impose it under section 65. Here the question, however, is, whether the Acts or Act of the Legislature of *Quebec*, professing to impose the tax in question are or is *ultra vires*? and the answer to that question depends upon the single point, namely: whether the tax is or not a direct tax? for the legislatures have not, as it appears to me, any power to raise a

revenue for any provincial purpose by any mode of taxation otherwise than direct. The whole expense of government and legislation for provincial purposes, which terms comprehend the whole expense attending all provincial purposes placed under the control of the Provincial Government and Legislature, must be defrayed out of the produce of the public property, and assets assigned to each province, and the subsidy paid to the province by the Dominion—supplemented, if these sources of revenue should be insufficient, by taxation of a direct character only, in addition to the money raised under the special authority given by clauses 9 and 15 of section 92. And as I am of opinion that the tax in question is not a direct tax, a point in my opinion, concluded by the judgment of the Privy Council in the *Attorney-General* v. *The Queen Insurance Co.*, the appeal should be allowed with costs.

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*Appeal allowed with costs.*

Solicitors for appellant: *MacLaren & Leet*

Solicitor for respondent: *A. Lacoste*

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PETER McLAREN.....APPELLANT;

AND

BOYD CALDWELL AND WILLIAM CALDWELL.....RESPONDENTS.

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*Mar. 3,4,5,6.
*Nov. 28.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

*R. S. O. ch.* 115, *sec.* 1, *construction of—Non-floatable streams—Private property.*

By the decree of the Court of Chancery for *Ontario* the respondents were restrained from driving logs through, or otherwise interfer-

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

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ing with, a certain stream, where it passed through the lands of the appellant and which portion of said stream was artificially improved by him so as to float saw logs, but was found by the learned judge at the trial not to have been navigable or floatable for saw logs or other timber, rafts, and crafts when in a state of nature. The Court of Appeal reversed this decree, on the ground that C. S. U. C. ch. 48, sec. 15, re-enacted by R. S. O. ch. 115, sec 1, made all streams, whether naturally or artificially floatable, public waterways.

*Held*,—(Reversing the judgment of the Court of Appeal and restoring the decree of the Court of Chancery,) that the learned Vice-Chancellor who tried the case, having determined that upon the evidence adduced before him, the stream at the *locus in quo*, when in a state of nature, was not floatable without the aid of artifical improvements, and such finding being supported by the evidence in the case, the appellant had at common law the exclusive right to use his property as he pleased, and to prevent respondents from using as a highway the stream in question where it flowed through appellant's private property.

*Held*,—Also (approving of *Boale* v. *Dickson*) (1), that the C. S. U. C. ch. 48, sec. 15, re-enacted by R. S. O. ch. 115, sec. 1, which enacts that it shall be lawful for all persons to float saw logs and other timber, rafts, and crafts down all streams in *Upper Canada*, during the spring, summer and autumn freshets, etc., extends only to such streams as would, in their natural state, without improvements, during freshets, permit saw logs, timber, etc., to be floated down them, and that the portions of the stream in question, where it passes through the appellant's land, were not within the said statute (2).

APPEAL from a judgment of the Court of Appeal for the Province of *Ontario*, whereby a decree of the Court of Chancery in favor of the plaintiff, the respondent herein, was reversed (3).

The facts, pleadings and points relied on, cases cited, and statutes referred to by counsel, appear sufficiently in the report of the case in the court below (4), and in the judgments hereinafter given.

(1) 13 U. C. C. P. 337.

(2) The Privy Council granted leave to appeal, and the case has been argued before the Judicial Committee and stands for judgment.

(3) 5 Ont. App. Rep. 363.

(4) 5 Ont. App. Rep. 363.

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Mr. *Hector Cameron*, Q. C., Mr. *Dalton McCarthy*, Q. C., and Mr. *Creelman*, for appellant, and Mr. *James Bethune*, Q. C., and *L. R. Church*, Q. C., for respondents.

RITCHIE, C. J.:—

The bill in this case was filed in the Court of Chancery on the 4th May, 1880, on behalf of the appellant, *Peter McLaren*, against the respondents, *B. Caldwell & Son*, to restrain them passing or floating timber and saw logs through portions of the main branch of the *Mississippi* river and its northern tributaries, *Louse* creek and *Buckshot* creek, where these streams passed and flowed through the lands of the appellant and over the dams, slides, and improvements owned or constructed by the appellant along these streams.

Vice-Chancellor *Proudfoot*, on the 4th of May, granted an *ex parte* injunction to the plaintiff (appellant), and on the 21st day of May, 1880, continued the injunction until the hearing of the cause.

From this decision the defendants appealed to the Court of Appeal, and on the 2nd of June, 1880, by a judgment of that court, the injunction granted was dissolved. The defendants thereupon answered the plaintiff's bill in the usual course on the 11th of August, 1880. Replication was filed on the 3rd of September, 1880.

The cause came on for examination of witnesses and hearing before Vice-Chancellor *Proudfoot*, at *Brockville*, on the 27th of October, 1880, and afterwards at *Perth*, on the 8th of December, 1880, and was continued until the 16th of December, on which day the Vice-Chancellor pronounced a decree in favour of the appellant.

From this decree the defendants appealed to the Court of Appeal for *Ontario*, and their appeal was allowed.

From this decision the plaintiff now appeals to this court.

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At the time the bill was filed the respondents were proceeding to drive their logs, in all some 18,000 logs, through all the appellants improvements on *Louse* creek and *Buckshot* creek, and on the *Mississippi*, all of which flow through the lots of land of which the appellant was, and still is, the owner in fee simple.

The plaintiff contends that the stream in question where it passes through his property is non-navigable, and non-floatable at all seasons of the year,—that he has, by artificial means placed on his own property, enabled lumber to float over his property through the course of said stream, and the main question at issue between the parties is this:—Has the appellant the legal right to prevent (as he seeks by his bill to do) the respondents driving their logs through his lands, and in doing so to utilize the improvements owned by him, on and along the streams in question? or, are those streams part of the public highway, and, therefore, open to the free use of the respondents in common with the appellant and the public generally?

It cannot be disputed, I think, that if those portions of the streams in which plaintiff's improvements were made, are incapable of being navigated or floated at any time of the year, and the fee simple of the beds of such streams is in plaintiff, the public at common law have no right whatever to enter on such private property, and plaintiff, having the absolute title to the same, has the sole right to deal with the bed and soil of the stream, and to place such improvements, constructions and erections thereon as he may choose. While it seems to be admitted that the public have no right to enter on such property and make improvements thereon, it is claimed that in *Ontario*, when streams of the character mentioned are rendered capable of being navigated through the instrumentality of such improvements made by the owner of the soil, whereby lumber

can at freshet times be floated through private property, the public have an absolute common law right to use such improvements and to deal with the stream, as if the same had been naturally floatable, that is, without the aid of artificial improvements; and this right it is also claimed, is conferred on the public by virtue of the statutory enactments of the Province of *Ontario*.

The Act 12 *Vic.*, cap. 87, is intituled, "An Act to amend an Act passed in the Parliament of *Upper Canada* in the ninth year of the reign of his late Majesty King *George* the Fourth, intituled 'An Act to provide for the construction of aprons to mill dams over certain streams in this Province, and to make further provision in respect thereof.' "

Section 5 of this Act is in the following words:

And be it enacted that it shall be lawful for all persons to float saw logs and other timber rafts and craft down all streams in *Upper Canada* during the spring, summer and autumn freshets; and that no person shall, by felling trees, or placing any other obstruction in, or across such stream, prevent the passage thereof; provided always that no person using such stream, in manner and for the purposes aforesaid, shall alter, injure or destroy any dam or other useful erection in, or upon the bed, of or across any such stream, or do any unnecessary damage thereto or on the banks of such stream; provided there shall be a convenient apron, slides, gate, lock or opening in any such dam or other structure made for the passage of all saw logs and other timber rafts and crafts authorized to be floated down such streams as aforesaid.

The Act 12 *Vic.* c. 87, remained in force until 1859, when it was repealed by Consolidated Statutes of *Upper Canada*, at page 462.

It was, however, substantially re-enacted during the same year as chapter 48 of the Consolidated Statutes of *Upper Canada*, of which Act the above section 5 is made to comprise sections 15 and 16. This Act is intituled 'An Act respecting mills and mill dams." Section 15 of chapter 48 is as follows:—

All persons may float saw logs and other timber, rafts and craft

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down all streams in *Upper Canada* during the spring, summer, and autumn freshets, and no person shall, by felling trees or placing any other obstruction in or across any such stream prevent the passage thereof.

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There can be no doubt that statutes which encroach on the rights of the subject, whether as regards persons or property, should receive a strict construction, and if a reasonable doubt remains, which cannot be satisfactorily solved, the subject is entitled to the benefit of the doubt, in other words he shall not be injured or affected in his person or property, unless the intention of the Legislature to interfere with the one or take away the other is clearly and unequivocally indicated.

At the very outset, if defendants' contention can be maintained, we are met with the singular incongruity of the Legislature enacting that "it shall be lawful for all persons to float saw logs and other timber rafts and crafts down," or "that all persons may float saw logs and other timber rafts and crafts down" streams that from the nature of the streams themselves it is impossible saw logs, &c., could be floated down; in other words it seems most unreasonable to suppose that the Legislature intended to legislate that it should be lawful to do what in the nature of things could not be done. Is it not much more reasonable to assume that the Legislature was dealing with a subject-matter capable of being used in the manner in which it is declared it shall be lawful to use it, and that in this view the language of the Legislature had reference to all streams on or through which saw logs and other timber, &c., could either during the spring, summer or autumn freshets be floated?

The object of the Legislature was, in my opinion, in the interest of the timber business, not to interfere with or take away any private right, but to settle by statutory declaration any doubt that might exist as to

streams incapable of being navigated by boats, but capable of floating property, such as saw logs and timber, only at certain seasons of the year, viz.: during spring, summer, or autumn freshets; thereby classing such streams as public highways, by adopting a test of navigability judicially recognized and acted on in the Province of *New Brunswick*, as far back as 1842, and in some, though not in all, of the American States, as applicable to the circumstances and necessities of this country, and which circumstances do not exist in *England*, where no such test prevails, thus affirming and settling a new and debatable point, viz.: the right of the public to float timber, &c., down streams floatable only in freshet times, and the Legislature having thus established the right proceeded to prevent the obstruction of the same; but, nevertheless, subject always to the restrictions imposed in respect to erections for milling purposes on such streams, and the action of the Legislature was not intended to interfere with private property and private rights in streams not by nature floatable at any season of the year.

If the Legislature contemplated what is now contended for, and intended the enactment to apply to streams not-floatable at all seasons, as there is no pretence for saying that the Legislature has conferred any right on the public to enter on private property on any such non-floatable streams, and make it floatable, and as a non-floatable stream cannot be made practically floatable by operation of law, what was the specific legal right conferred on the public by the statute? Is it not obvious that the only effect of the enactment could be to confer on the public the right to use private property and the improvements made thereon by the proprietors thereof without making any compensation therefor? From this section is it possible to infer any such intention? Had any such intention been present

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to the mind of the Legislature it should have been, and I think it would have been, clearly and unequivocally expressed. To attribute to the Legislature an intention so unreasonable and unjust is not justifiable unless the language is so direct and unambiguous as to admit of no doubt or other construction.

I am at a loss to appreciate the force of the illustration given by Mr. Justice *Patterson* of the statutory highways of *Ontario*, as being at all analogous to the case of non-floatable streams. It seems entirely to beg the question No doubt, if the Legislature had, in so many words, declared all streams, whether or not navigable or floatable, common or public highways, then doubtless the improvements or the removal of obstructions on such common or public highways, could in no way interfere with their common and public character. But this leaves us just where we were, and in no way that I can see solves the question we have to determine, viz.: whether or not the Legislature has so declared streams not floatable, public highways. It may so happen, and no doubt has happened, that in grants of land, allowances for roads therein dedicated as highways, on actual survey, and on the laying out of the roads, have proved, from the natural character of the ground, impassable as highways. But it is clear that any such case must be exceptional and accidental.

It cannot, I think, be supposed that the Legislature would, knowingly, dedicate by law, over private property, common and public highways, which could never be used as such by reason of the land being by nature totally unfit for and impassable as a highway. On the same principal, it seems to me as equally unreasonable to suppose that the Legislature intended simply to declare it lawful for all persons to float sawlogs down streams in freshet times, through which, at

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such times, no logs could by any possibility be floated. I am likewise quite at a loss to understand how such a mere declaration, impossible to be acted on, could encourage the lumber trade or afford any facilities to parties engaged in the lumber trade in conveying their rafts to market.

Then as to the right to use the improvements of a proprietor by which he has made the stream floatable. The proprietor of a non-floatable stream who makes it floatable for his own use, does no more than if he made a canal through his property. He does not interfere with his neighbor; he takes nothing from the public, who can neither use the stream as it is, nor improve it, except by the permission of the proprietor, and as to whom, having no right or property therein, the improvement of the proprietor does no wrong, and who are placed in no worse position by the owner's refusal to permit them to be used than they were in if no such improvement had been made.

It has been urged that to allow an individual to shut up a stream a hundred miles long because he may own small portions of the stream not floatable in a state of nature would be most unreasonable. But it seems to be forgotten that it is not the individual who shuts up the stream, it is closed by natural impediments which prevent such portions being used for floatable purposes, and as it is admitted the public have no right to enter on such portions and erect improvements whereby the stream in those parts may be made navigable or floatable by reason of the same being private property, the stream is as effectually shut up by a refusal to permit an entry and improvements to be made as if the proprietor himself made the improvements and prohibited the use thereof by the public. If the use of the non-floatable portions of a stream is as necessary for the carrying on of lumbering operations as has been urged,

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the obvious means of securing a right to use private improvements would be to obtain by payment of an adequate consideration the proprietor's permission, or, if the streams are unimproved, to secure from the proprietor the privilege of making such necessary improvements, or, failing the ability to accomplish this, if the development of the public domain, the exigencies of the public, or the business of the country, is of such paramount importance in comparison with individual loss or inconvenience as to require that private rights should give way to the public necessity, the remedy must be sought at the hands of the legislature through the instrumentality of expropriation, with suitable and full compensation under and by virtue of the right of eminent domain. There is, in my opinion, nothing whatever to justify the conclusion that the legislature intended under this provision to exercise its right of eminent domain, and expropriate the property of the owners of streams not by nature navigable or floatable, or any property or improvements the owner might place or make thereon.

But, in my opinion, as I have suggested, the Legislature merely intended that all streams through which lumber could pass, whether all the year round, or only during the freshet times, should, for the purposes of the lumber trade, be common and public highways, but did not intend thereby to enact that streams through which lumber could not pass, even in times of freshets, should be common and public highways, still less that sluiceways and improvements on private property, through which, in its natural state, lumber could not be passed, should become subject to public uses any more than a canal or railroad dug or constructed on private property round a natural obstruction.

The case of *Harod* v. *Worship* (1), is somewhat

(1) 1 B. & S. 381.

analogous. At any rate principles are therein enunciated very applicable to the present:

The Great Yarmouth Haven Act, 1835, sec. 76, subject to a penalty any person who shall place on any space of ground immediately adjoining to the Haven and within ten feet from high water mark, any goods, materials or articles, so as to obstruct the free and commodious passage through or over the same, or who shall break down or remove any quay head or river bank next adjoining such Haven for the purpose of forming a dock, without making and maintaining a foot bridge over the same. By the Great Yarmouth Haven Improvement Act, 1849, sec. 18, the commissioners of the Act shall twice in the year inspect the public right or rights of way, in and along both shores of the Haven, and shall take all necessary proceedings to abate or remove every encroachment made on such right or rights of way. Upon appeal against a conviction under the former enactment, a case for the opinion of this court stated that the appellant who occupied a boat building yard, which sloped down to the Haven, placed three boats on the part of the yard immediately adjoining the Haven, and within the space of ten feet from high water mark, so as to obstruct the free and commodious passage over the same. There was no public right of passage there. Held, by *Cockburn*, C. J., and *Crompton* and *Blackburn*, JJ., that a right of way was not given by sec. 76 of the Great Yarmouth Haven Act, 1835, and that the section only applied where a right of way existed, and therefore that the appellant was not properly convicted. *Wightman*, J., *dissentiente*, on the ground that the section was intended to secure a passage free from obstruction along the side of the Haven.

*Cockburn*, C.J.:—

I adhere to the opinion which we intimated when the case was before us in last Michaelmas Term, namely that s. 76 of Stat. 5-6 *W. IV.* c. xlix does not create any right of passage where none existed at the time of the passing of the Act. The offence of which the appellant has been convicted is that of placing materials within ten feet of the haven of *Great Yarmouth*, so as to obstruct the free and commodious passage through and over the same. In fact there was not at the time of the passing of the Act, any right of passage for the public over it: therefore, unless the Act created the right, the appellant could not be convicted of an obstruction of it within s. 76.

It is argued that the effect of s. 76 is to give a right of passage over the space in question for using the haven; and that s. 18, of Stat. 12-13 *Vic.* c. xlviii, by which the Commissioners of the Act are authorized and required to inspect the public rights of way, in and along the

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shores of the *Haven*, and are required to take proceedings to abate or remove encroachments on such rights, confirms that construction. But it is a canon of construction of acts of parliament, that the rights of individuals are not interfered with unless there is an express enactment to that effect, and compensation is given to them, and it would militate against the canon and seriously interfere with private rights, if we held that the enactment in s. 76, carried into it, by implication, a right by the public to pass over the space in question. I think the legislature meant that both s. 76 of Stat. 5-6 *W. IV.* c. xlix and s. 18 of Stat. 12-13 *Vic.* c. xlviii should be applied to those places where a public right of way already existed, and not where previously there was no right of way. The effect of not so limiting the application of those enactments would be, that whereas there are many private grounds along the shore of the *Haven*, a right could be given by implication to the public to interfere with and remove private walls and pass over private property; which could not be intended, without compensation. Therefore I am of opinion that s. 76 of Stat. 5-6 *W. IV*, ch. xlix, must be limited to the cases in which a right of passage has been enjoyed by the public.

*Wightman*, J.:—

The section says nothing about obstructing a right of way; but it prohibits, under the penalty of £5 any person placing any goods, materials, or articles whatsoever upon the ground immediately adjoining the *Haven*, "so as to obstruct the free and commodious passage "through or over the same." Whoever may have a right to go over the adjoining land, and for whatever purpose and however that right may arise, is to have a free passage by the terms of the section, which provides that a clear space of ten feet is to be left. The words are very strong, and it is, I think, very difficult to get over them. I admit that there may be a difficulty as to their conferring upon the public a right of way over the land, and I do not know to what extent such a right may be given, or whether it is given at all; nor do I know that there was any reason for the enactment, except that for the general purposes of the *Haven*, it was considered expedient to keep a space clear at the side of it; but the obstruction is prohibited in express terms.

*Crompton*, J.:—

The other construction is an interference with private rights without any compensation to individual owners; and we ought to see clearly that such was the inteution of the legislature before we adopt that construction. I cannot see that the statute gives a public right of passage of ten feet width all around the *Haven*.

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*Blackburn*, J.:—

It is important that there should be rights of passage along the sides of this ancient *Haven*, and it is very likely that there should be, though not on every part. Taking s. 76 by itself, the first part of it must be construed by the respondent, either as declaring that there is, and shall be a free and commodious passage all round the *Haven*, that is, giving the right and imposing a penalty for obstructing it, according to which construction the section takes away a private right without giving compensation, or, if it does not give a free and commodious passage, it must be construed, as enacting that the space is to be kept open though no person could use it, and though there was no right of way at the time of the passing of the Act. So also as to the second part of the section, which subjects to a penalty any person who forms a dock on the side of the *Haven* without making and maintaining a footway bridge over it, we cannot suppose that the legislature would order a safe foot bridge to be made and maintained unless foot passengers had a right to go there: and if they had it not, the respondents must contend that the legislature gave it. But I agree with the Lord Chief Justice and my brothey *Crompton* that we should not construe that section so as to interfere with private rights. The words of that section, if literally read, bear the construction put upon them by my brother *Wightman*, but that would subject a person to a penalty for doing an act upon his own land. I think we must construe the section as imposing a penalty for doing an act of obstruction at those places where a public right exists.

I am very much strengthened in the conclusion at which I have arrived by the weight of judicial authority in *Ontario*.

The question appears to have been raised and determined as far back as 1863 in the case of *Boale* v. *Dickson* (1), and by that case the slides in question appear to have been put up and used as private property on a non-floatable stream for twenty years. This case affirmed the proposition that the legislation in question "extends only to such streams as in their natural state will without improvements during freshets permit saw logs, timber, &c., to be floated down them." The judgment in this case was prepared by *Draper*, C. J. and

(1) 13 U. C. C. P. 337.

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adopted as the judgment of the court by Chief Justice *Richards* and *A Wilson* and *J. Wilson* JJ. This case was acted on in 1865, by the unanimous judgment of the Common Pleas, in *Whelan* v. *McLachlan* (1), and was again affirmed in *McLaren* v. *Bucke* (2), by *Hagarty*, C. J., *Gwynne* and *Galt*, JJ.

In the present case we have V. C. *Proudfoot*, while considering himself bound by the decision in *Boale* v. *Dickson*, acting on it, but expressing no doubt as to its soundness, and the decision of *Spragge*, C.J. and *Patterson* and *Morrison*, JJ., overruling these decisions, and *Burton*, J., again affirming them, so that I find there are in fact three Chief Justices and five Justices in support of the conclusion I have arrived at. One Chief Justice and two justices taking a different view.

Then again, I think the conclusion I have come to is much strengthened by the circumstance that by the Revised Statutes of *Ontario*, the Legislature in 1877, after all these decisions, re-enacted chapter 48, of the Consolidated Statutes of *Upper Canada*, passed in 1849, in almost precisely similar words. Considering then, that up to this period all the judicial decisions of all the Judges, with no dissenting voice, from 1863 to 1876, place on this enactment the construction now contended for by the plaintiff, if such construction was so clearly contrary to the intention of the Legislature, so opposed to the development of the Crown domain, so antagonistic to the interest of the public, and so destructive to the lumber business of the country, as has been so strenously urged before us, can it be supposed that the legislature in revising the statutes in 1877, after a series of decisions and only one year after the latest decision, would not have corrected the judiciary, either by a declaratory act, or by new legislation, and have enacted in unmistakable language that private rights on non-

(1) 16 U. C. C. P. 102. (2) 26 U. C. C. P. 539.

floatable streams should be subject to private user, and more particularly so, if such user was to be without compensation. Not having done so, does not this case come with great force within the canon of construction that where a clause in an Act of Parliament, which has received a judicial interpretation, in a court of competent jurisdiction, is re-enacted in the same terms, the legislature is to be deemed to have adopted that interpretation? In this case, I think there is unusual force in treating the re-enactment of this section as a legislative approval of the judicial interpretation it has received; and for holding that such interpretation should not be shaken, when it is considered that the legislature, from such judicial proceedings, must have known that property was being purchased and held and investments made, based on the claim that by such judicial decisions private rights to property had been established and secured. As was said by Lord *Ellenborough* in *Doe d. Ottley* v. *Manning* (1), a long time ago:

> It is no new thing for the court to hold itself concluded in matters respecting real property by former decisions upon questions in respect of which, if it were *res integra* they would probably have come to very different conclusions, and if the adhering to such determinations is likely to be attended with inconvenience, it is a matter fit to be remedied by the legislature which is able to prevent the mischief in future, and to obviate all inconvenient consequences which are likely to result from it as to purchases already made.

At the trial defendant claimed the right to show, with a view to the correct construction of the statute, that all the streams in *Upper Canada*, now *Ontario*, at the time of the passing of these various acts, were non-floatable without artificial improvements and aids of some kind.

This evidence was rejected, and he now claims that if the judgment of the Court of Appeal is reversed, there should be a new trial with a view to the recep-

(9) 9 East 71.

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tion of evidence of this character, and also on the groun that the Attorney General should be a party to the suit

With respect to the objection that the learned Vice Chancellor was not justified in the conclusion he arrive at on the question whether the streams in question were when in their natural state, navigable or floatable fo saw logs, during the spring, summer and autum freshets, the appellant contends that it should b answered in the negative, and the respondent contend that it should have been answered in the affirmative.

The learned Vice-Chancellor, after hearing the evi dence of forty-six witnesses called by the appellant an fifty-six called by the respondents, came to the conclu sion, which is stated at page 97 of the case, in the fol lowing words:

> After carefully weighing all the evidence that has been given her and at *Brockville*, it seems impossible to escape the conviction, a least I cannot, that without these artificial means (referring to th appellant's improvements) neither the *Mississippi*, nor *Louse*, no *Buckshot* creek, can be considered floatable, even in freshets o high water.

Neither of the judges of the Court of Appeal appea to have questioned the finding of the learned judg on this point, and I can find nothing to justify me i saying that the learned Vice-Chancellor arrived at wrong conclusion, still less to justify me, sitting in thi last Court of Appeal, in saying that he was so mani festly wrong that his verdict should be set aside and new trial had.

It is rather inconsistent in defendant claiming a new trial on the ground that he was not permitted to show that all the streams in *Ontario* were not floatable, whe he in the same breath avers and asks us to say th Judge was wrong, under the evidence, that the stream in question was naturally non-floatable, when he allege the evidence showed it floatable, and as such a public

highway, and to grant a new trial on these contradictory grounds.

Is it not obvious that, to make the construction of the statute dependent on the weight of evidence as to the floatable or non-floatable character during freshet times of all the rivers in *Ontario*, would necessarily involve the investigation and determination of the character of each and every stream in the province, and which, if judged by the evidence offered in respect to that in question in this case, and which involved the examination of 102 witnesses whose testimony covers some 819 folio pages with some twenty or thirty maps or plans, clearly show that the trial of such a side issue would be interminable and impracticable; but I know of no principle of law by which a party seeking to protect his rights of property can be called on or could be expected to be prepared with evidence to try out such interminable side issues with the sole view of influencing the judgment of the court in the construction of the language of an Act of Parliament.

As to the Attorney-General being made a party, if this is private property and not a public highway, the Attorney-General has no more to do with the question than any other member of the community, and there is no more reason why he should be made a party than in any other controversy between private individuals in relation to the rights of private property; to make the Attorney-General a party would be to admit just what plaintiff denies.

No judgment in this case can prevent the Attorney-General from protecting the public rights and interests in public highways, wherever he can show they have been infringed.

For these reasons I have come to the conclusion that the appeal should be allowed, and the decree of V. C,

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*Proudfoot* be restored with costs in this court and in the court below.

STRONG, J. :

The finding of the learned judge before whom this case was tried, that those parts of the river *Mississippi* and of *Louse* and *Buckshot* creeks, at which the appellant has constructed his improvements, were not originally and in their natural state capable of being used, even in times of freshets, for the transportation of sawlogs or timber, was not on the argument of this appeal demonstrated to be erroneous, and a careful perusal of the evidence has led me to the conclusion that an attempt to impugn that finding would have been hopeless, even if we could have entirely disregarded the rule so often laid down in this court, that the finding of the judge before whom the witnesses were examined is, in the case of contradictory evidence, entitled to the strongest possible presumption in its favor. We must, therefore, assume the facts to be as they are stated in the first declaration with which the decree under appeal is prefaced, namely :—

That those portions of the three streams referred to in the plaintiff's bill of complaint, where they pass through the lands of the plaintiff, when in a state of nature were not navigable or floatable for saw-logs and other timber rafts and crafts down the same.

The appellant's title to the lands upon which he has made the improvements in question, including the beds of the respective streams, was not seriously disputed and has been established by the production of his title deeds. The question for this court to determine is, therefore, purely one of law ; namely, whether, either at common law, or under the provisions of the revised statutes of *Ontario*, chapter 115, sections 1 and 2, the respondent has the right of passage which he claims for his saw-logs and timber through the artifi-

cial waterways constructed by the appellant upon the streams in question. It will be convenient in the first place to consider if the respondent has at common law and irrespective of the statute any such right as he thus claims.

There can be no doubt that the law in respect of the right of the public to use as highways all streams of sufficient capacity to afford the means of transportation for boats, rafts, logs or timber, was correctly stated by *Macaulay*, C.J., in his very learned judgment in *Reg.* v. *Meyers* (1). In that case, after examining with great care many English and American and some *New Brunswick* authorities, and after having given full consideration to a doctrine which seemed to be countenanced by some of the English decisions, that in a fresh water river, above the ebb and flow of the tide, which is technically called a non-navigable river, a public right of navigation can only exist by prescription arising from long continued usage, the learned Chief Justice thus states his conclusion:

> To make it depend upon usage implies that however navigable in fact, a public easement does not arise *primâ facie*, but is to be acquired by enjoyment, and, if so, the question must become one of time and user combined in a sufficient degree to create and confirm the right. But this is not what I understand to be laid down in *Hale de jure Maris*, and approved in subsequent authorities, wherefore I prefer the conclusion that in the application of the common law to *Upper Canada* in substitution for the old law of *Canada* it should depend upon the fact of natural capacity and not the fact of usage.

This case of *The Queen* v. *Meyers*, decided nearly thirty years ago (in February, 1853), has never since been judicially controverted or questioned, and might, therefore, considering the high authority of the court which decided it and the length of time it has stood unchallenged, be well considered as by itself a rule of

(1) 3 U. C. C. P. 305.

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the common law applicable to *Upper Canada* upon this question, even if its doctrine had not, as I shall presently show that it has, the support of numerous reported cases decided in the American Courts and the approbation of text writers of the highest authority. Mr. *Angell* in his treatise on Highways (1) states the result of the American decisions, as follows:

> In the *United States* it is held that the right of public servitude in a stream depends not upon its navigability, in the common law sense of the term, but upon its capacity for the purposes of trade, business and commerce. Any stream capable of being used in the transportation of any kind of property to market, whether in boats, rafts or single pieces, is a public stream and subject to the public use. The ebb and flow is not the only test, nor is the public easement always founded upon usage or custom; the test is, whether there is in the stream capacity for use for the purpose of transportation valuable to the public; and in this view it is not necessary that the stream should have capacity for floatage at all seasons of the year, nor that it should be available for use against the current as well as with it; if in its natural state and with its ordinary volume of water, either constantly or at regular recurring seasons it has such capacity that it is valuable to the public, it is sufficient.

For these propositions the learned author cites numerous cases, decided principally in the courts of *Maine*, *Michigan* and *New York*, which fully sustain his text. *Morgan* v. *King* (2); *Moore* v. *Sanborne* (3); *Brown* v. *Chadbourne* (4); *McManus* v. *Carmichael* (5); *Treat* v. *Lord* (6); *Lorman* v. *Benson* (7); *Rhodes* v. *Otis* (8); *Stuart* v. *Clark* (9); *Dalrymple* v. *Mead* (10). To these authorities may be added that of Chancellor *Kent*, who states in his commentaries that when a river is navigable for boats or rafts the public have an easement therein, or a right of passage as over a public highway, and this, although the bed of the river is the

(1) Pp. 44-45.
(2) 18 Bar. 277.
(3) 2 Mich. 519.
(4) 31 Me. 9.
(5) 3 Clarke 1.
(6) 42 Maine 552.
(7) 8 Mich. 18.
(8) 33 Ala. 578.
(9) 2 Swan 9.
(10) 1 Grant 197.

private property of the riparian holders. It has scarcely been disputed in the present case that this is the correct view of the law, as it was held to have been in *Reg.* v. *Meyers*, and I refer to the authorities already mentioned rather as bearing upon the construction of the statute upon which the judgment of the court below was altogether founded, than as directly decisive of the present appeal. The right to the use by the public of all possible means of navigation in the transportation of produce and supplies is indeed so essential to the settlement of a new country that such streams may well be likened to ways of necessity, and the doctrine of the common law in recognizing them as highways rested on an analogy to the public right of passing over the private property of adjoining owners to avoid the dangerous or impassable portion of a public road.

In a case like the present, however, where the owner of the bed and the banks of a private stream, which, in the part of its course, is insufficient to afford a passage even for the floating of logs or timber in single pieces, has, by artificial means, made it navigable, such improved portion does not for that reason, and because it immediately adjoins parts of the stream which, being naturally susceptible of navigation, the public are entitled to use without compensation, become liable to a servitude for the benefit of the public as in the case of a stream naturally adapted to such a use. This is at once apparent if we consider for a moment the principle upon which the common law has made streams, originally navigable in their natural state, liable to this quasi-easement, which, as I understand it, is that this burden is imposed for the public benefit, whilst the property is vested in the Crown and passes to all subsequent private owners subject to it, whilst in the case of a stream made navigable by artificial construction, the imposition of such a public right of

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user would be to appropriate private property to public uses without compensation; an encroachment on proprietary rights, which the law not only never sanctions, but seeks in every way to avoid, in the case of positive written laws, by adopting strict and exceptional rules of construction. In *Wadsworth* v. *Smith* (1) the Supreme Court of *Maine* propounds the law on the point now under discussion as follows:

> If, therefore, *Ten Mile Brook* was naturally of sufficient size to float boats or mill logs, the public have a right to its free use for that purpose unincumbered with dams, sluices or tolls; and no man can thus lawfully incumber it without the public permission. But such little streams or rivers as are not floatable, that is, cannot, in their natural state, be used for the carriage of boats, rafts, or other property, are wholly and absolutely private; not subject to the servitude of the public interest, nor to be regarded as public highways, by water, because they are not susceptible of use as a common passage for the public. If the *Ten Mile Brook* be naturally a stream of this description, then, although *Wadsworth* and his grantor have at their own expense made it floatable by artificial means, it did not thereby become public. *Smith* had no common law right to improve it. It was private property—and when private interests are involved, they shall not be infringed without a satisfaction being made to the parties injured—and it does infringe private interests to suffer the public, without compensation, to pass over private property not being a common highway, inasmuch as it affects the inheritance of the owner.

See also *Dwinel* v. *Barnard* (2).

Having ascertained the state of the common law at the time of the passing of the statute, upon the proper construction of which the decision of this appeal must depend, I next proceed to consider the effect of the enactment in question. It is comprised in the two first sections of the R. S. O. ch. 115, which are as follows:—

> Sec. 1. So far as the legislature of *Ontario* has authority to enact, all persons may, during the spring, summer and autumn freshets, float saw logs and other timber, rafts and crafts down all streams; and no person shall, by felling trees or placing any other obstruction in or across any such stream prevent the passage thereof. Sec. 2. In case

(1) 2 Fairfield 278. (2) 28 Maine 554.

there is a convenient apron, slide, gate, lock, or opening in any such dam or other structure, made for the passage of saw logs and other timber, rafts, and crafts authorized to be floated down such stream as aforesaid, no person using any such stream in manner and for the purposes aforesaid shall alter, injure, or destroy any such dam or other useful erection in or upon the bed of or across the stream, or do any unnecessary damage thereto or on the banks thereof.

For reasons which I will state very concisely, I am of opinion that the words "all streams" in the first section did not, as the court below have decided they did, embrace artificially constructed private streams, such as the three streams in question in this case are at the points at which the applicant has by the expenditure of his own money made them navigable.

First, then, to give the words "all streams" the construction and application contended for would be to determine this appeal in direct violation of the sound and well recognized canon of construction which has prevailed for centuries, and been constantly approved and acted on by courts administering English law. The rule of construction in question is well stated by Lord *Blackburn* in the late case of *Metropolitan Asylum District* v. *Hill* (1), in the House of Lords, as follows:

It is clear that the burthen lies on those who seek to establish that the legislature intended to take away the private rights of individuals, to show that by express words or necessary implication such an intention appears.

Then, in order to comply with the rule or canon just referred to, it is incumbent on us to avoid the forbidden construction if it is possible to do so. Do we, then, find in the statute anything which compels us to read the words "all streams" as comprising streams in whole or in part artificially constructed?

This cannot be pretended, since nothing short of the express mention of such artificial streams would be a sufficient compliance with the first alternative of the

(1) 6 App. Cases 208.

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rule. And, equally, it cannot be said that there is a necessity for such a construction arising from implication, since nothing short of the fact that there existed no streams other than those artificially constructed to which the Act could apply would warrant such a violent presumption as the rules requires. It is clear, therefore, to my mind, that no other streams were intended than those which the law had already burdened with an easement in favor of the public, and with the use of which, therefore, the legislature might fairly be presumed to deal without compelling compensation to the owner. And I am of opinion that if any authority for this application of the rule referred to is required, the case of *Harrod* v. *Worship* (1) furnishes us with one. In that case an act of parliament having imposed a penalty on any person who placed articles on "any quay within ten feet of the quay head, or on any space of ground immediately adjoining the haven within ten feet from high water mark, so as to obstruct the free passage over it," it was held to apply only to ground on which there was already a public right of way, but not to private property not subject to any such right. Notwithstanding the comprehensive nature of the general terms used, it was not to be inferred that the legislature contemplated such an interference with the rights of property as would have resulted from construing the words as creating a right of way (2). The case just quoted appears to be even stronger than the present and fully warrants us in adopting a construction so restricted as to save the statute from operating in derogation of private rights of property.

Further, it would appear to me, that the true rule of the common law as to the public use of floatable streams being that which the decision in *Reg.* v. *Meyers* had decided it to be, as already stated, we must read

(1) 1 B. & S. 381. (2) Maxwell on Stats. 258.

the first part of the first section as merely enunciative of the common law, and as introductory to the second section by which an important qualification and abridgment of the public rights was authorized by the erection of mill dams, which would but for the statute have constituted public nuisances, and then we are to consider the second part of the first section prohibiting the felling of trees or placing obstructions as introduced *ex abundanti cautelâ* to prevent any undue extension of the permission to erect dams into a recognition of a right to erect other obstructions. To put it in a familiar form, we may consider the legislature as saying: "True it is "that by law all persons may float rafts and timber "down streams of sufficient natural capacity for that "purpose, and no person can lawfully place any obstruc- "tions in such streams, but it is hereby enacted that "hereafter such streams may be obstructed by mill dams, "provided sufficient aprons or slides are made in the "dams. But no other obstruction is authorized." I have no doubt that that was the sole object and intention of the Act, to restrict somewhat the rights of lumberers in the interest of mill owners; and in putting that construction upon it I feel confident that we in no way violate its spirit, but adopt a much more just and rational construction than if we held that, by the mere use of general words and comprehensive language, the legislature intended to authorize a gross violation of the rights of private property without in any way providing for compensation to its owners.

This is in effect the view of the statute which prevailed in *Boale* v. *Dickson* (1), which, I may say, was the decision of judges of such very high authority that even if I differed from the conclusion arrived at in that case, instead of entirely agreeing with it as I do, I should be extremely unwilling to overturn the rule of property

(1) 13 U. C. C. P. 337.

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law established by it after it has now stood unimpeached for twenty years, and after large sums of money have been expended in reliance upon its authority. Upon this point I refer to the observations of Lord Justice *Thesiger* in the case of *Pugh* v. *The Golden Valley Railway Co.* (1).

I am of opinion that the appeal must be allowed, and the order of the Court of Appeal reversed, thus restoring the decree of the Court of Chancery, with costs to the appellant in all the courts.

HENRY, J.:—

I take exactly the same view of this case as my learned brethren, and did not therefore consider it necessary to prepare a written judgment in this case. The law annexes to private property rights and privileges by which the owner of such private property can do with it what he pleases, provided he is not guilty either of a public or a private nuisance. That is one of the tests by which the rights of property, and of the owners of property, such as the appellant's, may be ascertained, and it is applicable to this case. The appellant in it is the legal owner of the streams and banks on which he undertook to construct dams and make certain improvements, and the only question is whether he had the right to the use of them exclusively. Under such circumstances, all we need inquire is, whether by the common law or by statute, his rights can be interfered with. Now I quite concur with the opinion just expressed by my colleagues as to what the common law is, and I am also of opinion that the legislature, when legislating in reference to streams and rivers in *Upper Canada*, only intended to make further provisions, that is to go a little beyond what might be considered the common law rights of the public, and provided for an easement whereby the public were authorized to use such

(1) 15 Ch. D. 334.

streams and rivers for the purpose of floating timber in times of freshet during the spring and fall. It might have been a question otherwise whether outside parties would have been entitled to use such streams and rivers, it being only practicable to use them during such periods, and during such freshets at such seasons the streams were naturally capable of being so used. As the case on the evidence comes before us with the finding of the learned judge before whom the issues were first tried, I have sought in vain for evidence to bring me to the conclusion that the streams upon which the improvements were made by appellant, were such streams as to come under the operation of the statutes. The question seems to me to resolve itself into these enquiries.

The only means of interfering with private property is by expropriation for public purposes or subjects. One private individual cannot say to another who has the sole right of user of his property:—"You have that property and I will force you to give me the use of it." He cannot compel the owner of such property to do so, even for a consideration offered to be given I know of no law that would give any such right. If, as it must be admitted, the appellant in this case cut a canal through his property, the law gives him the exclusive use of it, then, I do not see how the respondents can have any right to use the improvement made by appellant on these streams any more than he would have to use the canal. Taking this view of the case, I think the appeal should be allowed, and the decree of Vice-Chancellor *Proudfoot* restored.

TASCHEREAU, J.:—

I have arrived at the same conclusion, more especially for the reasons given by Mr. Justice *Gwynne*, whose notes I have had occasion to read.

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GWYNNE, J.:—

I find it impossible to arrive at any other conclusion upon the evidence in this case, than that arrived at by the learned Vice-Chancellor before whom the case was tried, namely, that in their natural state, and without the artificial means employed, and improvements made by the appellant, and those through whom he derives title, in the streams referred to at the places referred to, none of those streams were capable of being used for floating down logs and timber, even in times of freshets or high water, although the *Mississippi*, one of those streams below the places where the improvements upon it have been made, does come within the character of a stream navigable in fact.

That the appellant is seized in fee simple of the lands on either side adjoining the streams at the several places where the improvements have been made, is either admitted or sufficiently established in evidence. An objection taken to the evidence of his title to the lot adjoining the stream, at the place where the improvement called the "*Buck Stewart*" dam is erected, if there be anything in it affecting the absolute perfection of the appellant's title, cannot be entertained in this suit, for that the appellant was in possession of that land, *quâ* owner in fee at the time of the committal by the respondents of the wrong complained of, is not disputed, and such possession is sufficient title against the respondents who are wrong doers, unless they can establish their main contention, which is—that although the appellant may be seized in fee of the lands adjoining the several streams, at the places where the improvements have been made, still the beds of those streams are vested in the Crown for the public use, and that, in virtue of such seisin in the Crown, the respondents were entitled to float their logs and timber on the

streams at the places so alone made capable of floating logs and timber by the improvements referred to, without any interference whatever offered by the appellant; and this right is asserted upon the basis: Firstly, that as is contended, the beds of all streams, large or small, in the Province of *Ontario*, are vested in the Crown under the provisions of the French law, as prevailing in the Province of *Quebec*, which, as was alleged, is different from the law of *England* in this respect, and are subject to the same public rights of user as like streams in the Province of *Quebec*; and secondly, that at common law, or at any rate, by force and effect of the *Upper Canada* statute, 12 *Vic.*, c. 87, all persons have the right to use the streams in question at the places in question, for floating their logs and timber, without any molestation or interference upon the part of the appellant, notwithstanding that the streams were, at the places referred to, made capable of floating logs and timber solely by the improvements made and maintained by the appellant. Whether there is any difference between the laws of the Province of *Quebec*, and that of the Province of *Ontario*, in relation to streams of the character of those in question here, it is unnecessary to enquire; for that the Crown could, in *Upper Canada*, ever since the Act of 1791, constituting that Province, now *Ontario*, grant the beds of streams, such as those in question, and that a grant by the Crown, of land abutting on such streams, on either side, to one person, or to different persons, does, *primâ facie* in the former case, pass the whole bed of the stream, passing through the land granted, and, in the latter case, does pass to each grantee the bed of the stream *ad medium filum aquæ* opposite the land granted, never has been doubted in the courts of *Upper Canada*; and that there is, or ever has been any difference between the law of *Upper Canada* and the law of

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*England*, upon this point, is a contention which cannot be for a moment entertained.

In *Kains* v. *Turville* (1) the late Chief Justice *Draper* says:

> The law is too well settled to require any extended reference to authorities to establish the rule, that in streams and rivers which are not navigable, a description of land which extends "to the water's edge" or "to the bank," carries the grant or conveyance of the thread of the stream, and that the description continuing along "the water's edge" or "along the bank," will extend along the middle or thread of the stream, unless, indeed, there be some words forming part of the description or introduced by way of exception, which clearly excludes whatever may lie between the water's edge or the bank, and the *medium filum aquæ*.

I will only refer to two authorities, one English, the other American In *Wright* v. *Howard* (2), *Leach*, V.C., says:

> *Primâ facie*, the proprietor of each bank of a stream is the proprietor of half the land covered by the stream.

In *Tyler* v. *Wilkinson* (3) *Story*, J., says:

> *Primâ facie*, every proprietor upon each bank of a river is entitled to the land covered with water in front of his bank, to the middle thread of the stream.

Such has ever been held to be the law of *Upper Canada*, nor is there a dictum or suggestion of any judge to the contrary.

Now, as I have already said, it has been admitted or established in evidence, that the appellant, in right of title derived from the Crown, is proprietor of the lands abutting either sides of the streams in question at the places in question. Moreover, the descriptions contained in the Crown patents, granting the lands in question, have been produced, from which it appears that there is not contained in any of them any reservation of the beds of the streams or anything in qualifi-

(1) 32 U. C. Q. B. 17.

(2) 1 S. & S. 190.

(3) 4 Mason 400.

cation of the grant of such beds, which the grant of the lands abutting upon the streams carries with it. In determining this case, therefore, we must proceed upon the basis that the appellant is seized in fee of the beds of the streams in question, at the places where the several improvements for rendering the streams capable of floating logs and timber have been made.

That very learned judge, the late Chief Justice Sir *James Macaulay*, thirty years ago, in the *Queen* v. *Meyers* (1), after a careful review of the English authorities and those of the *United States*, and of *Rowe* v. *Titus* (2), and *Esson* v. *McMaster* (3), decided in the courts of the Province of *New Brunswick*, arrived at the conclusion, that in the application of the common law to *Upper Canada*, in substitution for the old law of *Canada*, when inland streams are proved to be in fact, and in their natural state, navigable, they are, *primâ facie*, public highways, by water, and that the public easement depends upon the fact of natural capacity, and not upon the fact of usage.

> It is [he says] the adaptation, [by which he means the natural adaptation,] of a stream to the purposes of navigation, and not the being adapted in use, that renders it a navigable river; and usage [he says] after all is but evidence to prove the fact of capacity in relation to the thing as affording the easement claimed therein.

And he concludes that since the Act of 1791, wherever an inland stream in *Upper Canada* is capable in its natural state of general and common use, as a highway by water, it is *jure naturæ* subject to such easement, being enjoyed by the public, and that when streams are capable in certain parts to be used as public highways, though not in others, by reason of interruptions from rocks, shoals, and other natural obstructions, causing what are called portages, such streams, although being incapable of being used

(1) 3 U. C. C. P. 305. (2) 1 Allen N. B. 329.
(3) 1 Kerr N. B. 501.

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continuously, are, in the portions capable of being used in a state of nature, highways, although they are not in the parts where, by reason of the impediments, they are incapable of being so used. According to the judgment of that learned judge, the public right to use inland streams in *Upper Canada* as highways depended upon the natural capacity of the stream to be used as such, and was confined to those portions of the streams which in their natural state were capable of being so used.

Now this judgment was pronounced four years after the passing of the Act of the Legislature of *Upper Canada* (1), and with a full knowledge therefore of the provisions of that Act, and from the whole judgment it is apparent that at that time, so recently after the passing of the Act, when the object of passing it would be fresh and present to the mind of the learned judge, it never entered into his head, that its objects or effect was to make private streams, which were not, in their natural state, capable of floating logs or timber, if made so by private enterprise, and a large expenditure of private capital upon private property, to become subject to an easement in the public, through and over the works and property of the person whose enterprise and capital had so enlarged the capacity of the streams, or that any person so improving the capacity of a stream, within the limits of his own property, as to give to the stream a capacity to float logs and timber, which by nature it had not, should be adjudged to be dedicating the works and improvements so made to the public use. Referring to the provincial statutes relating to the subject, he says:

> Some of those Acts are adapted to waters strictly private, and speak of dams legally made, which they could not be in obstruction of public highways by water; and others are intended expressly

(1) 12 Vic. ch. 87.

to authorize dams in streams manifestly regarded as public navigation, but in which the public interests are protected, if not promoted, by requiring the construction of locks, to be freely used, exempt from tolls.

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The Court of Common Pleas at *Toronto*, in three cases, namely, *Boale* v. *Dickson* (1), *Whelan* v. *McLachlan* (2), and *McLaren* v. *Buck* (3), has held that the 5th section of 12th *Vic.*, ch. 87, the section relied upon by the respondents here, refers only to such streams as in their natural state would, without improvements, during freshets and high water, permit saw logs and timber to be floated down them, and not to streams which, not having such natural capacity, have been given such capacity by the expenditure of capital by private persons upon their own property. This view appears to me to accord with the opinion of Sir *James Macaulay*, to be gathered from his judgment in the *Queen* v. *Meyers*, above referred to, and hitherto no doubt has ever, in the judgment or argument of any reported case, been cast upon the soundness of the above judgment bearing expressly upon the point; however, in the case now before us, the Court of Appeal for *Ontario* (Mr. Justice *Burton* dissenting) has held that the above decisions are erroneous, and in effect that the respondents, or any other person, have perfect right, without any permission, molestation or interruption from the appellant, to use the improvements made by him in the streams passing through his property, by which improvements alone the streams were given a capacity to enable them to float logs and timber. Apart from the imputation of arbitrary interference by the legislature with the rights of private property, without compensation, and the disregard of the established canon for the construction of statutes, which are claimed to have the effect of

(1) 13 U. C. C. P. 349. (2) 16 U. C. C. P. 110.
(3) 26 U. C. C. P. 549.

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extinguishing private rights in the assumed interests of the public, which such a construction involves, a careful examination of that statute and of other statutes of the Legislature of *Upper Canada*, bearing upon the subject, leads, I think, to the clear conclusion that the judgment of the Court of Appeal for *Ontario* cannot be upheld.

The 9th *George IV.*, ch. 4, which, as appears from its preamble, was passed, not only to give facilities to lumberers, but for the protection also of fish in certain streams, enacted that after the 1st May, 1829, every owner of any mill dam, which is, or might be legally erected, or where lumber is usually brought down the stream, on which said mill dam is erected, or where salmon or pickerel abound therein, should erect a good and sufficient apron or slide, in such dam of certain dimensions, specified in the Act in proportion to the width of the stream. The expression in this Act "where lumber is usually brought down the stream," plainly, to my mind, indicates the intention of the legislature to have been, in so far as the interests of persons floating logs, etc., down the streams was concerned, to limit the application of the Act to such streams as lumber was usually, that is in a state of nature, floated down, the object of the Act being to prevent the obstruction of streams having sufficient capacity to float lumber, and not to provide means to enable lumber to be floated down streams, not having by nature such capacity. The Act 2 *Vic.*, ch. 16, which was to prevent the felling trees into certain rivers mentioned therein as dangerous to mill dams and bridges, and impeding the navigation of the named streams, has no application to the present case; neither has 7 *Vic.*, ch. 36, which was passed to prevent obstructions in rivers and rivulets in *Upper Canada*, occasioned by persons throwing slabs, bark, waste stuff, or other

refuse of saw mills, stumps, and waste timber, or leached ashes into the rivers or rivulets of *Upper Canada*; neither has 10th and 11th *Vic.*, ch. 20, which was passed to explain and continue 7th *Vic.*, ch. 36, for by 14th and 15th *Vic.*, ch. 123, which was passed to explain the two latter Acts, it was expressly enacted that neither 7th *Vic.*, ch. 36, nor 10th and 11th *Vic.*, ch. 20, did, nor did any part of these Acts, extend to any river or rivulet wherein salmon or pickerel or black bass or perch do not abound, so that these Acts were plainly passed for the protection of those fish.

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The 12th *Vic.*, ch. 87, is the Act upon which the judgment of the Court of Appeal in this case is rested. That Act, which was passed for the purpose of amending 9th *Geo. IV.*, ch. 4, in its preamble, recites that "it is necessary to declare that aprons to mill dams, which are now required by law to be built and maintained by the owners and occupiers thereof, in *Upper Canada*, should be so constructed as to allow a sufficient draught of water to pass over such aprons as shall be adequate in the ordinary flow of the stream, to permit logs and other timber to pass over the same without obstructions," and it enacted that from and after a day named it should be the duty of each and every owner or occupier of any mill dam, at which an apron or slide is by the said Act (9th *George IV.*) required to be constructed, to have altered and, if not already built, to have constructed, such apron or slide, so as to afford depth of water sufficient to admit of the passage over such apron or slide, of such saw logs, lumber and timber as are usually floated down such streams, and in the 5th sec. it was enacted, that it should be lawful for all persons to float saw logs and other timber, rafts and craft down all streams in *Upper Canada*, during the spring, summer and autumn freshets, and that no person should by felling trees, or placing any other obstruction in or across

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such streams, prevent the passage thereof. Now this Act, by its preamble and first enacting clause, is expressly limited in its application to mill dams at which an apron or slide is by 9th *George IV.*, c. 4, required to be constructed. This language involves a legislative recognition of the fact that there might be erected mill dams over streams, where no apron or slide was required to be constructed by 9th *George IV.*, ch. 4, and a reference to the Act shows that in point of fact, it did not require an apron or slide to be constructed in any mill dam erected across a stream where salmon or pickerel did not abound, unless the stream was one whereon lumber was usually, that is, as it appears to me, in a state of nature, brought down; for lumber could not be usually floated down a stream, which in a state of nature was incapable of floating the lumber, so as to be brought down. The Act 12th *Vic.* ch. 87, recites its object to be to provide that aprons required to be constructed by 9th *George IV.*, ch. 4, should be so constructed as to be adequate in the ordinary flow of the streams to permit saw logs and timber to pass without obstruction, plainly indicating, as it appears to me, the intention of the legislature to have been, to provide that streams, by nature capable of floating down logs and lumber, should not be prevented from doing so even by mill dams. The enacting clause therefore provides, that the apron or slide shall be so constructed, as to afford depth of water sufficient to admit of the passage of such logs, lumber or timber, as are usually floated down such streams, wherein such dams are erected, still referring to the streams as are referred to in the preamble, namely: streams down which, but for the obstruction caused by the mill dam, the timber usually was, and so could be, floated down. The 5th section appears to me to have been added lest the term "usually floated down," should be construed to have a limited

application, namely; to such streams only as during the whole year were used, or were capable of being used, for floating logs, etc., and the object of the section was, inasmuch as there had not been in *Upper Canada* any practical decision as to what were the rights of the public, in streams capable of floating timber in periods of freshets, by the common law, as applied to the condition of *Upper Canada*, to declare by legislative enactment, that in all streams, during periods of freshets, the public should have the right (which, however, could be exercised only if the condition of the streams by nature would admit of it), of floating down logs and timber and that no person should by any obstruction interfere with the exercise of such right, and which but for such obstruction could have been exercised:—a right which four years afterwards, the Court of Common Pleas, in *The Queen* v. *Meyers*, for the first time in the *Upper Canada* courts, declared that the common law, as applied to the peculiar condition of *Upper Canada*, was sufficiently elastic to secure, as a right existing *jure naturæ* and not depending on the fact of user and acquirable only by prescription.

It is impossible to conceive that the legislature contemplated, by this language, to declare that, and, in my judgment, the language used is not capable of the construction that, it should be lawful for all persons during the period of freshets, to float logs, rafts, etc., etc., down streams which had not capacity sufficient to enable logs, rafts, etc., to be floated down them, even during freshets; or to prohibit persons from erecting dams, within the limits of their own property, over streams not having by nature such capacity, even during freshets, unless subject to the consequence that in the event of any such dam having the effect of making the stream, which by nature was incapable of floating logs, to become capable of being used for that purpose,

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as it passes through the property of the person erecting the dam over the stream, of the bed of which he was seized in fee; the stream so made passable through private property should *eo instanti* of the artificial capacity being given to it, become subject to the burthen of being a highway, open to the public, without the consent, molestation, or interference of the person whose enterprise and capital expended upon his own property created the artificial capacity of the stream, and without any compensation whatever to the owner of the property, who had constructed upon his own property the work which gave to the stream such artificial capacity. Such a construction cannot, in my opinion, be given to the Act, without an utter disregard of the plainest principles of justice, and of every principle ordinarily applied to the construction of statutes. But that the legislature in point of fact never did contemplate anything so unjust is apparent from the 16th *Vic.* ch. 191, and 18th *Vic.* ch. 84, by which the former Act was amended, and extended to *Lower Canada.* By these Acts it is enacted that any number of persons, not less than five, may form themselves into a company, for the purpose of acquiring or constructing and maintaining any dam, slides, piers, or other works necessary to facilitate the transmission of timber down any river or stream, or for the purpose of blasting rocks or dredging and removing shoals or other impediments, or otherwise improving the navigation of such streams for the said purpose, provided always that no such company should construct any such works, or interfere with any private property or of the Crown without first having obtained the consent of the owner, or of the Crown, except as in the Act is provided, as to the amount to be paid by the company to such owner for the privilege to construct such works by arbitration, in case of difference. And it was further provided that when any

company formed under the Act, should require any slide, pier or other work, intended to facilitate the passage of timber down any water, already constructed by any party other than a company formed under the Act, it should be lawful for the owner of such works (or if constructed on the property of the Crown, for the person at whose cost the same shall have been constructed), to claim compensation for the value of such works, either in money or in stock of such company at the option of the said owner, or the person at whose cost the same shall have been constructed, the value of such compensation in case of difference, to be also determined by arbitration. Then the companies were authorized to collect tolls, from all parties using the works.

We here find the legislature with scrupulous regard for private rights providing that no man shall be interfered with, in the full enjoyment of his property, without his consent, or without full compensation being made to him.

Now if, as is here provided, no company formed under the Act, could acquire or interfere with the works constructed by this appellant without his consent, or without paying him full compensation, and if, as is also here provided, the companies could prevent all persons from using the works so acquired, unless upon the payment of tolls, it is impossible to hold, that by force of 12th *Vic.*, ch. 87, all persons were entitled to use as public property works erected upon private property without the consent of, and in fact against the will of, the person who had constructed the works upon his own property. I am of opinion, therefore, that the plain natural and reasonable construction of the 5th sec. of 12th *Vic.*, ch. 87, is that its object and effect is simply to prevent any person, even the owner in fee, of the bed of a stream, by any obstruction erected by him across the stream, to interfere with the free passage down the stream of such

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logs and timber as, but for such obstruction, could be floated down the stream, although such floating down could only be effected or take place during the period of freshets; the judgment of the Court of Common Pleas, therefore, in the three cases above quoted, puts the correct construction upon the Act, and the judgment of the Court of Appeal in *Ontario*, in this case, must be reversed, the appeal in this case be allowed, and the judgment of the Court of Chancery restored with costs to the appellant in this court and in the courts below.

In the view which I have taken of the Act, it is plain that the learned Vice-Chancellor acted quite right in refusing to receive any further evidence of the nature of that tendered by the respondents, his refusal to receive which has been objected to.

*Appeal allowed with costs* (1).

Solicitors for appellants: *McCarthy, Hoskin, Plumb & Creelman.*

Solicitors for respondent: *Bethune, Moss, Falconbridge & Hoyles.*

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1879

*June 18, 19.

1880

*Feb'y. 3.

DONALD MILLOY.....APPELLANT;

AND

JOHN KERR *et al*.....RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

*Warehouse receipts*—34 *Vic., ch.* 5 *D*—*Right of property.*

At the request of the Consolidated Bank, to whom the *Canada* Car Company owed a large sum of money, *M.* consented to act as warehouseman to the company for the purpose of

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

(1) Since this case has been printed, information has been received that the Judicial Committee of the Privy Council have reversed the decision of the Supreme Court of Canada.

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storing certain car wheels and pig iron, so that they could obtain warehouse receipts upon which to raise money. The company granted *M.* a lease for a year of a portion of their premises, upon which the wheels and iron were situate, in consideration of $5. The Consolidated Bank then gave him a written guarantee that the goods should be forthcoming when required, and he therefore issued a warehouse receipt to the company for the property, which they endorsed to the Standard Bank and obtained an advance thereon, which they paid to the Consolidated Bank.

It appeared that *M.* was a warehouseman carrying on business in another part of the city; that he acquired the lease for the purpose of giving warehouse receipts to enable the company to obtain an advance from the Consolidated Bank; and that he had not seen the property himself, but had sent his foreman to examine it before giving the receipt.

In February, 1877, an attachment in insolvency issued against the company, and *K. et al.*, as their assignees in insolvency, took possession of the goods covered by this receipt, claiming them as part of the asssets of the estate. *M.* then sued *K, et al.* in trespass and trover for the taking.

*Held*, per *Strong*, *Taschereau* and *Gwynne*, JJ., (affirming the judgment of the Court of Appeal, and that of the Court of Queen's Bench,) that *M.* never had any actual possession, control over, or property in, the goods in question, so as to make the receipt given by *M.*, under the circumstances in this case, a valid warehouse receipt within the meaning of the clauses in that behalf in the Banking Act.

[*Per Ritchie*, C.J., and *Fournier* and *Henry*, JJ., *contra*, that *M. quoad* these goods was a warehouseman within the meaning of 34 *Vic.*, ch. 5 D, so as to make his receipt endorsed effectual to pass the property to the Standard Bank for the security of the loan made to the company in the usual course of its banking business] (1).

APPEAL from a judgment of the Court of Appeal for *Ontario*, affirming a judgment of the Court of Queen's Bench, making absolute a rule *nisi* to set aside a verdict for the plaintiff. The pleadings and facts fully appear in the reports of the case in 43 U. C. Q. B. 78, and 3 Ont. App. R. 35, and in the judgments hereinafter given.

(1) The Court being equally divided the appeal was dismissed without costs.

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Dr. *McMichael*, Q. C., and Mr. *J. K. Kerr*, Q.C., for appellant:

The following, among other authorities, were relied on by counsel for appellant: *R. C. Bank* v. *Ross* (1); *Kough* v. *Price* (2); *Burke* v. *McWhirter* (3); *Watson* v. *Henderson* (4); *Union St. Jacques Montreal* v. *Dame Julie Belisle* (5); *Browne's* Actions at Law (6); *Bauerman* v. *Radenius* (7); *Smith's* Leading Cases (8); *Philips* v. *Bateman* (9); *Re Coleman* (10).

Mr. *Robinson*, Q.C., and Mr. *George Kerr*, jr., for respondent.

The learned council cited the following authorities: *Bump* on Bankruptcy (11); *Clarke* on Insolvency (12); In *re Butler* (13); *Borland* v. *Phillips* (14); *Coates* v. *Joslin* (15); *Mathers* v. *Lynch* (16); *Newton* v. *Ontario Bank* (17); *Davidson* v. *Ross* (18); *Gordon* v *Harper* (19); *Owen* v. *Knight* (20); *Bradley* v. *Copley* (21); *Smith* v. *Miller* (22); *Great Western Railway Company* v. *Hodgson* (23); *Deady* v. *Goodenough* (24); *Glass* v. *Whitney* (25); *Paice* v. *Walker* (26); *Royal Canadian Bank* v. *Miller* (27); *Todd* v. *Liverpool, London and Globe Insurance Company* (28); *Bank of British North America* v. *Clarkson* (29).

(1) 40 U. C. Q. B. 466; 34 *Vic.*, ch. 5, s. 46 & 47.
(2) 20 U. C. C. P. 313.
(3) 35 U. C. Q. B. 1.
(4) 25 U. C. C. P. 562.
(5) L. R. 6 P. C. 31.
(6) P. 90.
(7) 7 T. R. 667.
(8) 6th Ed. 2nd vol. 362.
(9) 16 East 372.
(10) 36 U. C. Q. B. 559.
(11) Pp. 808-810, 814-817, 831-834.
(12) P. 312.
(13) 4 Bankruptcy Register, 303.
(14) 2 Dillon 383.
(15) 12 Grant 524.
(16) 27 U. C. Q. B. 244.
(17) 15 Grant 283.
(18) 24 Grant 22.
(19) 7 T. R. 9.
(20) 4 Bing. N. C. 54.
(21) 1 C. B. 685.
(22) 1 T. R. 480.
(23) 44 U. C. Q. B. 187.
(24) 5 U. C. C. P. 163.
(25) 22 U. C. Q. B. 290-294.
(26) L. R. 5 Ex. 173.
(27) 29 U. C. Q. B. 266.
(28) 20 U. C. C. P. 523.
(29) 19 U. C. C. P. 182.

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RITCHIE, C. J.:—

This was an action in which plaintiff alleges that defendants broke and entered certain lands of the plaintiff and took and carried away and converted to their own use goods, railway car wheels and pig iron, &c. of plaintiffs. The defendants claim the property in dispute as joint official assignee of the estate of the *Toronto* Car Wheel Company.

These goods originally belonged to that company, and plaintiff's contention is, that he being a warehouseman, and the said company wishing to have the said goods warehoused with him, and not wishing to incur the expense and inconvenience of transferring the goods from where they then were, on the company's property, to plaintiff's usual place of business on *Front* street, at the foot of *Yonge* street, in the city of *Toronto*, by indenture made on the 15th Dec., made and executed under the seal of the company, in consideration of the rents and covenants therein contained, demised and leased to the plaintiff, his executors and administrators and assigns, all that certain parcel or tract of land forming part of the premises presently occupied by the said lessors, and situate at the north-west corner of *Front* and *Cherry* streets, in said city, and which may be described as follows: "Commencing at the south-east corner of the premises of one *Huggard*, thence easterly along the north side of *Front* street eighty feet, thence northerly and parallel with the east limit of said *Huggard's* premises one hundred and fifty-four feet three inches, thence westerly parallel with *Front* street eighty feet to premises of said *Huggard*, thence southerly along the east limit of said *Huggard's* premises to *Front* street;" for the term of one year, from the 15th December, 1876, paying therefore yearly $5 at the expiration of the term with certain covenants not material to be noticed; upon which property the goods in question were.

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This property was staked off, and plaintiff entered into the possession thereof and of these goods, and granted to the said company a warehouse receipt as follows:

Received in store in the yard or place near the corner of *Front* and *Cherry* street, *Toronto*, fourteen hundred car wheels and three hundred and fifty tons pig iron from the *Toronto* Car Wheel Company of *Toronto*, to be delivered pursuant to the order of the said *Toronto* Car Wheel Company to be endorsed thereon.

This is to be regarded as a receipt under the provisions of statute 34 *Vic.*, ch. 5 of the Statutes of *Canada*, intituled "An Act relating to Banks and Banking." The said car wheels and pig iron are separate from, and will be kept separate and distinguishable from other grain, wares, manufactures or merchandize.

*Donald Milloy.*

Dated *Toronto*, Dec. 20th, 1876.

The object of giving this lease and getting the warehouse receipts, the manager of the company says, was to raise money.

It was for the purpose of raising money to take up our paper as it became due with the Consolidated Bank. This receipt was endorsed over to the Standard Bank of *Canada*.

The evidence of plaintiff's foreman shows that he went down to see that the iron was there, and he says:

There were stakes put there, and a place squared off; I went down to see that the iron was there; I went down also when I had an order to deliver any; I was disposing of it, or some of it, the same as I would at our own place when I got an order; I was aware that a lease had been granted to Mr. *Milloy*, and from it I exercised control over the place; I know the quantities delivered to the *Toronto* Car Wheel Company; 30, 10, 20, and 10; and two loads of iron, 5 tons in each lot; the first order is dated the 27th December, and was for 30 car wheels; January 10th, 10 car wheels; January 15th, 20 wheels; February 20, 10 wheels; and 5 tons of iron on same date; the day I delivered the stuff, I put the figures down in my book; on the 27th, 5 tons of iron were delivered; these were all the deliveries; I never counted them; I went to count them twice but there was so much on the wheels, I could not see them; there was a large quantity there; all that was there was taken away by the defendants; I don't know the number myself;

*Cross-Examined.*—I am in the employ of Mr. *Milloy*; where I am

principally, is *Yonge* street wharf; this place he had; I don't know that he had any other place leased for that purpose that I am aware of; I have been with him I suppose about nine years; I went down many times there; I was down early in December, about the time the lease was made; the first entry is a delivery of iron; that is my book, in which, when the orders were given, through my hands, I put an entry when I delivered; I asked Mr. *Milloy* if I would keep an account of my time going down there; that is wholly my writing there; that across the page was all put there on the second of January; I had been down several times before that; our deliveries are before that; I have put in ink over that—1876; on January 25th I went and measured the yard of the *Toronto* Car Wheel Company leased by *Milloy*—83 by 132 feet, and found it correct; that was the first time I measured it and the last; I did not measure it when I first went down; I went down by Mr. *Milloy's* orders; it might be the day previous he ordered me to go down; it was about January 25th, 1877, I measured the piece of the yard that was leased; I went down previously, but I had no memorandum; I was down, on Mr. *Milloy's* instructions; I did not think of keeping any time until I was losing time delivering car wheels; I had to stop there while they were taking the loads away; he first told me about measuring the land about the time it is entered there, I went and did that; I could go out and in then at all times; I went into the office or in at the gate if it was open; I was in the office at all times when I went there, except when I went down to move the wheels; we had to go in at the gate; that part of the property is embraced exactly in the lease.

*Donald Milloy*—I am plaintiff in this case; I am a wharfinger and steamboat agent, carry on business on *Front* street, and at the foot of *Yonge* street; I have carried on my business on *Front* street for a number of years; that is the only place I have been carrying on my business as a warehouseman outside of this transaction; Mr. *Turnbull* came to me first and spoke to me; I do not remember his christian name; he was in the Consolidated Bank at that time; I think he was cashier, but I am not certain.

*Examination resumed*—In consequence of what Mr. Turnbull said to me I got this lease; I think he came himself first, and then afterwards Mr. *Gartshore* came with him; that lease was then taken; I don't know who drew the lease out; I don't remember who brought it to my office; I never saw the lease until left in my office all ready prepared and executed; I was never asked to sign that lease; I forgot the time the lease was left at my office; it was some time in December, I think, of the year 1876; I think the lease will show the date; I do not remember any discussion with *Gartshore* or *Turnbull* as to the

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terms of the lease; I understood a part of the property was to be staked out; it was to be the part this property was stored on; there was no particular discussion as to the land to be leased; I think it was $5.00 rent I paid; the land is described in the lease; I got it for $5.00—80 by 154; I don't know that that was a very cheap lease; it depends on what you can do with the property; I paid them that $5,00 by cheque; that is the cheque that I gave, payable to *John Gartshore*, dated 19th December; I charged that $5.00 in the books; I have got my book here; I produce it; I have my ledger here also; I turn up the account of the *Toronto* Car Wheel Company; the book-keeper charged the Consolidated on December 19th with $5.00; on the day after I got cash, $50.00; it was a cheque; he was at the office when I came in; I really forget who gave the cheque; I suppose it came from the *Toronto* Car Wheel Company; I see the book-keeper has balanced it by profit and loss; he never asked me what to charge; that is an entry of his own; that is the only ledger account I have with the Car Wheel Company; March 31st, profit and loss, $45; when I took that lease I got a letter of guarantee from the Consolidated Bank, guaranteeing the property being there, and being forthcoming; that is the letter I got, dated 20th December, 1876 (Exhibit 5); as a warehouseman, I do not remember ever taking such a guarantee before as that; the property was so far away; this was a special transaction; Mr. *Turnbull* told me the Car Wheel Company wanted to raise some money; I don't know who got the warehouse receipt; I signed it, left it with the book-keeper in the office, and some one called and got it; perhaps the book-keeper took it to the bank; I don't know; my man went down at the time I got the lease, to see that the car wheels and the pig iron was there; I do not know whether I got the letters the same day that I gave the warehouse receipts or not.

*Cross-examined by Mr. Cameron*—I really do not remember who suggested the lease in the first place, whether Mr. *Turnbull* or myself, I cannot say; when I was applied to for a warehouse receipt I told them the property was too far, and suggested the removal of the property up to *Yonge* street, but they preferred doing it in this way, to save double handling and the costs that would be incurred; the lease was suggested at this time; I know I would not have granted a warehouse receipt unless I had the lease; when it was so far away, I desired something more than the goods guaranteed; we generally receive ten cents a ton a month for storing iron; I had no commission other than the $50; that was all I received.

I think the plaintiff had the legal title to and was legally in possession of the land under this lease, and

had a right to carry on his business of a warehouseman on these premises so leased to him, and having, by his foreman, entered and taken actual possession of the goods on the land, the land and the goods were in fact and in law under his control as a warehouseman; he was in a position to give the warehouse receipt, and, when he so gave it, he became responsible for the property to those to whom he gave the receipt, or to whomsoever the same might be duly indorsed, and that he was not limited to carry on his business of a warehouseman to one place of business more than another; that he had a right to carry on his business in the place or places most suitable and convenient therefor, so long as the premises on which such business was carried on were in his possession and the goods in his custody and under his control, and I can see nothing in the fact of his having a guarantee from a third party for the safety of the goods in the place in which they were stored, and for their being forthcoming, that can in any way invalidate his liability as a warehouseman to the *bonâ fide* holder of the receipt.

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The point of this case then, it seems to me, turns simply upon the question: was there such an indebtedness of the *Toronto* Car Wheel Co'y to the Standard Bank as could be secured by the indorsement of a warehouse receipt? I may say at the outset, that I can discover nothing whatever in the evidence to show that, so far as the Standard Bank is concerned, there was any infringement of any of the provisions of the Insolvent Act, or that the security was in any way invalidated or injuriously affected by that Act, or that there was anything collusive or fraudulent, illegal or improper in the transaction, either with reference to the *Toronto* Car Wheel Company or their creditors. As I read the evidence, the Car Company were indebted to the Consolidated Bank, who held what they, for a time, considered a valid warehouse

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receipt for these goods, but which was either not a valid security, or the party giving it would not continue to hold the goods, or both. That the position of the dealings between the Consolidated Bank and the company was such that the company could not give a good security to the bank by means of a warehouse receipt, by reason of the past indebtedness of the claim of the bank against the company; that the bank was desirous of obtaining a settlement, and payment of all claims due or not due from the company to the bank, and, f r the accomplishment of this, was anxious they (the company) should obtain a new loan from other parties to whom they might be able to give a valid security. I can see no impropriety in the bank rendering the company assistance by advice, or recommendation, or by asking another bank to make a loan to the company to enable them to obtain means to discharge their indebtedness. So far as the Standard Bank is concerned, I cannot discover from the evidence that they were in any way informed or knew the nature and particulars or state of the transaction between the Consolidated Bank and the company, or had any information to lead them to suppose the company were in insolvent circumstances; on the contrary, they seem to me to have accepted in good faith the recommendation of the Consolidated Bank; and on estimating the value of the securities and finding the security ample, and believing the transaction was a safe and good one, took it up in the usual and orderly course of banking business. The evidence on this point seems very clear and conclusive.

The indebtedness, for the security of which the warehouse receipt was indorsed over to the Standard Bank, *Stevens* the discount clerk of the Standard Bank says, was on a note dated 20th December, same day as the warehouse receipt for $21,400, which he says

was discounted by the Standard Bank in the ordinary course of business on the credit of that receipt.

*Cross-examined*—My duty in the bank is discount clerk; that note was brought to me and discounted; Mr. *Brodie*, the cashier of the bank, brought me the note; I discounted it for the *Toronto* Car Wheel Company; I gave $20,999.27; I gave the money to the manager of the *Toronto* Car Wheel Company, Mr. *Gartshore;* I know nothing at all about it, beyond the handing of the note to me by Mr. *Brodie;* I know nothing about the warehouse receipts; all I know is the note was handed to me, and I discounted it; the money was paid in bills; I don't know where the money went after that; I don't know if the Consolidated Bank had discounted any paper with us.

The cashier of the Standard Bank, says:

*John L. Brodie*—I am cashier of the Standard Bank; it was Mr. *Turnbull* called to see me; he asked if I was open to take up a transaction which they would recommend; I said I would see; he stated the nature of the security; as our Vice-President, *W. F. Cowan*, would know something about the value of these things, I asked to leave it until I would see him; after seeing him, and estimating the value of the securities, as we had a friendly feeling to the Consolidated Bank, and they asked us to take it up, we, finding the security ample, took it up; I did not take it up without consulting the Vice-President and the President also, I do not know anything but that they recommended the transaction as safe and good; when a bank recommends to another, there would be an honourable understanding, I think, to the effect not to allow them to suffer loss; the securities were recommended as perfectly good, by the Consolidated Bank; we loaned the money in the usual way.

Q. You knew that the *Toronto* Car Wheel Company kept their account with the Consolidated Bank? A. Very likely I knew that.

Q. Did they tell you their solicitors had recommended them to get through you? A. They did not tell me anything of the kind.

His Lordship: Was any representation made to you by Mr. *Turnbull* he would wish you to do this as a convenience to them? A. He never made any such representation, but I may have inferred so.

Q. Were you to stand in the place of the Car Company that the Consolidated Bank stood in? A. I don't know that; I did it at the request of the Consolidated Bank, but I did it only because I was satisfied the security was good.

Mr. *Turnbull*, of the Consolidated Bank:

Q. State what the arrangement was between you and the bank?

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A. We went to Mr. *Brodie*, and told him the Car Company wanted to raise money; we did not tell him for what purpose; they would be prepared to give Mr. *Milloy's* warehouse receipts; we told him the security would be good, to our own knowledge, and there was ample margin, and requested him to make the discount, which he did.

Q. Did you tell Mr. *Brodie* anything further? A. I don't know that I did; I do not think it; there was nothing further, to my recollection; we told him he was to advance upon the security of the stuff; we did not say anything about seeing them harmless; that was not understood between us.

Q. When one bank comes to another, and recommends them to make a discount, is it not understood between them the one will see the other all right? A. It would be certainly understood, after the representation I made as to the nature of the security, that we should see they did not lose by it; I have not considered this as a matter of our own all along; I think Mr. *Gartshore* himself asked me to go with him to the Standard Bank, seeing I had been with him previously, to ask them to authorize Mr. *Milloy* to deliver certain wheels to the Northern Railway Company, on getting the Northern Railway Company's acknowledgment to pay the Standard Bank; I do not recollect any instruction; it was a matter for Mr. *Brodie's* consideration; Mr. *Brodie* was getting value for all his money; I may have gone on a second occasion; I am sure as to one occasion, but not as to two; I am not sure I went a second time.

The Consolidated Bank certainly had a perfect right to close their transaction with the Car Company and to render the Car Company assistance to raise the necessary funds to enable them to discharge their indebtedness. If the Standard Bank made the loan to the Car Company, as *Brodie* says, in the usual way ("we loaned the money in the usual way"), and because they found the security ample, though done on the recommendation and at the request of the Consolidated Bank, but as *Brodie* says: "only because he was satisfied the security was good," and as Mr. *Turnbull* says "nothing was said and it was not understood between us as to the Consolidated Bank seeing the Standard Bank harmless, and the discount clerk says the note was discounted by the Standard Bank in the ordinary course of

business on the credit of that receipt," I cannot see how it can be considered otherwise than a pure *bonâ fide* independent dealing of the Standard Bank with the Car Company in the course of their business, even though the transaction was accomplished, through the instrumentality of the Consolidated Bank, and there may, in consequence of the representation and recommendation made by that bank to the Standard, be a sentimental or honourable feeling that the Consolidated Bank should see they did not lose by it. No doubt the Consolidated Bank were deeply interested in the Car Company getting the money from the Standard, because it was to discharge their indebtedness to them, and very possibly they were the more anxious because the Car Company could not secure them as they had been heretofore secured, or thought themselves secured. But as it does not appear that the dealings or the transactions of the Consolidated Bank and the Car Company were communicated to the Standard Bank, or that they were in any way cognizant of them, why should the Standard Bank be affected thereby? I think it may fairly be inferred, that but for the intervention of the Consolidated Bank, the Standard Bank would not have advanced the money to the Car Company, but if it was a fair loan in the usual course of business made on the security of this warehouse receipt offered by the Car Company, I cannot see why the Standard Bank should be injuriously affected because the Consolidated Bank were benefited by their debtors being placed in a position to discharge their indebtedness, nor can I discover upon what pretence the Car Company could repudiate their lease to the plaintiff or the validity of this warehouse receipt. If there has been nothing in this transaction at variance with the provisions of the Insolvent Act and no collusive or fraudulent conduct on the part of the Standard with a view

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to defeat or defraud creditors, I cannot discover upon what principle the defendants as the assignees of the Car Company can assail the lease or security so given by those they represent in good faith to the bank, which lease or transaction the Car Company could not infringe. As then I think there is no evidence to establish that this transaction was a fraudulent preference to or had any legal connection with the Consolidated Bank, but was an entirely new and distinct transaction between the Standard Bank and the company, the question in my opinion, in the case is:—was the plaintiff, *quoad* these goods, a warehouseman within the letter and spirit of the Banking Act, so as to make his receipt indorsed effectual to pass the property to the Standard Bank for the security of a loan made to the company in the usual course of banking business? and as I think he was, I think the appeal should be allowed, and judgment given for plaintiff.

STRONG, J., gave a written judgment in favor of affirming the judgment of the Court of Appeal (1).

FOURNIER, J., concurred with the Chief Justice.

HENRY, J.:—

This is an appeal from the judgment of the Appeal Court of *Ontario*. A verdict was found for the appellant, but set aside, and an order was made for one to be entered for the respondents by the Court of Queen's Bench. From that order the plaintiff appealed to the Appeal Court of *Ontario* who sustained the judgment of the Court of Queen's Bench, and hence his appeal to this court.

There are three counts in the declaration:—

1st. In trespass, for seizing and taking away the plaintiff's goods and converting them to their own use.

(1) The learned judge, having mislaid his judgment, directed the reporter to report the case without it.

2nd. For trespass to lands of plaintiff and for *asportavit* and conversion of plaintiff's goods.

3rd. For conversion of plaintiff's goods.

The defendants pleaded thereto :—

1st. A denial of the trespass and conversion.

2nd. To the first count denying the plaintiff's property in the goods.

3rd. To the second count denying the plaintiff's property in the land and goods.

4th. That the land was the freehold and the goods the property of the defendants as joint official assignee of the *Toronto* Car Wheel Company, insolvents, under the provisions of the Insolvent Act of 1875.

5th. That the plaintiffs right to the land and goods was only under a lease from the *Toronto* Car Wheel Company, and by a pretended delivery to him by that company of the goods as a warehouseman or agent of the company. That the plaintiff subsequently gave to the company certain paper writings purporting to be warehouse receipts for the goods to be delivered pursuant to the order of the company, and the company thereupon endorsed the same to the Standard Bank of *Canada* as agents and trustees of the Consolidated Bank of *Canada*, merely for the purpose of securing a large amount of indebtedness of long standing of the company to the last mentioned bank. It then alleges the then insolvency of the company, and that the plaintiff and the Consolidated Bank knew or had probably cause for believing such to exist, and that the inability of the company to meet its engagements was for a long time theretofore public and notorious. The plea then alleges that the solvency of the company was attacked by a notice from some of the creditors to the company of an application for an attachment under the Insolvent Debtors Act served over thirty days from the endorsement of the warehouse receipts to the company, and that

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about a month after, a writ of attachment against the company was issued and delivered for execution to the defendants, and in about a month thereafter, at a meeting of the creditors, defendants were appointed joint assignee of the company's estate in insolvency. That at the time of the issue and delivery to the defendants of the writ of attachment, the company was not in possession of the goods and land, and that such possession was transferred to the defendants, who thereupon took possession of the same as part of the property and estate of the company, and that as such joint assignee, they, the defendants, were entitled to retain the said lands and goods.

6th. The sixth plea is pretty much like the fifth, but is varied by an allegation, "that the said lease was executed and the said goods so delivered to the plaintiffs, and the said receipts so indorsed to the said Consolidated Bank, with intent fraudulently to impede, obstruct, and delay the creditors of the said company in their remedies against it, with intent to defraud its creditors or some of them, and the same was so done and intended with the knowledge of the plaintiff and the said Consolidated Bank of *Canada*."

7th. The seventh varies from the preceding two pleas by an allegation, "that the deposit, pledge, or transfer of the said premises by lease, and the delivery of the said goods and the endorsation of the said receipts to the Standard Bank were made by the said company in contemplation of insolvency by way of security for payment to the Consolidated Bank of *Canada* for a debt then and for a long time due and owing to the said last mentioned bank, * * * * * the same being at the time of the issue and delivery of the writ of attachment to the defendants in the possession of the company. That the defendants were in March, 1877, appointed assignees of the said company's estate and

effects, and under the provision of the Insolvent Act, 1875, were then entitled to retain the said lands and goods for the benefit of the company's estate."

The plaintiff by replication, first took issue on all the pleas. By a second replication to that part of the fourth plea which alleges that the time of the committing of the alleged trespasses, the said land was the freehold of the defendants as joint assignee of the company's estate and effects, the plaintiff says, "that before the time when, etc., and before any proceedings in insolvency had been taken against the company," the company "by an indenture of lease duly executed under their corporate seal demised the land to the plaintiff" for one year from the fifteenth day of December, 1876, which demise was "at the said time when, etc., in full force and effect and undetermined," and that "the said plaintiff was in the actual possession of the said land under and by virtue of the said demise."

To the latter replication there were three rejoinders to which it is necessary also to refer.

1st. The first alleges there was only a nominal consideration for the lease, which is alleged to be dated the fifteenth of December, 1876. That the company was then a debtor, subject to the provisions of the Insolvent Act of 1875. That on the 20th of January, 1877, a notice of an application to be made for a writ of attachment was served on the company and the writ issued on the 21st of February, 1877. That at a meeting of the creditors in March following, the defendants were appointed joint assignee of the estate; that at the time of the issue and delivery of the writ of attachment to the defendants, the company were in possession of the lands and that such possession was transferred to the defendants, who therefore took possession of the same as part of the property and estate of the company, and as such joint assignee were then (at the time of the

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pleading) entitled to retain the said lands for the benefit of the company's estate.

2nd. The second rejoinder, with the same descriptive averments as in the first, alleges that the lease was executed to secure a debt due to the Consolidated Bank. That the lease was made with intent fraudulently to impede, obstruct, and delay the creditors of the company in their remedies, or with intent to defraud its creditors, and that the same was so made, done, and intended with the knowledge of the plaintiff and the said bank (the Consolidated).

3rd. The third rejoinder, with the same descriptive averments as in the other two, alleges that the lease was made in contemplation of insolvency by way of security for payment to the Consolidated Bank of a previous debt whereby the bank obtained an unjust preference. That the land at the time of the issue and delivery of the writ of attachment to the defendants was in possession of the company, that the defendants were subsequently appointed joint assignee of the estate, and as such entitled to retain the said lands and goods for the benefit of the estate.

In order that my views should be the more readily understood in regard to the special pleas, the second replication and the three rejoinders thereto, I have felt it necessary to recite them at the risk of the charge of unnecessary prolixity.

I must now see how far they are founded on the Insolvent Act referred to.

Section 131 provides that:

A contract or conveyance for consideration respecting either real or personal estate by which creditors are injured, made by a debtor unable to meet his engagements with a person ignorant of such inability, whether such person be his creditor or not, and before such inability has become notorious, but within thirty days next before a demand of an assignment or the issue of a writ of attachment under this act or at any time afterwards, whenever such demand shall have

been followed by an assignment or by the issue of such writ of attachment, is voidable, and may be set aside by any court of competent jurisdiction upon such terms as to the protection of such person from actual loss or liability by reason of such contract, as the court may order.

It is obvious the pleas in question as far as they relate to the lease and warehouse receipts are not under that section, nor could they be under the circumstances in evidence for many reasons which are so palpable that I need not state them.

Section 132:

All contracts or conveyances made and acts done by a debtor respecting either real or personal estate with intent fraudulently to impede, obstruct or delay his creditors in their remedies against him, or with intent to defraud his creditors, or any of them, and so made, done, and intended with the knowledge of the person contracting or acting with the debtor, whether such person be his creditor or not, and which have the effect of impeding, obstructing, or delaying the creditors of their remedies, or of injuring them or any of them, are prohibited and are null and void, &c.

I need not refer specifically to the special pleas before mentioned, or to the subsequent pleadings as to them, but may say that I think they contain substantially allegations sufficient to justify the reception of evidence under the provisions of the last recited section.

Section 133 is, I think, also applicable:

If any sale, deposit, pledge, or transfer be made of any property real or personal by any person in contemplation of insolvency by way of security for payment to any creditor, or if any property real or personal, moveable or immoveable, goods, effects, or valuable security be given by way of payment by such person to any creditor, whereby such creditor obtains or will obtain an unjust preference over the other creditors, such sale, deposit, pledge, transfer, or payment shall be null and void, and the subject thereof may be recovered back for the benefit of the estate by the assignee in any court of competent jurisdiction.

With the addition that if within the prescribed thirty days or afterwards:

It shall be presumed to have been made in contemplation of insolvency.

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The seventh plea is the only one alleging a defence under this latter section. It alleges in substance that the deposit, pledge, or transfer of the premises by the lease, the delivery of the goods and the endorsation of the receipts, were made and given by the company in contemplation of insolvency, and that the warehouse receipts were assigned to the Standard Bank as the agents and trustees of the Consolidated Bank. These allegations bring the plea, in my opinion, within the provisions of the act; for if it were all done to make payment of a previous debt or liability to the Consolidated Bank, or to secure the payment of it by having it made to the Standard Bank as mere agents or trustees of the Consolidated Bank, it would in law be the same as if the transfer were direct to the latter. No other provision of the act is, in my opinion, applicable. Section 130 refers to gratuitous contracts or conveyances, but in none of the special pleas is the ground broadly taken that the lease and transfer of the goods were gratuitous and without consideration. The sixth and seventh pleas do not in any way refer to the matter of the consideration for the lease. The fifth, however, alleges that the lease was given "for a merely nominal consideration," but another part of the plea shews there was a consideration by plaintiff agreeing to take possession of and safely keep goods of the company, and to give therefor accountable receipts to deliver the same to the company or their order. The lease could not be held to have been a "gratuitous conveyance" and "without consideration within the meaning of that section." I will now consider the substance of the two sections and will then turn to the evidence to see how far the issues on both sides have been sustained. To set aside a conveyance under section 132 requires proof;

1st. Of a fraudulent intent to impede, &c., a creditor in his remedies, or to defraud his creditors.

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2nd. That the conveyance was so made and that the fraudulent intent was known to the party to whom the conveyance was made.

I have read over the evidence repeatedly with much care and such evidence is conspicuous only by its entire absence. The proof of the two issues was on the defendants, and proof of both were necessary to constitute a defence. On the contrary the evidence clearly negatives both allegations. The history of the whole transaction shows an honest debt due tothe Consolidated Bank. That that institution had previously held the same goods as collateral security, but difficulties having arisen which prevented a renewal of their security under the Warehousing Act, through *Conger* who had acted as warehouseman, it decided to renew that security by the means adopted and now complained of. The Consolidated Bank under the circumstances of its advances on the security of the goods had, in my opinion, such an equitable lien on the goods as collateral security for its advances, as might have been enforced in equity, as between it and the company, although the security by means of the warehouse receipts given by *Conger* had failed. I cannot, therefore, conclude that even had the transfer of the receipt from the plaintiff been directly to the Consolidated Bank, it would have been within either of the fraudulent intents referred to in the section under consideration. The evidence as to the advances in question is not, it is true, very satisfactory as shewing they had been originally made on the security of the goods, but if not, the onus of shewing that the security was not given for a then subsisting debt, and that at the time the company was in such an embarrassed position as to have made the transfers *ab initio* void was upon the Respondents. There is no pretence, from the evidence, that such was the case, and in the absence of proof to the contrary we are bound to presume nothing against

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the validity of the original security so often renewed by the warehouse receipt of *Conger*. The company would be estopped both at law and in equity from questioning the validity of those receipts signed by *Conger*; and if they were valid when given the subsequent insolvency a year after could not affect the right of the bank. Admitting, however, my conclusions thus expressed are wholly wrong, where is the evidence of the other requirement of the section? What is there to show the guilty knowledge of the plaintiff when he took the lease and gave the warehouse receipt? I may answer emphatically nothing. We have no evidence on the point at all, except his own, and he distinctly and positively swears to the contrary, and no jury would be justified in finding in opposition to his statement in the absence of proof of circumstances inconsistent with it; and none such are in evidence here. The learned judge who found the verdict for the plaintiff has so far thereby shown credence in the evidence of the plaintiff, and I cannot but approve his having done so.

I will now consider the issues under the provisions of section 133.

A defence under that section requires, first, proof that the transfer was made in contemplation of insolvency to a creditor, and with the addition of one or other of two objects, either to secure payment for a debt then and previously existing or in actual payment of that debt. It must be to a creditor, or, what is the same thing, to his agent or trustees, as in the special pleas in this case is alleged.

To arrive at the true meaning of this section, it is necessary to define in the first place the term "in contemplation of insolvency." A variety of definitions of the term have been given, but from the researches I have been enabled to make, I am inclined to the opinion that the decision must, to a great extent, be affected by

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the circumstances of each case. It is often a question of great uncertainty, so far as the evidence of the fact goes. The abstract meaning of the term is what, however, I am now more particularly considering; the construction I feel disposed to adopt is this: In contemplation of insolvency, I take to apply to the case of a man who reflectively considers himself in such a position financially that he cannot meet his engagements and must bring his business to an early close—that his assets are insufficient to meet his liabilities. The "contemplation" is, no doubt, intended to be personal to the party making a transfer in such a case to one of his creditors; but it might in some cases be a question of evidence whether his contemplation, although not so, should have resulted in the conviction that he occupied such a position, as by law, prevented him from securing or paying one or more of his creditors to the injury of the others. The policy of the law is, no doubt, to require every one placed in circumstances of reasonable doubt of being able to pay all his creditors not to make any preference. I take it, therefore, that a preference so given is void. There are, however, cases where a person fairly and reasonably believes himself well able to pay all his liabilities, and has assets more than enough to pay all his debts and anticipates no immediate interruption of his business; and if to enable him to discharge debts due to others and to keep his business going, he obtains further time for payment of a debt due to one or more creditors by giving them security on his real or personal estate, it cannot, in my opinion, be said he did so "in contemplation of insolvency" within the provisions of the section. The question is, to my mind, a mixed one of law and fact.

In the report of the trial, I find the learned judge decided, that when the note was given to the Standard Bank the company was insolvent, but that the bank

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was not aware of that fact. I presume he meant in view of the act, and although he does not distinctly say that the transfer was made in contemplation of insolvency, I think that was what he meant. Having seen the witnesses and heard their evidence, he was better able to decide that point, and apart from any view I might from the evidence be otherwise inclined to adopt, I will adopt his finding as the correct one, although I think the evidence hardly sustains it. I am, however, decidedly of the opinion that the defendants wholly failed to established the fact that the transfer was made to the Standard Bank as the agents and trustees of the Consolidated Bank, and that, therefore, the pleas not having in that respect been proved, the defence must fail.

When the trespasses and conversion took place, the appellant was in the lawful possession of the land and goods. That possession was given to him by the then owners of both. He had a title by lease to the land, and his possession of the goods was uncontrollable by any one except the Standard Bank—to whose order he held the goods. His man had immediate charge of them and he, the appellant, exercised acts of possession and control over them inconsistent with any right of the company to interfere with them or control him in regard to them. He had become answerable for their safe keeping to the Standard Bank, and was in a position to bring trespass or trover for any injury to conversion of them against any person but one having a superior right or title. His position as bailee threw upon him responsibility which he could only relieve himself from by keeping his contract, and to enable him to do so the law gave him a remedy to protect him from loss and injury. He is, therefore, entitled to recover in this action unless the defendants can avoid the transfer to him on the grounds taken in the pleas.

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Bearing in mind the allegations in all of the three special pleas, dispute the validity of the transfer of the lands and goods on the ground that the transfer was made to the Standard Bank as the agents and trustees of the Consolidated Bank, let us consider the evidence referring to that transfer.

The appellant alleges that he signed and delivered the warehouse receipt to the company ignorant as to what bank it would be endorsed. Witnesses from the directing and managing staff of both banks were examined, and they all swear positively the discount of the company's note was solely on the collateral security of the goods. It is true it was done at the request of the cashier or manager of the Consolidated Bank, with which institution the Standard Bank was on terms of friendly commercial relations, but that is nothing, as all the other evidence sustains this position and there is nothing to contradict it. It is the evidence given by the respondents and brought out of their own witnesses by their own counsel. How could any court or jury reject it *in toto*, and set up in opposition to it some fanciful ideas that the case was otherwise. The respondents, by producing such evidence on the trial, and substantiating the testimony of one witness by others to corroborate it, I maintain, are completely estopped from taking a position founded on the presumption that such evidence was unreliable or untrue. Courts and juries cannot make evidence—their duty is to decide according to the evidence produced—to reconcile conflicting evidence if possible, and, if not, to decide according to the weight of it, but certainly, where the evidence is all in one direction, not to allow their imaginations to furnish antagonistic conclusions. Nothing in the administration of justice would be more dangerous than the admission of such a rule. Once leave the controlling and guiding cardinal point, and the chances are a hun-

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dred to one that injustice would be done in the great majority of cases. It is true that injustice results from false and improper relations of facts, but the main object is to secure the greatest amount of success in dealing judicially with existing legal controversies.

Taking then the whole evidence, it would be an unnecessary waste of time and words to point out in detail how essentially and effectually it negatives the allegation that the Standard Bank took the transfer as the agents and trustees of the Consolidated Bank. When the whole transaction between the company and the Standard Bank was concluded by the discount of the note and the payment over of the proceeds to the company, what relation of agency or trusteeship, I would like to be told, existed between the two banks? The discount was obtained through the aid of the representative of the Consolidated Bank, but that was all. No, even verbal, promise of indemnity is pretended to have been given and the only relation remaining between the two banks was that of a supposed honorable, but not binding, implication of liability not to allow one bank to lose who discounted for a third party on the recommendation of the other. No such position was spoken of or relied on in making the discount, and if it were it would be unavailable in case of loss Suppose, however, a binding contract for indemnity had been given, would that destroy the lien on the goods? Would it in the slightest degree legally affect it? If a man on a mortgage as security on another man's land lend him money, and takes at the same time a bond for further security from a third party, no one would contend the taking of the latter would avoid the mortgage. Suppose the money went to pay a debt to the party to the bond, could it in such a case be said that the mortgagee was the agent or trustee of such party? No authority would sustain such a doctrine, and still the

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respondents rest their defence on that, to my mind, absurd proposition. Admitting, however, as correct the construction of the evidence, as the defendants counsel suggest, I must differ from those who conclude thereupon in favor of the defendants. If one man owes another a debt for the payment of which he is pressing, but from pressure for funds himself, or from any other cause, no matter what, he cannot give further indulgence, or take such security as the debtor could offer him, and he, for the purpose of recovering his debt, induces another to advance the required funds on such security, I can conceive no law or principle which would invalidate the security, or make one party a trustee for the other. There is no one provision or principle contained in the Insolvent Act that in the slightest degree refers to such a transfer *bonâ fide* made, which I, in this case, have no reason to doubt was the case; but on the contrary, am bound by the evidence to decide was the case. There is no doubt that the Consolidated Bank was anxious for the settlement of its claim, and took the measures the evidence shows for the purpose of getting in the debt, but why should their anxiety and measures affect the *bona fides* of the transaction on the part of the Standard Bank? I cannot see upon any principle why such should be the decision.

I have, therefore, only to add that in my deliberate judgment the defence under the special pleas has wholly failed.

For the same reasons I must decide in favo[r] of the appellant on the other issues.

I have attentively considered all the judgments delivered in the Queen's Bench and the Court of Appeal, and was struck with the divergence as to the controlling points which they relatively exhibit.

Mr. Justice *Wilson*, the learned present Chief Justice of the Queen's Bench, in his judgment says:

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The lease cannot be said to have been a gratuitous lease or contract. It was a beneficial one to and for the company; and if it cannot be impeached on other grounds it cannot, in my opinion, be held to be invalid because it is gratuitous.

For the reasons already given, as well as for those given by him, I entirely approve of his ruling on that point.

He says, too, he can see no reason for avoiding the lease on account of the purpose for which it was given—"even although it was made to meet or effectuate a single transaction." This, of course, not to touch any question of fraud or improper dealing, "and as honestly meant as it was honestly acted upon."

I have considered the legal question involved and the statutes applicable to it, and I have no difficulty in arriving at the same conclusion; and I feel justified in adopting his reasoning as to those parts of the case. His lordship also approves as legal the endorsement of the warehouse receipt; and also decides that the plaintiff was properly in court and not bound to seek relief by a petition to the judge of the Insolvency Court I concur with his decision of these two points. His lordship's judgment was therefore in favor of the plaintiff upon all the points, except that in reference to the relative position of the two banks. He assumed the position that, had the receipt been transferred to the Consolidated Bank it would have been void, and from the evidence he held, that the Standard Bank was acting solely in the interest and as the mere instruments of the other bank as a cover.

For the reasons I have already given I differ from the first of these two latter conclusions, and I think the evidence as wholly against the latter one.

After the argument of the appeal at *Toronto* judgments at length were given by the learned Chief Justice of *Ontario* and Mr. Justice *Patterson*

The former says :—

Upon this statement of facts I am of opinion that the plaintiff was not a warehouseman of these goods within the meaning of the acts and (consequently) that the endorsement of the receipt given by him did not transfer any property to the bank. In coming to this conclusion I disregard the circumstances which are effectively dealt with by Mr. Justice *Wilson* for the purpose of showing that the Standard Bank was really the Consolidated Bank in the whole affair. I should have much difficulty in holding, if the warehouse receipt had been given by a warehouseman in the ordinary course of business, that the transaction was proved to be in its essence a fraudulent preference to the Consolidated Bank. I might not have been able to free my mind from grave suspicions that this was its true character; but I should have thought that this was a question upon which there ought to be a finding by the judge or jury who had the opportunity of hearing the witnesses. But I cannot bring myself to the conclusion that the plaintiff was in this transaction a warehouseman or that his receipts come within the fair meaning of the acts which enabled this mode of dealing with property to be equivalent under certain circumstances to a chattel mortgage.

Upon all the other points there is a concurrence of opinion in favor of the plaintiff, but as regards the two questions the one judgment is opposed diametrically to the other.

Mr. Justice *Patterson* rules against the finding that the transfer to the plaintiff was made "in contemplation of insolvency." He says :—

The first fact, therefore, viz : the comtemplation of insolvency has to be established and no such fact is found.

I think, however, it was found by the judge on the trial, and, therefore, am led to believe that what was meant was that it had not been proved.

He is of opinion also that under the circumstances the alleged preference to the Consolidated Bank was not unjust. After referring to the previous warehouse receipts held by the Consolidated Bank, and upon which they depended for security, he says :

That the change from one warehouseman to another which an accident made necessary, while it restored the property for an

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instant to the control of the car company, might not touch the justice of the bank's claim to be secured in preference to creditors the dates or particulars of whose debts we know nothing of. We have not the materials for a decision, even if it was properly our province to decide, that the preference was unjust. The onus of establishing these facts was upon the defendants, and therefore the uncertainty in which they are left affords no ground for setting aside the plaintiff's verdict.

Referring to 34 *Vic.*, ch. 5, sec. 47, he says:

Upon this it is argued that as the transfer to the Standard Bank was, in reality, to secure an antecedent debt of the Consolidated Bank, it was forbidden by the statute. I do not take that view of it. I think that, although the two Banks were so identified, that the interest of the one might, under the provisions of the Insolvent Act, vitiate a transaction which, in form, was affected by the other, yet the Standard Bank, having really advanced its money, had a right to take the security in question, under the terms of the Banking Act, even though the money was to go to pay the old debt of the other Bank: and I do not perceive that this is affected by the circumstance that the bank which was benefitted agreed to save the other harmless.

I entirely agree with this view of the law.

He therefore concurs with Chief Justice *Moss* in reversing the judgment of Chief Justice *Wilson* upon the only point on which the judgment of the latter was against the appellant, and as the learned justices *Burton* and *Morrison* concurred in the two judgments so delivered, the judgment of the Court of Queen's Bench was on that point overruled.

Apart then from any question of fraud or unjust preference, the decision of Mr. Justice *Patterson* was based on the want of legal title of the plaintiff. He says:—

I am unable to hold that the Insolvent Act avoids the transaction without drawing inferences of fact which should properly have been drawn by the judge at the trial, and he has not drawn them.

As affecting the legal title and possession of the plaintiff, the learned judge thinks the evidence is insufficient "that he had no actual possession or control of the goods, but that it was not in contemplation that he should

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have it. The guarantee he required from the bank for the forthcoming of the goods, while sufficient evidence of this, is only one fact in a consistent series." I have read and considered the evidence as to this point very carefully, and I feel bound to decide in the opposite direction. The goods were in an open yard some distance removed from the ordinary warehouse of the plaintiff, and in the absence of some guarantee of their safety would entail extra loss of time and more vigilance than he might have felt he should incur. His taking an indemnity would or could not affect his liability to the owner or his endorsee. His liability to them would be the same, and as a merely legal proposition I cannot see how the fact of the indemnity can in any way affect the question of possession. On the contrary taking the whole transaction together, it is rather evidence of the possession being in him. That his possession and control should be complete, the right to hold the land was given him by the company. His right to take possession of the goods was also given him by the company. They substantially said to him: We will make you, for the time, the legal owner of the land upon which the goods are deposited, and you shall have them in your possession and under your control as warehouseman on your giving us a warehouse receipt for them. He accepted the offer, and in pursuance of its terms assumed the necessary responsibility and gave the required receipt. By the terms of it he became responsible for the safety of the goods. To enable him to perform his part of the contract the possession and control of the goods was absolutely necessary.

The company would be estopped from disputing his right to that possession, and as soon as the company endorsed that receipt over to another party, their right to the property in, and the possession of, the goods ceased subject, however, to any right of redemption of

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them, if any, as between them and their endorsee. Independently, however, of this legal proposition there is abundant evidence that the plaintiff had the actual possession and manual control of the goods. After the transfer of the warehouse receipt to the Standard Bank; which took place immediately after it was signed, the plaintiff received and executed orders from that bank for several lots of the goods. His man went to the yard on each occasion and delivered the goods so ordered and kept a detailed account of what he delivered. The company never interfered with his possession or disposal of them under the orders of the bank or otherwise. They were not on land then in possession of the company and how could it be contended that the goods were actually or constructively in the possession of the company? If not, then, they were not only actually but in contemplation of law in possession of the plaintiff.

It may however be contended that although the company could not have claimed or taken possession of them the right of the assignees is different. If the transfer was not affected by the provisions of the Insolvent Act the right and title of the asssignee is identical with those of the insolvent. His legal engagements and contracts are those which the assignee is bound by, and estoppels against the insolvent are equally so against his assignee. By operation of the Insolvent Act the assignee is put in the place of the insolvent with power in certain cases to avoid contracts, made in violation of the act. It was very properly decided by Chief Justice *Wilson* in *re Coleman* (1) that the assignment does not, however, "pass to the assignee any property which was not the property of the insolvent nor any greater estate or interest in his property than he himself had in it. An equitable mortgage good as against the

(1) 36 U. C. Q. B. 582.

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insolvent would be good against his assignee in insolvency, and so also would an equitable assignment of a debt or other appropriation of his estate good against him be good also against his assignee." If such be the law, and I have no doubt of it, the assignee of the company occupied no higher ground than the company itself did, and he is equally with them estopped from disputing the legal title and possession of the plaintiff of the land and goods. The respondents admit having entered upon the land and taken the goods. If their act was not a justifiable one they were trespassers on the land of the appellant held and possessed under his lease and for taking and converting his goods.

In the judgments delivered by Chief Justice *Moss* and Mr. Justice *Patterson*, they appear to have been grounded principally or wholly upon the conclusion that the plaintiff was not a warehouseman of the goods in question within the meaning of the acts; and the latter quotes my learned brother *Gwynne* in a judgment of his in *Ontario Bank* v. *Newton* (1). I have read that judgment, and with all deference, I must contend the principle there decided does not touch this case. In that case, the party who signed the receipt had never been a warehouseman, and his only act as such was in signing the receipt, then the subject of consideration, and it was decided that he could not by such an act make himself a warehouseman for the purpose of or under the acts. How that decision can affect this case, where the fact of the plaintiff having been a regular warehouseman is not only not denied, but admitted, I confess myself unable to discover. A distinction, however, is attempted to be drawn in this case from ordinary ones, because the goods were not stored in the usual warehouse or yard of the plaintiff. I have considered the point and cannot sustain that distinction.

(1) 29 U. C. C. P. 258.

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Is a warehouse keeper to be limited to one warehouse or yard, or would a warehouse keeper be disqualified to open a warehouse yard apart and at a distance from his warehouse, or would he be limited to one warehouse or one yard? I can see no restriction in the acts. The act does not require the warehouseman to be the keeper of any particular kind of warehouse, but provides for the giving effect by endorsement to the receipt of any person who is a warehouseman. The acts give effect to the receipt of a warehouseman "for cereal grains, goods, wares or merchandise stored or deposited * * * in any warehouse, mill cove or other place within the province, and from the date of the endorsement vests "all the right and title of the indorser to or in such cereal grains, goods, wares or merchandise, subject to the right of the indorser to have the same retransferred to him if such bill, note, or debt be paid to him when due" A warehouseman, or yard keeper, is not the less so because he has more than one warehouse or yard, and as the acts only require the receipt to be from a warehouseman, a receipt given by one having more than one warehouse satisfies the requirement of the act certainly as fully as, if not more fully, than if he had but one. A man could hardly be the less called a hotel keeper if he kept two or three hotels instead of but one. Nor are the means he takes to obtain one or more of the warehouses a necessary inquiry to validate the receipts of a warehouseman or yard keeper. Suppose a warehouseman becomes the tenant of a warehouse in which goods of a third party are stored, and he, after taking a lease from the owner with the understanding that thereby he is to have possession of the goods to hold them for the owner, and he subsequently signs a warehouse receipt for them, which is endorsed to a bank, would it not be monstrous to hold that in case of any informality in the lease or otherwise, the bank should lose its

advances. The only enquiry the acts require is to ascertain that the party is a warehouseman, and that he has signed the receipt. To require such an inquisitorial and often impracticable inquiry as would be otherwise necessary, would defeat the whole object and purposes of the act. In a great many cases goods are deposited hundreds of miles from the banks making the advances, and the time and trouble necessary to make such inquiries would paralyze the beneficial operation of the Acts. Such I claim could not have been intended, and I feel bound to say such is not the true construction of them.

We are told, however, that attention should be given to the Chattel Mortgage Acts which require registry. The object of those Acts is not altogether to give publicity to transfers, but to secure titles to parties for debts existing or for advances by which the owners would be accommodated and benefited. The object was, to prevent frauds from secret transfers, and whilst such were allowed to prevail, no one felt safe in advancing upon chattel security any more than he would be inclined to do in case of land security in the absence of registry regulations. The main object I take as to both was to enable a man as well with regard to personal as real estate to go to the registry office and satisfy himself in respect of either that there was no previous assignment or incumbrance in his way. Subsequent to the enactment in question Parliament, which is invested with the power to legislate in regard to the regulation of Trade and Commerce, thought proper to provide that a party might obtain a lien on goods in another way, and prescribed the mode by which it could be so obtained. Under the latter the plaintiff, as a warehouseman, received the goods, signed a warehouse receipt for them, which was endorsed to the Standard Bank. If the proceeding throughout was

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according to the late enactments (which virtually repealed the former Acts to that extent) what right have we to consider at all the previous Chattel Mortgage Acts? If they at all conflict we must give weight to the later enactments. The later Acts provide for no registry; and the beneficial operation of them would have been frustrated if they had done so. Parliament, for wise commercial considerations, has dispensed with any registry in cases provided for, and it is not the province of courts to set themselves up against the policy of acts—a jurisdiction the constitution has not given to them. In reference to the case before us Parliament has spoken in amply plain and binding terms, and it is not for us to say it did not mean what those terms explicitly express. After making the necessary provisions and conditions, the legislature has plainly said that if those provisions and conditions are complied with and fulfilled, the endorsement of the warehouse receipt shall convey to the endorsee a good title or lien. The appellant has brought himself within such provisions by complying with them. Within the terms of the statute he was in possession lawfully of the goods, and I cannot conceive how, under the circumstances the alleged policy of the Chattel Mortgage Acts can be invoked as a set-off to rights legally acquired under the other acts. As the principles involved are commercially so important and affect trade throughout the whole Dominion, I have gone more into detail than might have been necessary for the decision of the present case.

Having fully given my views upon the legal questions involved and the evidence adduced on the trial, I have now only to add that I think the judgment against the appellant should be reversed, that the appeal should be allowed and judgment given for him with costs.

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TASCHEREAU, J.:—

I am of opinion to dismiss this appeal. That *Conger's* warehouse receipts were utterly illegal and void in law seems undenied. That *Milloy's* receipts were but the continuation of transactions of the same nature as those with *Conger* appears to me plain and evident. The parties attempted to give *Milloy's* receipts more of an appearance of legality, but the whole transaction was as fictitious and colourable as the one with *Conger*. *Milloy* was never in the actual possession required by law of the goods in question to authorize him to give a warehouse receipt on them. The shadow of a lease which the Car Company granted to him was not even signed by him and the nominal rent of five dollars was paid by the bank; even in the present suit, *Milloy* is only a nominal plaintiff. He so little had the possession of the goods, that he required from the bank a guarantee that they would be forthcoming when required. For these reasons, I am of the opinion that the unanimous judgments of the two *Ontario* courts in this case should be confirmed and this appeal dismissed with costs.

GWYNNE, J.:

I have been unable to read the evidence in this case without arriving at the conclusion that the transaction, in virtue of which the plaintiff had executed to him by the car company the instrument called a lease, and in virtue of which the plaintiff signed the document which has been called "a receipt under the provisions of statute 34 *Vict.*, ch 5 of the statutes of *Canada*, intituled 'An Act relating to Banks and Banking,'" was devised and contrived wholly by the Consolidated Bank.

The evidence also satisfies my mind that (if it were necessary for the determination of this case to establish

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this, which I do not think it is), the object of the Consolidated Bank in designing this contrivance was to endeavour to secure payment to themselves of a large debt due to them by the car company (which company the bank well knew to be in insolvent circumstances) in preference to the other creditors of the company, and that this contrivance was devised in preference to a chattel mortgage, because it was well known, both to the car company and to the bank, that a chattel mortgage would be publicly known and would precipitate the impending insolvency.

But, whatever may have been the motive of the bank, it is quite apparent to my mind that, to carry out the transaction devised, the plaintiff was introduced into it wholly as the agent of the bank, and that he only consented to act in it by their procurement, in their interest, upon their guarantee, and in short as their agent; that in this character it was that he accepted the document called "the lease," and that he signed the document called "a warehouse receipt." Personally, he never had possession of the property mentioned in the receipt and in his character of warehouseman he never in reality contemplated assuming possession of the property, or any control over it, or responsibility for it. The fair conclusion from all the evidence appears to me to be that he took no part in the transaction whatever, otherwise than by the direction of, upon the guarantee of, and as the agent of, the bank, in which latter character also the fair conclusion is, that the present action is brought. Under the circumstances appearing in evidence it is, in my judgment, an abuse of terms to call the receipt given by the plaintiff a receipt within the meaning of the clauses in that behalf in the Banking Act, or to say that the plaintiff ever had any actual possession, control over, or property in, the goods mentioned in the receipt,

or in fact, to regard him in the transaction in any other capacity than that of an agent of the Consolidated Bank. To decide otherwise would, as it appears to me, open the door to a ready mode of nullifying the Chattel Mortgage Act, and of successfully perpetrating those transactions which the Insolvent Act pronounced to be frauds upon creditors. If it were necessary (but for the reasons already given I do not think it is) to trace the connection of the Standard Bank with the transaction, I think the fair inference warranted by the evidence is that they also interfered only in the interest of and at the request of the Consolidated Bank, and upon the implied undertaking of the latter bank to indemnify them against loss in the event of their advancing the money which they did advance, an undertaking which most probably has been fulfilled or the Standard Bank would naturally be the plaintiffs here, and that they knew or had sufficient information from which they could and should have known, and may, therefore, be inferred to have known, the infirmity attached to the receipt upon which they were asked to advance the money. But whatever may have been the conduct of the Standard Bank in the transaction, whether they were the dupes or the coadjutors of the Consolidated Bank in endeavoring to perfect the contrivance of the latter, it is plain, to my mind, that for the reasons given above and in the Court of Appeal from whose judgment this appeal comes that plaintiff cannot succeed in this action.

*Appeal dismissed without costs.*

Solicitors for appellant: *McMichael, Hoskin & Ogden.*

Solicitors for respondents: *Kerr & Akers.*

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*May 12.
1884
*Jan'y 16.

THE MERCHANTS' BANK OF CANADA..... } APPELLANTS;

AND

ROBERT HALL SMITH.....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

*Warehouse receipts*—35 *Vic., ch.* 5 (*D.*), *Intra vires.*

The appellants discounted for a trading firm, on the understanding that a quantity of coal purchased by the firm should be consigned to them, and that they would transfer to the firm the bills of lading, and should receive from one of the members of the firm his receipt as a wharfinger and warehouseman for the coal as having been deposited by them, which was done, and the following receipt was given:

"Received in store in Big Coal House warehouse at *Toronto*, from Merchants' Bank of *Canada* (at *Toronto*), fourteen hundred and fifty-eight (1458) tons stove coal, and two hundred and sixty-one tons chestnut coal, per schooners 'Dundee,' 'Jessie Drummond,' 'Gold Hunter,' and 'Annie Mulvey,' to be delivered to the order of the said Merchants' Bank to be endorsed hereon.

"This is to be regarded as a receipt under the provisions of Statute 34 *Vic.* ch. 5—value $7,000.00.

"The said coal in sheds facing esplanade is separate from and will be kept separate and distinguishable from other coal.

"(Signed), W. SNARR."

"Dated 10th August, 1878.

The partnership having become insolvent, the assignee sought to hold the coal as the goods of the insolvents, and filed a bill impeaching the validity of the receipt. The Chancellor who tried the case found that the receipt given was a valid receipt within the provisions of the Banking Act, and was given by a warehouseman, and that the bank were entitled to hold all the coal in store of the description named in the receipt. This judgment was reversed by the Court of Appeal for *Ontario*, and on appeal to the Supreme Court of *Canada* it was

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

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*Held* (reversing the judgment of the Court of Appeal) that it is not necessary to the validity of the claim of a bank under a warehouse receipt, given by an owner who is a warehouseman and wharfinger and has the goods in his possession, that the receipt should reach the hands of the bank by indorsement, and that the receipt given by *W. S.* in this case was a receipt within the meaning of 34 *Vic.*, ch. 5 (D.)

2. (*Ritchie*, C. J., and *Strong*, J., dissenting), That the finding of the Chancellor as to fact of *W. S.* being a person authorized by the statute to give the receipt in question should not have been reversed, as there was evidence that *W. S.* was a wharfinger and warehouseman.

3. Per *Fournier*, *Henry* and *Taschereau*, J.J., That sections 46, 47 and 48 of 34 *Vic.*, ch. 5 (D) are *intra vires* of the Dominion Parliament.

APPEAL from a judgment of the Court of Appeal for *Ontario* (1).

The facts and pleadings are sufficiently set out in the judgments hereinafter given. See also report of the case in 28 *Grant* 629.

C. *Robinson*, Q C., and *J. F. Smith* for appellants:

The transaction was one strictly within the Banking Act of 1871. See *Royal Canadian Bank* v. *Ross* (2).

The firm of *J. Snarr & Sons* failed to pay the advances made by the appellants, and became insolvent early in March, 1879, and the respondent, who became their assignee, under the Insolvent Act of 1875, has no greater right than the *Snarrs* would have had. *Ayres* v. *The South Australian Banking Co.* (3); *Re Coleman* (4).

As regards the form in which these receipts were given, sections 46, 47 and 48 of the Banking Act of 1871 (34 *Vic.* c. 5 D), under which these receipts were taken, were passed to relieve banks from the strict construction which had been placed by the courts in *Ontario* on

(1) 8 Ont. App. Rep. 15.
(2) 40 U. C. Q. B. 466.
(3) L. R. 3 P. C. 558.
(4) 36 U. C. Q. B. 583.

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the Consolidated Statutes of *Canada*, ch. 54 and amending Act 24 *Vic.* ch. 23 s. 1, (see *Royal Canadian Bank* v. *Miller*) (1), which strict construction had not, however, been followed in the Province of *Quebec*, for in *Molson's Bank* v. *Janes* (2), it was held in the Superior Court at *Montreal*, and afterwards affirmed by the Court of Review, that a warehouse receipt given by the owner of goods (under 24 *Vic.* ch. 23 before cited, as amending Con. Stat. Can. ch. 54), acknowledging to have received coals into store on account of and deliverable to the order of the bank, transferred the property to the bank without endorsement.

The Act of the Dominion 34 *Vic.* ch. 5, in the enabling part of sec. 46, enacts that a bank may acquire and hold any receipt given them as collateral security for the due payment of any debt which may become due to the bank, under any credit opened or liability incurred by the bank on behalf of the holder or owner of such receipt, or for any other debt to become due to the bank. And by sec. 48, when the warehouseman is at the same time the owner of the goods, etc., any such receipt, or any acknowledgment or certificate intended to answer the purpose of such receipt, shall be as valid and effective for the purposes of the Act as if the person making such receipt and the warehouseman were not the same person.

The credit granted to the *Snarrs* was for a legitimate purpose under the Act, and the receipts were given as acknowledgments intended to answer the purpose of receipts under the Act. The purposes of the Act, for which such receipts are declared to be valid, are to enable the bank to make advances on warehouse receipts, and through other documents specified as collateral securities; and the Act should, to effect this purpose, receive a liberal construction.

(1) 29 U. C. Q. B. 266. (2) 9 L. C. Jur. 81.

The *British North America* Act, by sec. 91, assigned to the Parliament of *Canada* the exclusive right of legislation as to "banking, incorporation of banks, and the issue of paper money," as well as the same right in regard to "the regulation of trade and commerce." What are to be considered "banking" securities, for the purpose of lending money on them by banks, as well as the right to say what constitutes a banking security, and in what manner and to what extent such securities may be taken and dealt with by banks, is a matter pertaining to "banking" as well as to the "incorporation of banks." In the latter aspect, such a question goes to the potential capacity of the corporation, which is the creation of the Dominion Legislature. Such legislation must necessarily affect property and civil rights, and the *B. N. A.* Act, in assigning the subjects under s. 91 to the Dominion Parliament, intended to confer and did confer on it legislative power to interfere with such rights within the province, so far as these latter might be affected by a general law relating to those subjects. *Cushing* v. *Dupuy* (1).

*J. MacLennan*, Q.C., for respondent:

It is clear that the receipts in question are not such as the statute authorizes. They are signed by *W. Snarr*, and express that the goods are received from the bank, and are to be delivered to the order of the bank. The real owners of the goods are nowhere mentioned. The transaction is a direct transaction between *W. Snarr* and the bank. There was no previous holder, as required by the statute. What is required is that a receipt shall be issued and held by some other person than the bank, and that the bank may require it from that other person. The bank therefore cannot succeed under sec. 46. See

(1) 5 App. Cases 409.

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*Bank B. N. A.* v. *Clarkson* (1); *Royal Canadian Bank* v. *Miller* (2); S. C., in appeal (3).

Neither can the claim be supported under sec. 48. *W. Snarr* was not a warehouseman within the meaning of the section. He was not a person engaged in the calling of a keeper of a wharf, of a warehouseman, or of a wharfinger He was a coal dealer. This section is liable to great abuse, and there should be no doubt of a man's calling in any case to bring him within it.

But if he were a warehouseman, the section does not apply, for he was not also the owner of the goods. The goods belonged to the firm, and not to *W. Snarr*, and the section only applies where the warehouseman is also the owner. *Ontario Bank* v. *Newton* (4); *Todd* v. *London & Globe* (5); S. C., in appeal (6).

The provisions of sections 46, 47 and 48, so far as they assume to alter the general law of the Province of *Ontario* in favor of banks, are *ultra vires* and void. At Confederation the general law of *Ontario* was expressed in the provisions of the Consol. Stat. of U. C. 24th *Vic.* ch. 23, and 29 *Vic.* ch. 19, and was applicable to banks as to other persons. This law, as regards the general public of the province, is the same as before, and is now found in R. S. O., ch. 116, secs. 14, 15 and 16.

The Banking Act of 1871 assumes to change this general law so far as banks are concerned. This is clearly not authorized by the provisions of the *British North America* Act, and is void. *The Citizens Insurance Co.* v. *Parsons* (7).

Excluding the alterations made by the Dominion Legislature, the bank's rights must be regulated by secs. 14, 15 and 16 of the R. S. O., ch. 116, and the

(1) 19 U. C. C. P. 182.
(2) 28 U. C. Q. B. 593,
(3) 29 U. C. Q. B. 266.
(4) 19 U. C. C. P. 258.
(5) 18 U. C. C. P. 192.
(6) 20 U. C. C. P. 523.
(7) 7 App. Cases 110.

transactions in question are clearly unsustainable under those sections.

The bank can have no claim for coal disposed of by the *Snarrs*. It was well known they were selling, and it was intended by the bank that they should do so, and they urged the *Snarrs* to sell. *Slado* v. *Morgan* (1); *Re Coleman* (2); *Cockburn* v. *Sylvester* (3).

RITCHIE, C.J.:—

This is an appeal by the defendants against the judgment of the Court of Appeal for *Ontario*, on appeal from a judgment of the Chief Justice of *Ontario*, before whom the action was tried when Chancellor of that province. A decree was made by the Chief Justice in favor of the appellants with costs. The respondent then appealed to the Court of Appeal, which court allowed the appeal, and reversed the decree, with costs. The appellants now submit that the decree was right, and ought not to have been reversed.

The firm of *John Snarr & Sons*, carrying on business at *Toronto*, dealers in coal, was composed of *W. S. Snarr* and *George Snarr*. Their place of business was on the *Esplanade*, in *Toronto*, where they had a wharf and coal sheds on the same premises.

In the summer of 1878, the firm, desiring a credit for the purpose of importing coal, applied to the appellants to grant it to them, and this the latter agreed to do on the understanding that warehouse receipts of the coal so to be imported would be transferred to them.

The circumstances under which they were given and received by the bank were as follows:

The *Snarrs* went to the bank about the middle of July, 1878, and arranged for advances, or a credit of $25,000 on endorsed paper, with warehouse receipts as

(1) 23 U. C. C. P. 517. (2) 36 U. C. Q. B. 559.
(3) 27 U. C. C. P. 34.

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collateral security on the coal to be purchased with the money. The notes were discounted, and the money put to the *Snarrs'* credit before any coal was bought, but they were apparently not allowed to draw upon the account until some of the coal arrived. They then purchased coal and had it consigned and shipped to *Toronto*; and the vendor's agent at the same time drew a draft for the price, addressed to the bank. The shipping papers and draft were sent to the bank. The *Snarrs* called at the bank, drew a cheque upon their account for a sufficient sum to buy a draft on *New York* for the amount of the draft, and handed this cheque to the manager, or else they wrote across the face of the draft an authority to the manager to charge it to their account. The manager endorsed the shipping bill to the *Snarrs*, which enabled them to get a delivery of the coal from the vessel, and the manager sent a draft on *New York* to the vendors. Afterwards when the coal was unladen at the *Snarrs'* warehouse, they gave the bank a warehouse receipt. It seems that the account was opened by a discount of a note for $7,000. Other similar discounts followed from time to time, and the *Snarrs* afterwards used the account as an ordinary deposit and drawing account for their business operations, as well as for the coal drafts, for which no separate account was kept.

The so called warehouse receipts given were as follows:

> Received in store in Big Coal House Warehouse at *Toronto* from Merchants' Bank of *Canada* (at *Toronto*), fourteen hundred and fifty-eight (1,458) tons stove coal, and two hundred and sixty-one tons chestnut coal per schooners 'Dundee,' 'Jessie Drummond,' 'Gold Hunter' and 'Annie Mulvey,' to be delivered to the order of the said Merchants' Bank to be endorsed hereon.
>
> This is to be regarded as a receipt under the provisions of Statute 34 *Vic.* ch. 5—value $7,000.00.

The said coal in sheds facing *Esplanade* is separate from and will be kept separate and distinguishable from other coal.

(Signed,) *W. Smarr.*

Dated, 10th August, 1878.

The following sections of 34 *Vic.*, ch. 5, provide (section 40) that the bank shall not—

Either directly or indirectly deal in the buying and selling or bartering of goods, wares or merchandise, or be engaged in any trade whatever, except as dealer in gold and silver bullion, bills of exchange, discounting of promissory notes and negotiable securities, and such trade generally as appertains generally to the business of banking.

The same section provides that—

The bank shall not directly or indirectly lend money or make advances upon the security, mortgage or hypothecation (*inter alia*) of any goods, wares or merchandise, except as authorized in this Act.

By section 41:

Bank may take, hold and dispose of mortgages and hypotheques upon personal as well as real property by way of additional security for debts contracted to the bank in the course of its business.

Same rights, &c., bank has in respect of real estate mortgaged to it, to be held and possessed by it in respect of any personal estate mortgaged. And section 48 provides that—

Where any person engaged in the calling of cove-keeper, keeper of a wharf, yard, harbor or other place, warehouseman, miller, wharfinger, master of a vessel, or carrier, curer and packer of pork, or dealer in wool, by whom a receipt or bill of lading may be given in such capacity, as hereinbefore mentioned, for cereal grains, goods, wares or merchandise, is at the same time the owner of or entitled himself (otherwise than in his capacity of warehouseman, miller, wharfinger, master of a vessel or carrier, cove keeper of a wharf, yard, harbor or other place, curer and packer of pork, or dealer in wool), to receive such cereal grains, goods, wares or merchandise, any such receipt or bill of lading or any acknowledgment or certificate intended to answer the purpose of such receipt or bill of lading, made by such person, shall be as valid and effectual for the purposes of this Act, as if the person making such receipt, acknowledgment or

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certificate or bill of lading, and the owner or person entitled to receive such cereal grains, goods, wares or merchandise were not one and the same person, and in the case of the curing and packing of pork, a receipt for hogs, shall apply to the pork made from such hogs.

The first question which arises, in my opinion, is, does sec. 48 apply to a private person's warehouse who does not hold himself out to the public as filling the character of one of the callings named in the section and with whom the public have a right to deal as such? The language of the Act is, where any person engaged in the calling of cove-keeper, keeper of a wharf, yard, harbor or other place, warehouseman, miller, wharfinger, master of a vessel or carrier, curer and packer of pork, or dealer in wool, by whom a receipt or bill of lading may be given in such capacity as hereinbefore mentioned as set out in the section I have just quoted at length.

I think this section was not intended to permit a person, whose business or calling was not one of those mentioned in the Act, to place goods on his private wharf or yard or in his private store or warehouse, and by giving a receipt, or; more properly speaking, as more applicable, an acknowledgment or certificate, make such a security as this Act contemplates banking companies may acquire and hold as collateral security as provided in the 46th section. The calling of the party being once established, then the form of the acknowledgment or certificate need not be too strictly scanned, if it clearly appears on its face to have been intended to answer the purpose of such a receipt as the statute contemplates, which the documents in this case clearly do; for though certainly awkwardly given in the form of a receipt, an awkward attempt at literal compliance with the statute, I see no reason why they may not be fairly treated as an acknowledgment or

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certificate, it being by the instrument expressly declared "this is to be regarded as a receipt under the provisions "of the statute 34 *Vic.* ch. 5, value $7,000." Nothing could more clearly show that this was, in the words of the statute, "intended to answer the purpose of such receipt," and by which no person could be misled.

I am therefore driven to enquire whether *W. Snarr* who signed the receipt was a warehouseman within the meaning of the statute, or *John Snarr & Sons*, if the receipt can be considered as signed by or for them. It is not pretended that *W. Snarr* carried on any business other than as one of the firm of *John Snarr & Sons*. I have read the evidence with great care, and I fail to discover anything whatever to show that *Snarrs* or any of them were warehousemen in the sense contemplated by the statute, they were wholesale and retail dealers in coal, pure and simple, and the bank dealt with them as such.

The very object of the transaction between the bank and *John Snarr & Sons* having been to enable the latter to carry on such their business as usual by supplying them with the means of doing so, that is, to enable them to procure coal for the business—such advances to be repaid out of the proceeds of the coal sold in the course of such business—the business was so carried on, the manager of the bank urging that sales should be made, though he does wish it to be understood that the sales were not to be made without his sanction, nor without his receiving the proceeds. No doubt the bank expected to obtain, and supposed the acknowledgments they held would secure to them, the proceeds; but the conduct of the manager and all the testimony in the case forces me to the conclusion that the sole business of the *Snarrs*, during the period of these transactions, was that of dealers in coal, which was carried on by them in dealing with the coal in question as usual, sales by

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wholesale and retail being openly made without any objection on the part of the bank, and with nothing whatever in the slightest degree indicating the character of warehousemen apparent in the business.

The very nature of the transaction is entirely inconsistent with that of warehousemen. *Snarrs* were not to hold these goods as warehousemen hold goods. They were to carry on their business by selling the goods. No doubt, both parties may have intended to secure the bank on the coal for the advances made by the bank and ultimately to pay the bank out of the proceeds of this coal, but this could only be done under the statute, in the manner therein prescribed; and as the statute in my opinion clearly applies only to persons engaged in the callings named therein, in which enumeration dealers in coal are not to be found, the *Snarrs* could not secure the bank in the manner they attempted to do. It has been argued that there was evidence to show that *Snarrs* were warehousemen outside of the coal business, but, in my opinion, there is nothing in the evidence to justify this contention. Let us refer particularly to the evidence as to the business carried on by *John Snarr & Sons*.

*Cooke*, the manager of the bank, is examined, and thus answers the questions put to him :—

Q. *Snarrs'* business was that of coal dealers? A. Coal dealers and wharfingers; I believe they received stone and different things of that kind on consignment or to store.

Q. Whereabouts? A. On the same wharf where they stored their coal; I think their books show; their clerk showed me once a book containing it, and Mr. *Snarr* himself told me so if that is anything.

Q. But so far as your transaction with them, their business was buying coal and selling it wholesale and retail? A. I think so.

Q. Had they the carts for taking it around the city in the ordinary way? A. I believe so.

Q. You will have to produce your ledger I am afraid? A. Well, the ledger won't show it.

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Mr. *Robinson*.—Mr. *Snarr* told you they were transacting what sort of business? A. That they were wharfingers who made a considerable sum per annum by storing stone and selling coal in consignments; I do not know whether it was Ohio stone or what stone, but storing it and I think to sell.

*Augustus C. Myers*, in the employ of *Snarr & Sons*, in June, 1877, and book-keeper from February, 1878, a witness called by the defendants, is asked:

Q. What business was *Snarr* carrying on besides buying and selling coal? Were they doing warehouse business? A. They had some iron stored on the dock and they charged for the storing of that, and there has been one or two loads of stone put there.

Q. Stored with them do you mean? A. Put there to dock and h ul away in a few days.

Q. Did they charge for it as wharfingers or warehousemen? A. Yes.

Q. And did they store much iron for the *Rochester* Iron Company? A. Well, they did; there was none since the latter part of, since 1876.

And again:

Q. What was the name of their business? A. Dealers in coal and wood.

Q. What was the character of their business, was it wholesale or retail? A. Both.

Q. And had they carts teaming about the city? A. Yes?

Q. Supplying customers? A. Yes.

Q. And when they would sell wholesale how would that be carried out? A. Well, they would ship by cars, load cars for other places, and when they would send up to the asylum in large quantities.

Q. And how much would it take to make a wholesale transaction? A. 10 tons or upwards.

Q. You do not mean selling to dealers? A. Well, to dealers in other places; *Rimer* was a dealer.

Q. He sold to *Rimer* who was another dealer and they shipped coal to other places. A. Yes.

Q. I suppose that must have been perfectly well known to any person who took notice to their business, the way it was carried on? A. Yes.

Q. That was an open transaction and no secrecy about it? A. No.

Mr. *McCarthy*.—You spoke about the business they were carrying on as wharfingers two years ago, that they had stored some stone or

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iron there? A. Some iron; I take from the book the date but there was one cargo received since I was there.

Q. When was the last cargo? A. In August, 1877, the schooner "Falcon."

Q. Then they stored that as wharfingers? A Yes, and they got so much a ton delivered.

Q. Was it for keeping it or receiving it on the wharf? A. Well, for receiving and delivering.

Q. Did they deliver it? A. Yes.

Q. Where did they deliver it to? A. It was subject to the order from the bank of *Hamilton*, it was on account of the *Rochester* Iron Company, and the bank of *Hamilton* had the charge of it.

Q. Were they at any expense delivering it? A. They carted it away on carts principally.

Q. That was the only transaction of that kind while you were there? A. Yes.

Q. They had a yard in which they stored coal which they bought and deposited too? A. Yes.

Q. But they did not store coal or wood for anybody else? A. No.

Q. What about the stone? A. There was some stone went across the docks also in the same way; it was put on the docks and some sand for *Gurney*.

HIS LORDSHIP.—Are you saying that they are wharfingers and yet dealers?

WITNESS.—There was some sand received for *Gurney* that they received 50 cents a ton, that they received and delivered up to *Gurney's* foundry.

Q. In regard to this wharf matter, Messrs. *Snarrs* had a wharf there? A. Yes.

Q. And on that wharf they at one time stored some stone for which they charged? A. There has been stone on the wharf.

Q. They received it and delivered it? A. Yes.

Q. And I suppose they charged for the time they kept it there? A. They charged so much a toise; that was charged as delivered.

Q. Then in regard to the iron, they had that on how many occasions? The first iron was there from the time *Milloys* gave up the dock to *Snarrs*.

Q. That would be February in what year? A. In 1876.

Q. It was left there by *Milloys* and turned over to *Snarrs*, and the second iron was in what year? A. August, 1877.

Q. Both lots of iron belonged to the *Rochester* Iron Company? A. Yes.

Q. And how long did it remain there? A. The last of it appears to have gone out April 30th, 1878.

Q. How long would it have been there at that rate? A. About eight months.

Q. And they charged, I suppose, for storing during that time? A. 50 cents a ton.

Q. And as far as you know is that all the business they did in storing for people? A. Excepting sand that was received for *Gurney*, and carted up to his place.

Q. And they charged for that? A. Yes.

Then as to his dealings with the coal in question, he thus answers the questions;

Q. How was that coal sold? A. In all quantities; from half a ton up to 100 tons.

Q. And when was it sold that way, on through from the 2nd of August? A. Yes.

Q. And these sales were going on from the time the coal was brought in in the ordinary course of their business? A. Yes.

Q. And that was in the ordinary course of their business, from half a ton up to 100 tons? A. Yes.

Q. And any person taking any interest in the way their business was managed could see that? A. It was all open as far as I was concerned.

Q. It was not all sold just the last month or few months, or six weeks before *Snarr* absconded? A. No.

Q. But you were selling up to the very time that he absconded? A. Yes.

Q. Were you selling in large or small quantities? A. Both wholesale and retail.

Q. Were you selling 100 tons at a time? A. Not very often, we were shipping by cars, 10 or 20 tons, and were also delivering through the city, but we make a regular abstract from the delivery book.

Then as to *Snarrs'* dealing with the coal in question, the manager of the bank says:

Q. It was the intention all along that this coal should be disposed of and out of the proceeds the notes should be paid; that was your idea? A. Yes.

Q. That was the reason the notes were taken at three or four months so as to give an opportunity for disposing of it? A. Yes.

Q. Was it expected that the coal would be sold during the currency of the notes? A. Yes, that was the intention and the idea.

Q. Well, then, when the notes matured, but one was partially paid and the others were renewed in full? A. Yes.

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Q. Were they all four months' renewals, the first notes, were they four months? A. I think they were all four months.

Q. What excuse was given for not paying, coal had not been sold or what? A. Some contracts that he had expected to get and had not; he said he expected some large contracts which he had not been able to get.

Q. Did you take any means to see if the coal was there or not? A. Well, I did not take any special means of getting it measured or examined by any expert.

Q. Did you do anything? A. I went down to the yard once or twice.

Q. When the renewals were made? A. No, not at the special moment?

Q. Were you pressing him to sell so as to retire the paper? A. I repeatedly urged him that I hoped he would get the contracts closed so that we could get the money.

Q. By getting his contracts closed you meant that he should dispose of the coal? A. Yes.

Q. And you expected the coal to be sold and in that way to pay the notes? A. Yes.

Q. Did he renew again, or was that the last renewal? Had he absconded before these notes were renewed? A. Yes; they were only renewed once, they were current at the time.

Q. One note was due in November and he absconded in the beginning of March? A. Yes; I think one note fell due shortly after he went away.

Q. Nothing had taken place in the interval during which the notes were current? A. I urged him repeatedly.

Q. What did you say to him? A. I asked him why he could not sell the coal, why he did not get the contracts, and he said it was a very bad time to sell coal, and he had failed in his endeavour to get these contracts, that he expected to sell it shortly, and gave me various excuses from time to time; I pressed him to try to get offers for the coal.

Q. As a matter of fact the coal was sold very largely? A. Yes.

Q. And no return had been made to you for it, that was the fact? A. I believe it was so.

Q. It is said that you urged him to sell the coal; were they authorized to sell it without your authority? A. No; I did not expect that they would make any contracts to sell it without I authorized it.

Q. And in regard to the sales, had they any authority by which they could sell this coal retail? A. No, not at all, but I permitted them to sell the coal of the "*E. P. Dorr;*" that was the only case in which I authorized them to sell; I do not recollect any other.

Q. Then I suppose other sales would have been made if they had been large sales? A. I expected they would have come and told me, and I would have taken the notes if good.

Q. But they had no authority to sell otherwise? A. No.

Q. In other words, did you give them any authority, generally speaking, without reference to you? A. Not at all.

MR. MCCARTHY.—Was there any bargain of that kind, or why do you say that? A. I have shown you already that I was very particular in transacting this, and I certainly had many conversations with them.

Q. I ask you when you made this arrangement if you ever made any such arrangement with the *Snarrs* that they were not to sell coal without authority? A. I did not say that they were to sell without my authority, but I expected.

Q. Was there any such arrangement made? A. Yes, there was an arangement made.

Q. During what time? A. During the currency of these notes.

Q. Tell me about the date? A. During the currency of these notes.

Q. Well, the currency was six or seven months? A. Well, say four months—I say the first four months.

Q. Do you swear that? A. Yes.

Q. That what was said or done? A. That I repeatedly asked *Snarr* if he could not sell some of this coal to pay these notes, and he gave me various reasons that he had not been able to sell and so required to renew the notes.

Q. You told Mr. *Robinson* that you had a right to control the coal? A. Yes.

Q. I want to know by what power or agreement you had the right to control the coal? A. I would not pass a cheque of his.

Q. I understand that you were urging him to sell the coal? A. Yes.

Q. That was a different thing from telling him that he could not sell it without your authority? A. He spoke of the parties to whom he could sell, and I told him that if he could sell the coal to these parties to do it.

Q. Then you were urging him to sell to different parties? A. Yes.

Q. Was there anything else—did you ever tell him that he was not to sell coal without your authority and consent? A. I not know that I told him in so many words.

Q. Then you did not tell him in so many words—you did not tell him in any other way? A. Why, I told him by refusing.

Q. Did you tell him in so many words or in any other way that he

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was not to sell the coal without your authority? A. I do not remember in so many words.

Q. You were urging him to sell the coal? A. To certain parties; he said he expected a large contract from the hospital.

Q. And what did you say to that? A. I urged him to sell.

Q. And anything else? A. There were other large firms that he hoped would buy from him.

Q. And you urged him to sell? A. Yes, and he was to give me the paper, or promised me the notes of those parties.

Q. Will you, on your oath, say that you told him at any time not to sell any coal without your consent? A. I do not know that I will say that.

Q. He told you of different parties and you urged him to sell coal to these different parties? A. Yes.

Q. And you were anxious that he should sell the coal to these parties? A. Yes.

Q. Did you ever ask him who he was selling to, or tell him he was not to sell? A. We had many conversations about it.

Q. I want to come at this: you are aware that he was retailing the coal? A. Yes; retailing some coal.

Q. Did you know? A. I did not know whether he was retailing hard or soft coal.

Q. Did you know that he was not retailing this coal? A. That is a strange question to ask; I did not know that he was.

Q. Did you interest yourself in the least? A. I did, as far as it was necessary for me to do.

Q. In what way? A. I tell you by asking him if he could not sell to these parties he mentioned.

Q. Did you take any means of seeing that he was not disposing of this coal? A. No.

Q. Did you ever ask him whether he was not? A. I did not.

Q. But you knew he was selling the coal? A. Yes.

Q. And you never took any means of seeing that he was not selling this coal, is that correct? A. No; I went down to his place once or twice.

Q. You said a moment ago that you took no means to prevent him selling this coal, is that true? A. Yes; I did not take any means to prevent him selling the coal because I did not know that he was selling and therefore did not think it necessary to take any means; I had no idea that he was selling our coal.

Taking the whole of this testimony together, it seems to me clear beyond a doubt that the business carried on by *Snarrs* was that of coal dealers, and coal dealers

alone, and that there is nothing whatever to justify the conclusion that these *Snarrs* ever carried on the business of warehousemen, or, at any rate, that they were warehousemen at the time of this transaction, or in reference thereto. The mere fact of their having in two or three isolated instances, two or three years before this transaction, received, under exceptional circumstances, goods to sell on consignment, or received articles to transmit and to deliver, would not justify their being treated as "engaged in the calling" of warehousemen or any of the callings specified in the statute, more especially as they do not appear to have, in any way, held themselves out as warehousemen, or ever even to have previously to this transaction given a warehouseman's receipt or document in any such capacity, but who, on the contrary, carried on a well known and well established business of an entirely different character, and in furtherance of which the transaction in question had reference, and which cannot make them, in my opinion, warehousemen in the sense of the 48th section, so as to enable them to give, or the bank to accept, the security contemplated.

As to the effect on the public of allowing parties, carrying on business of coal dealers, to give valid and binding receipts or acknowledgments of this kind, it is, in my opinion, contrary to the spirit and policy of the law, and calculated to lead to confusion in mercantile dealings and disastrous results to innocent parties; for, if these receipts are valid securities in the hands of the bank, what is to prevent the bank from following the coal and claiming its value from innocent purchasers from *Snarrs*, on the ground that *Snarrs* had wrongfully sold the coal on which the bank held a valid and binding security, and of which such wrongful sale could not deprive them? Surely to such a claim, could not the innocent pur-

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chaser reply with crushing effect: *Snarrs* were not engaged in any of the callings mentioned in the statute, but were openly and notoriously engaged in the business of wholesale and retail dealers in coals and none other, in which capacity I dealt with them, and they could not give such a security as the bank claims to hold, therefore the sale was good and sufficient to pass the property.

It is abundantly clear that the bank cannot recover in this action unless the security they claim to hold on these coals is strictly within the provisions of the statute, the statute expressly declaring that the bank shall not directly or indirectly deal in buying, selling or bartering goods, and shall not directly or indirectly lend money or make advances or loans upon the security of any goods, wares or merchandise, otherwise than that in accordance with the statute and as authorized thereby.

STRONG, J.:

I am unable to agree with the learned judges of the Court of Appeal, who held that the documents called warehouse receipts under which the appellants claimed title to the coal in question in this suit were not good and valid instruments of title under the 48th section of the Banking Act of 1871. That they were intended to be effectual under the statute is declared on their face. The statement that the coal had been received from the bank was in a sense true, since it had originally been consigned to the bank By the words "to be delivered to the order of the said Merchants bank" the *Snarrs* expressly acknowledged that they held the coal as the property of the bank. I am therefore of opinion that these instruments were acknowledgments intended to answer the purposes of a receipt within the meaning of those terms as used in the 48th section of

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the Banking Act of 1871. I differ from the learned judges of the court below, who held that, in order to make a receipt, acknowledgment, or certificate, given by any of the persons engaged in the callings mentioned in this section, who are also the owners of the goods, effectual, there must be a person interposed between them and the bank, and that the acknowledgment cannot be directly given to the bank. It is declared that an acknowledgment, certificate, or receipt, given by a wharfinger, or warehouseman, who is himself the owner of the goods, shall be as effectual as if he were not both owner and wharfinger or warehouseman, and if the owner and wharfinger or warehouseman were not "one and the same person" then such a receipt or acknowledgement as this given to the owner would be a valid charge upon the property in the hands of the bank if transferred to it by indorsement. I consider that the statute cannot be construed as requiring an indorsement in the case of an acknowledgment given by a warehouseman owner, for such a form would be inappropriate and meaningless. What I consider this 48th section to authorize is, that an owner, who is engaged in the calling of a warehouseman or wharfinger and has the goods in his own possession, may, by a certificate or acknowledgment given directly to the bank, effect the same purposes as may be attained by a receipt given by a warehouseman to the owner (when they are different persons) and by the latter transferred to the bank. This is the only sensible construction which we can place on the statute and we are bound to interpret it *ut res magis valeat quam pereat*, which we should not do if we held otherwise.

To say that there must be a person interposed between the bank and the wharfinger, for which no good reason can be suggested, would be to add to the words of the sections, which do not point out to whom the acknow-

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ledgment or certificate is to be given, but merely say that any acknowledgment so intended to answer the purposes of a receipt shall be good; therefore, there being no reason for requiring the intervention of another person between the owner and the bank, all we have to ascertain is, whether the instrument given was intended to answer the same purposes as a receipt would have answered, if there had been a separation of the characters of owner and warehouseman, and this is plainly shown both by the form of the instrument and the nature of the transaction.

If an endorsement were requisite to complete the title of the bank, it would be of course for a Court of Equity, (and this suit was instituted as a suit in equity,) to direct that the title of the bank, as holders for value, should be completed by an indorsement, as is done in a case of a transfer for value of a bill payable to order, where, by reason of the omission to indorse, the transferee is not clothed with the legal title. And this equitable right the bank would have against the plaintiff, who is an assignee in insolvency and not a purchaser of the coal for valuable consideration.

But for another reason, upon which the judgment of Mr. Justice *Patterson* also proceeds, I have come to the conclusion that the judgment appealed from should be affirmed. The 48th section can have no application unless the insolvents, the *Snarrs*, are proved to have been persons engaged in the "calling of warehousemen or wharfingers," and the evidence shows they were not such persons but dealers in coal and wood. The witness, *Myers*, who had been book-keeper of the insolvents, says, they were "dealers in coal and wood." It is true that it is shewn that there was some iron on the wharf when they got possession of it from *Milloy* for which they received wharfage, and that another lot of iron was received by them, after they got possession, and also

charged for, and that on one occasion some sand and on another some stone was received at the wharf; but these three or four occasional and isolated transactions do not show that they were persons engaged in the calling of wharfingers or warehousemen. Further, I cannot agree that *William Snarr* is to be considered as having been a warehouseman for the firm, the warehouse and wharf were really the leasehold of the firm and the nominal title only was in *William Snarr*.

Upon the constitutional question I refrain from expressing any opinion, its determination, in the view of the case which I take, not being requisite for the decision of the present appeal, and in doing so I act upon the principle laid down in the Privy Council in *Parsons* v. *Citizens' Ins. Co.* (1), and which was also acted upon in the *Western Counties Ry.* v. *Windsor & Annapolis Ry. Co.* (2).

The receipts being for the reason given inoperative under the Banking Act, the respondent, as assignee in insolvency of the *Snarrs*, and being in that capacity the representative of the creditors, is entitled to insist upon the provisions of the *Ontario* Chattel Mortgage Act, which avoids these instruments considered as mere equitable assignments outside of the Banking Act.

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

FOURNIER, J. :—

In this case I entirely agree with the reasons given by the learned Chancellor on all points. As to the fact of *Snarr* being a warehouseman, I adopt the finding of the learned judge who tried the case. True, the evidence is not very strong, but still evidence of several transactions by *Snarr* as a warehouseman was given; the law does not say how many transactions shall be

(1) 7 App. Cases 96. (2) 7 App. Cases 178.

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deemed necessary to qualify a person as a keeper of a yard, a warehouseman, &c.

Then as to the receipt, although not exactly in the form of the statute, still *Snarr* intended it to meet the requirements of the statute, and if it had been necessary to amend it, the court could have directed it to be amended as prayed for by the appellants. The respondent, being the assignee of *Snarr*, cannot impeach the form of the receipt any more than *Snarr* could have done had the latter been a party to this suit.

The question has been raised as to the constitutionality of certain sections of the Banking Act, as being an encroachment on civil rights, as they provide the means of making contracts with banks. No doubt contracts entered into with banks under the Banking Act are encroachments on civil rights or civil law, but such encroachments have been declared to be legal and constitutional by the Privy Council in the case of *Dupuy* v. *Cushing* (1). For, when legislating upon subject-matter exclusively assigned by the *British North America* Act to the Dominion Parliament, civil rights, and even civil procedure, will necessarily be interfered with, and the conclusion arrived at by the Privy Council in that case of *Dupuy* v. *Cushing* is perfectly applicable to this case; here the Dominion Parliament, legislating on the subject-matter of banking, interfere with civil rights by saying that banks may take certain receipts as collateral security for the payment of any debt which may become due to the bank under credit opened by the bank for the holder of such receipt; and as held by the Privy Council in *Dupuy* v. *Cushing*:

> It is a necessary implication that the Imperial statute, in assigning to the Dominion Parliament the subjects of bankruptcy and insolvency, intended to confer upon it legislative power to interfere

(1) 42 L. T. N. S. 445.

with property, civil rights and procedure within the provinces, so far as a general law relating to these subjects might affect them.

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If so, how can it be said that the Dominion Parliament cannot, by a general law on banking, passed in order to facilitate commerce, provide certain forms of receipts or certificates which shall be considered to be valid instruments upon which parties may obtain money from banks? I do not think this question to be susceptible of argument since the decisions of the Privy Council. I am of opinion that these sections of the Banking Act are *intra vires* of the Dominion Parliament. For these reasons, I am for allowing the appeal.

HENRY, J.:

In deciding as to the rights of the parties in this case, it is necessary to consider the bearing upon it of the Acts passed in *Canada* previous to 1867, and the Act of the Dominion, intituled "Banks and Banking" (34 *Vic.*, ch. 5), or rather the 46th and the four next succeeding sections of it. Section 14 of the first-mentioned Act is as follows:

Any cove receipt, bill of lading, specification of timber, or any receipt given by a cove keeper, miller or by the keeper of a warehouse, wharf, yard, harbor or other place, for cereal grains, goods, wares or merchandise laid up, stored or deposited in or on the cove, mill, warehouse, wharf, yard, harbor or other place in this Province of which he is keeper; or any bill of lading or receipt given by a master of a vessel, or by a carrier for carrying cereal grains, goods, wares, or merchandise shipped in such vessels, or delivered to such carrier for carriage from any place whatever, to any part of this province or through the same, or on the waters bordering thereon, or from the same to any place whatever, and whether such cereal grains are to be delivered upon such receipt in specie or converted into flour, may, by endorsement thereon by the owner of, or person entitled to receive such cereal grains, goods, wares or merchandise, or his attorney or agent, be transferred to any private person as collateral security for any debt due to such private person, and being so endorsed shall vest in such private person from the date of such endorsement, all the right and title of the endorser

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to or in such cereal grains, goods, wares or merchandise, subject to the right of the endorser to have the same re-transferred to him, if such debt is paid when due.

It will be observed that by the term "private person," used in the first mentioned act, banks were excluded from its operation. Section 46 of the Dominion Act before mentioned, in language similar in substance and nearly verbatim, extended the provisions of the previous act to banks; but instead of permitting them to take an endorsement of a receipt for a debt already due, as might be done by a private person under the first mentioned act, they were only authorized to take a receipt:

As collateral security for the due payment of any bill of exchange or note discounted by such bank in the regular course of its banking business, or for any debt which may become due to the bank under any credit opened or liability incurred by the bank for or on behalf of the holder or owner of such bill of lading, specification or receipt, or for any other debt to become due to the bank.

The coal, which is the subject of contention in this case, with a large quantity besides, was shipped for parties named *Snarr*, who subsequently became insolvent, and the respondent became assignee of their estate in bankruptcy. It was, however, consigned to the bank, who paid for it. The latter, having paid for it, had by agreement a lien on the shipments of coal for the advances made, and indorsed the bills of lading to the *Snarrs*, who kept a coal warehouse from which they sold, upon obtaining from them receipts signed by *W. Snarr*, such as the following:

Received in store in Big Coal House warehouse, at *Toronto*, from Merchants' Bank of *Canada*, at *Toronto*, (so many tons stove coal and so many tons chestnut coal) per schooners (naming them) to be delivered to the order of the said Merchants Bank to be endorsed hereon. This is to be regarded as a receipt under the provisions of statute 34 *Vic.*, ch. 5, value $7,000. The said coal in sheds facing the esplanade, is separate from, and will be kept separate and distinguishable from other coal.

Dated 10th August, 1878. *W. Snarr.*

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*W. Snarr* was a member of the insolvent firm, and lessee of the wharf and of the warehouse wherein the coal was stored.

No part of it was delivered to the bank or upon their order. Instead of being kept separate, as agreed upon, the *Snarrs* placed it with other coal of their own, and sold from the warehouse and bins without regard to their agreement.

When the *Snarrs* became insolvent, the respondent, as assignee, took possession of the coal remaining unsold in the warehouse, and sold it, or the greater part of it, under an agreement with the appellants that he should pay the proceeds of the hard coal into the appellants' bank at *Toronto* to the joint credit of the appellants and respondent without prejudice to the rights of either party in respect to the same. The question now is, who is entitled to the amount so paid into the bank, and subsequently paid into court, and also as to any coal of the description specified in the receipts remaining in the warehouse or sold subsequently by the respondent?

Questions have been raised as to the validity of the receipts as what are commonly known warehouse receipts under the statutes referred to. Before, however, considering the validity of the receipts it is important to consider the question of the ownership of the coal before the *Snarrs* were placed in possession of it. It having been consigned to the bank, who paid for it and had a lien upon it, as security for the money advanced, the property in it and the right to the possession of it vested in the bank; and the *Snarrs* could obtain no title to or possession of it, except through the bank. The latter gave them no right or title to it, but merely gave them the custody of it as warehousemen to be kept separate from any other coal, and to be delivered to the order of the bank, just as they might have done to any other person having the means of storing it. No

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property in it passed to the *Snarrs* or out of the bank and, independently of the validity of the so called warehouse receipts, the property in the coal was in the bank; but the receipts are evidence of the terms under which the *Snarrs* got possession of the coal, and which shows plainly that they got such solely as the bailees of the bank. It is true that under the arrangements the *Snarrs* had an equitable claim to obtain the coal on repayment of the bank's advances, and that equitable claim was all that went to their assignee. If then the *Snarrs'* had no title to or property in the coal, except as I have said, how can their assignee claim any? The latter can only have the property, rights, and interests of the insolvents to deal with. The *Snarrs* would be estopped by their agreement contained in the receipts from making any claim of property in the coal until the advances were repaid or tendered to the bank, and the same estoppel meets their assignee. Independently, then, of the receipts, as warehouse receipts under the statute, the appellants should be adjudged to have been the owners of the coal and as such entitled to our judgment.

The statute of *Canada* first mentioned is still in force in *Canada*, as far as I can discover. The Dominion statute does not in any way repeal or alter it, but merely extends it to banks. They adopt the wording of the previous acts and provide that:

> The bank may acquire and hold any cove receipt, or any receipt by a cove keeper or by the keeper of any wharf, yard, harbor or place, any bill of lading, any specification of timber or any receipt given for cereal grains, goods, wares or merchandise, stored or deposited in any cove, wharf, yard, harbor, warehouse, mill or other place in *Canada*, as collateral security for any debt to become due to the bank.

It will be noticed that the receipt is not required to be signed by a warehouseman. It is valid if signed "by the keeper of any wharf, yard, harbor or other place."

The receipts in evidence in this case were signed by *W. Snarr*, who is proved to have been the lessee of the warehouse in which the coal was deposited; and that to my mind is sufficient, as soon as he receives goods, wares or merchandize to be warehoused and held for another party; but there is evidence of *W. Snarr* being a warehouse keeper for other parties at different times before the signing of the receipt. The Act does not mention "warehousemen" as necessary parties to give receipts; but, on the contrary, the term is not even used to indicate the party or parties by whom they are to be signed. What right, therefore, has any court to require that a receipt, to be valid, should be signed by one who has a warehouse in which goods are frequently deposited.

We must get at the objects of the Legislature by giving to the words of an Act their proper and ordinary meaning: but we have no right to attribute to the legislature any intention but what is fairly deducible from the words used. To require then more than I have said would, in my opinion, be requiring what was not intended or provided for.

If the bank, by way of lien, had the property in the coal and the possession of it, what law would prevent them from storing it for safe keeping in any store, warehouse, or place they pleased and taking an accountable receipt therefor? And having such a receipt as the statute prescribes, what objection could be raised if the bank assigned it to another bank within the provisions of the statute? For the bank to store or deposit the coal as was done in this case no statutory provision was necessary. In doing so the bank would be only exercising a common law right over their own property.

The Dominion statute provided in terms for the assignment to banks of receipts obtained by other

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parties, and to enable such parties to transfer the property mentioned as security to the banks making advances to them.

The prohibitory provisions of section 40 of the Banking Act before mentioned do not apply to the circumstances of this case. The bank did not lend money to the *Snarrs* upon the security of the receipts. The money had been previously lent and no mortgage or hypothecation was given by the *Snarrs* to the bank. The bank held the property under the bills of lading and had a lien upon it for their advances to pay for it, which they might hold. They were not trading with the property as prohibited by that section, but having advanced the money to pay for it,it was held as collateral security for the payment of certain notes then running. I see nothing in law or equity to prevent their doing so.

The question of the validity of the provisions to be found in section 46 and succeeding ones on the ground that they constitute an interference with the functions of the Local Legislatures under the *British North America* Act, which gives to the latter the right to legislate in relation to "property and civil rights in the province," has been raised. The previous section (91) of that Act, however, gives to parliament the right to legislate in regard to "the regulation of trade and commerce, and banking, incorporation of banks, and the issue of paper money," and the concluding clause of section 91 provides: that

> Any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned to the legislatures of the provinces.

The subjects of "banking" and incorporation of banks give, and no doubt the section intended to give,

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to Parliament full and exclusive powers to deal with those subjects, and I cannot for a moment believe that the power to deal with "property and civil rights in the province" was intended in any way to interfere with or control the action of Parliament in respect of the subject of banking. It is the policy of the Act to give exclusive jurisdiction in legislation, either to Parliament or to the legislatures of the provinces. It was impossible to specify in detail the extent of the powers of either so as to remove all doubts, and therefore the several provisions of the whole Act and its object must, in many cases, be fully considered to enable a right judgment to be formed. If the provisions of section 46 and those following it were necessary in the interests of the country, what power existed in the local legislatures to enact them, affecting as they do the subjects of "banking and incorporation of banks," given exclusively to Parliament. We must, I think, conclude that when the two subjects were placed within the powers of Parliament, without any limitation, no limitation was intended, and that everything necessarily connected with banking should be within the powers of Parliament; although interfering, in some respects, with "property and civil rights." There are many of the subjects in section 91 given to Parliament, which to as great an extent as in the case I am now considering, interfere in some respects with "property and civil rights;" "navigation and shipping," "inland fisheries," "bills of exchange and promissory notes," "bankruptcy and insolvency," and others I might mention as amongst the number; and if Parliament had not the power to pass the Act in question in regard to the receipts referred to in section 46, because of interference with the matters of "property and civil rights," it would indeed be but consistent to say that for the same reason Parliament had not the exclusive right to

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deal fully with the several subjects I have just referred to or any of them. I could give further reasons for sustaining the legislation referred to, but I consider it unnecessary to do so. The concluding clause of section 91, which I have quoted, was evidently intended to remove any reasonable doubt as to the plenary powers intended to be given to Parliament in regard to all the subjects in that section enumerated, and to subordinate to them the powers given to the legislatures as far as is necessary to legislate in regard to the subjects so enumerated.

One other question remains, as to the identity and ownership of the coal remaining in the warehouse when the *Snarrs* became insolvent. The law, however, is well settled. It is shown that the *Snarrs* improperly mixed the coal they received under the bills of lading assigned to them by the bank, and which *W. Snarr* agreed to keep separate, with coal of their own of the same kind, so that the one could not be distinguished from the other. Under such circumstances, the bank was entitled to the mixed coal to the extent of the quantity the *Snarrs* received under the transfers of the bills of lading. As the quantity left in the warehouse and taken possession of by the respondent was less than the quantity so received by the *Snarrs*, the bank is entitled to the whole sum paid into court.

For the reasons I have given, and for those others contained in the judgment of the learned chancellor who tried this case, I am of opinion that the judgment of the Appeal Court should be reversed, and the decree of the learned Chancellor affirmed with costs.

TASCHEREAU, J.:

I am of opinion that *Snarr*, having been found by the judge at the trial to be a warehouseman, and there being on the record some evidence in support of that

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verdict, which evidence stands entirely uncontradicted, he must be held by this court to be such a warehouseman.

I am also of opinion that the warehouse receipt in the case is sufficient under the Act, and that the property of the coal duly passed to the bank in virtue of such receipt. If deficient in form, the *Snarrs* or their assignee cannot take advantage of it, because they had covenanted to give a good receipt.

The sections in question of the Banking Act are, in my opinion, clearly within the legislative power of the Dominion Parliament. I would allow the appeal, and restore the first judgment.

*Appeal allowed with costs.*

Solicitors for appellants: *Smith, Smith & Rae.*

Solicitor for respondent: *John Leys.*

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J. H. CHAPMAN ..... .....APPELLANT;

AND

FRANCIS AND JAMES A. TUFTS.....RESPONDENTS.

1882

*Oct. 25.

1883

*Jan. 12.

*Unstamped bill of exchange—42 Vic., ch. 17, sec. 13—Knowledge—Question for Judge.*

The action was brought by *T. et al* against *C.* to recover the amount of a bill of exchange. It appeared that the draft when made, and when received by *T. et al*, had no stamps; that they knew then that bills and promissory notes required to be stamped, but never gave it a thought and their first knowledge that the bill was not stamped was when they gave it to their attorney for collection on the 26th February, 1880, and they immediately put on double stamps.

The bill was received in evidence, leave being reserved to the defend-

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

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ant to move for a non-suit; the learned judge stating his opinion that though as a fact the plaintiffs knew the bill was not stamped when they received it, and knew that stamps were necessary, they accidentally and not intentionally omitted to affix them till their attention was called to the omission in February, 1880.

*Held*, 1. That the question as to whether the holder of a bill or draft has affixed double stamps upon an unstamped bill or draft so soon as the state of the bill was brought to his knowledge within the terms of 42 *Vic.*, ch. 12, sec. 13, is a question for the judge at the trial and not for the jury. (*Gwynne*, J., dissenting.)

2. That the "knowledge" referred to in the Act is actual knowledge and not imputed or presumed knowledge, and that the evidence in this case showed that *T.* acquired this knowledge for the first time on the day he affixed stamps for the amount of the double duty, 26th February, 1880.

3. That the want of proper stamps or proper stamping in due time is not a defence which need be pleaded (*Gwynne*, J., dissenting).

APPEAL from the decision of the Supreme Court of *New Brunswick*, refusing a motion that the verdict in this cause be set aside, and a non-suit entered (1).

This was an action brought by the respondents as payees against the appellant as acceptor of a bill of exchange.

The first count of the declaration is on the acceptance, by the defendant, of the draft of one *David S. Howard*, dated 26th December, 1880, for $500, in favor of the plaintiffs. The declaration also contained the usual common counts. The only plea material to the case is the first, which traverses the acceptance of the draft. The cause was tried on the 10th August, 1881, at the *St. John* Circuit Court, before his honor Mr. Justice *Duff*. The only question involved in the case was as to the sufficiency of the stamping.

The evidence on the point was, that the plaintiffs received the draft about a fortnight or a month after it

(1) 22 N. B. R. 199.

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was drawn; that the plaintiff, *James A. Tufts*, who was the witness, knew then that notes and bills required stamps, but never gave it a thought; that he did not put stamps on it until it was being sued; that his first knowledge that it was not stamped was when his attorney called attention to it on 26th February, 1880; that he then immediately put on double stamps and cancelled them; that he had the management of this, his brother and co-plaintiff having been away, and having had nothing to do with it.

The counsel for the defendant claimed on the trial that it was not competent for the person who had the bill in his possession, with the knowledge that bills of that kind required stamps, to make the bill good by acts such as those of Mr. *James Tufts*, as above detailed. He did not claim that there was any evidence of the plaintiffs having had any knowledge, in fact, that the draft was not stamped, any sooner than the time stated by the only witness who was called in the case, viz.: on the 26th February, 1880, at which time the double stamps were put on and duly cancelled.

The counsel for the plaintiffs claimed that double stamps having been put on by the holder, and duly cancelled as soon as he acquired knowledge of the defect, ("plaintiff put double stamps as soon as he becomes aware of the defect;") the acceptance was rendered legal and valid under 42 *Vic.* ch. 17.

Mr. Justice *Duff* received the draft in evidence, reserving leave to enter a non-suit if the draft was improperly received in evidence.

The motion of counsel for the defendant was, "That the verdict in the above cause be set aside, and a non-suit entered;" and the court, having taken time to consider, ordered—"That the said motion be refused."

Mr. *Davies*, Q.C., appeared for appellants, and Mr. *Travis* for respondents.

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RITCHIE, C.J.:

This was an action on a bill of exchange by the drawees against the acceptor, tried at the *St. John* Circuit Court before Mr. Justice *Duff*.

The only question involved is as to the sufficiency of the stamping. It was, in my opinion, the duty of the learned judge, under the statute 42 *Vic.*, ch. 17, to determine whether the bill, on its face, was properly stamped or not properly stamped, and as I think the evidence shows that the respondent paid the double duty so soon as he acquired the actual knowledge that the bill was not properly stamped, the bill was properly received in evidence, and the judgment in the plaintiff's favor should be affirmed.

STRONG, J.:

The question, whether the plaintiffs affixed double stamps so soon as the unstamped state of the bill was brought to their knowledge, within the terms of sec. 13 and 20, ch. 17, was, as it appears to me, by the express provisions of that section, a question for the determination of the judge at the trial, and not one to be tried by the jury. It was a question of fact, upon the decision of which the admissibility or rejection of a document tendered in evidence was made to depend, and like all such issues, was one to be tried not by the jury but by the judge. And this being so, I am of opinion that the want of proper stamps or proper stamping in due time is not a defence which ought to be pleaded, inasmuch as the rules of pleading only require such defences founded upon facts as the jury might be called upon to try to be placed upon the record. In my view, therefore, Mr. Justice *Duff* took the proper course at the trial in dealing with the question himself, instead of treating it as one for the jury.

This view is warranted by the express words of the

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section, "to the satisfaction of the court or a judge," which I construe according to their primary meaning as excluding a jury. These words "to the satisfaction" have relation as well to the payment of double duty by the holder as soon as he acquired knowledge as to the other condition that the omission should be through error and mistake, and without any intention to violate the law; both questions are clearly made triable by the judge alone. Then, this being so, it was quite competent for the court in banc to reverse the finding of the learned judge at the trial on this preliminary issue.

The learned judge finds substantially that it was through error and mistake and unintentionally that stamps were not affixed as soon as the bill came to the plaintiffs' hands, but he also finds that the plaintiffs knew when they received the bill that it was unstamped. The latter part of the finding the majority of the court below have thought unwarranted by the evidence—a conclusion in which I entirely agree. I can find nothing in the evidence to warrant us in holding that the plaintiff, *James A. Tufts*, had any knowledge of the unstamped state of the instrument at any earlier date than that at which he swears he first became aware of it. He says his first knowledge that the bill was unstamped was when Mr. *Travis*, his solicitor, called his attention to it on 26th February, 1880, when he immediately put on double stamps and cancelled them. There is no evidence in any way to vary or neutralize this in the slightest degree. And unless we are bound to say that because the bill had been for some time preceding the date of the stamping in the plaintiffs' possession, they must be presumed to know it was not stamped, it will be impossible for us to come to any conclusion different from that arrived at by the Supreme Court of *New Brunswick*. The object of the enactment of which the plaintiff claims the benefit was

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clearly to relieve persons from loss through innocent inadvertence to pay the duty, and if we were to hold that imputed or constructive, and not actual knowledge was meant, we should be going far to do away with the efficacy of the section, as affording a means of relief against innocent error and mistake, and that without anything in the language of the statute requiring such a construction. I am, therefore, of opinion that "knowledge" means actual and not imputed or presumed knowledge; and this the evidence shows the plaintiff acquired for the first time on the day he affixed stamps for the amount of the double duty.

The appeal must be dismissed with costs.

FOURNIER, J., concurred.

HENRY, J.:—

The question was raised here whether a plea of the absence of proper stamps was necessary to be filed before the defendant could obtain the benefit of the evidence of the want of them. In the statute which provides that a bill or note not properly stamped shall not be sufficient, we have mentioned what kind of a bill would be sufficient to enable a party to recover. The statute settles that, and provides that, where the maker did not put on the stamp corresponding with the date and obliterate it when it is made, the party to whom the note is given, as soon as he discovers it is not stamped or is not sufficiently stamped, by putting on double the number deficient, with the date of his doing so, is enabled to make that which was useless before a good and available document. When a note or bill is produced and bears the stamping by the party who makes it, it is on view before the judge a sufficient document, and it would be for the other party to show that there was some reason, either that it was not stamped at the time, or give

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some other reason, why the stamp as affixed should not be considered sufficient. When a party denies the acceptance of a bill or the making of a note, he virtually denies the making of a legal and available document, and I think it is not necessary for the party to plead the want of stamps. It refers to a bill that the other party could recover on at law. The denial of the acceptance throws upon the other party the onus of proving a valuable document upon which he is entitled to bring the action. In this case the party in whose favor the bill was drawn received it without any stamps, and the evidence goes to show that, as soon as he became aware of the fact, he put on the legal number of stamps. It was a question then that might or might not be tried by the judge. The judge, in the first place, would be bound to receive the document on the trial, and it might be a question for him afterwards to decide whether there was any evidence on the other side which would do away with the testimony of the plaintiff. If there were contradictory evidence, it would, I take it, be left to the jury, but the judge was bound to decide whether on the face of it it was a good and available document. Under these circumstances, then, I think the judge did right so far as he gave effect to the bill, but I must say that I think his judgment was a little contradictory, and I think that, the only evidence being the evidence of one of the plaintiffs in regard to the fact of his own knowledge of the stamping of the bill, and that not being in any way attacked by counter evidence, I can only say that I for one, sitting as a judge, would have no hesitation in saying that the evidence was sufficient under the law. So that, although the judge decided in that way, it is more a legal decision than it is a decision on the evidence. Under these circumstances, I think the plaintiff is entitled to recover. He proved, I think, that he was not

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aware that the bill was not stamped, and I agree with my learned brother *Strong* in stating that, under the statute, it is actual knowledge that is required. If a party knows the bill is not stamped, and does not act upon that knowledge and put on the stamps, then, of course, he is liable to the consequences, but, if a man without knowing it puts a bill into his drawer or his safe, keeps it two or three months, takes it out again, and discovers it is not stamped or not sufficiently stamped, I think the statute provides for that. I therefore think the appeal should be dismissed, and the judgment below confirmed.

GWYNNE, J.:—

In my judgment the learned judge who presided at the trial of this case would have erred if he had ruled upon the case as presented at the trial, that there was no case to go to the jury and that the plaintiffs should be non-suited. As the plaintiffs could not be non-suited against their will, what was contended for is, in effect, that unless they should be willing to accept a non-suit the learned judge should have told the jury that there was no case to go to them, and that therefore their duty was to render their verdict for the defendant. The question depends upon the proper construction to be put upon the 2nd section of 37 *Vic.* ch. 47.

The action was brought by the plaintiffs as payees against the defendant as acceptor of a bill of exchange. To this action the defendant pleaded *non accepit*, upon which plea issue was joined, and the issue was brought down for trial by a jury. On the bill being produced, it appeared to bear date the 26th December, 1879, to be for the sum of $500, and to have on it bill stamps to the amount of 30c. marked "cancelled *F. T. & Co.*, Feb. 16, '80." There was no plea upon the record that the bill was not properly stamped. The stamps appearing upon

it were consistent with the fact of the bill having been stamped at a time and in a manner authorized by law; but whether there existed any fact or circumstance which would render the stamps so put on insufficient in point of law was a point which, it must be admitted, was not raised by the plea of *non accepit*. Our act is quite different in this respect from the English act, which prohibits a bill not stamped being received in evidence, and therefore in *England* under a plea of *non accepit* an objection of want of a stamp does necessarily arise, because a bill not stamped being inadmissible in evidence, a defendant upon issue joined to a plea of *non accepit* must prevail, no bill being produced. He succeeds simply by reason of the plaintiff being unable to produce a bill, the existence of which the plea denies. It was assumed, however, by all parties at the trial, that the plea did put in issue all such questions as might be raised by the evidence, by reason of the stamps not having been, if they should appear not to have been, put upon the bill and cancelled at a time and in a manner authorized by law; the most favorable light therefore for the defendant in which we can entertain the point argued on this appeal is to treat the question, as it should be treated, upon an issue joined on pleadings in express terms raising the question. The plea in such a case would be to the effect that the bill had no stamps put upon it when it was drawn or accepted, and that the plaintiffs when they became holders of the bill acquired the knowledge that the bill was defective for want of stamps, and did not as soon as they acquired the knowledge that the bill was so defective by reason of the stamp duty not having been paid thereon, pay double duty thereon by affixing stamps to the amount of such double duty, and cancelling them as required by law in that behalf, but wilfully neglected so to do, and afterwards, to wit, a long time after they had acquired such

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knowledge that the bill was so defective as aforesaid, to wit, on the 26th February, 1880, put on and cancelled the stamps appearing on the said bill; by reason whereof and by force of the statute in that behalf, the said bill hath become and is invalid in law and equity. To this plea the plaintiffs, as appears by the evidence given at the trial, might have replied in substance to the effect that they first became holders of the bill some time after, to wit, a fortnight after it was drawn and accepted, and that they did not, when they first became such holders, nor until the 26th day of February, 1880, acquire knowledge that the said bill was defective for the reasons in the said plea alleged, and immediately upon their acquiring such knowledge they did upon the same 26th day of February affix stamps to the said bill to the amount of double the duty payable at the time of the drawing of the bill, and did cancel such stamps in the manner required by law; issue being joined on this replication would have effectually raised the point of fact to be tried, and the jury sworn to try that issue would have been the sole constitutional tribunal to render a verdict upon it. Now, the only evidence given at the trial upon the point was that given by *James A. Tufts*, one of the plaintiffs, whose evidence, as I read it, upon the case submitted to us, is, in substance, that although he knew that bills and notes require stamps, yet that the first knowledge he had that the bill in question was not stamped, was when Mr. *Travis*, his attorney, called his attention to it, Feb. 26th, 1880, and that he then immediately put on double stamps and cancelled them. He added, that he had the management of the matter; that his brother, the other plaintiff, had nothing to do with it. It was not objected or suggested at the trial that the other plaintiff should have been called; the naked contention of the defendant's counsel was that upon the evidence of

*James A. Tufts*, as above, there was no case to go to the jury, and that of plaintiff's counsel was, that by the provisions of 37th *Vic.*, ch. 47, sec. 2, the double stamping on the 26th Feb., 1880, was sufficient in law.

This section enacts that any holder of a bill of exchange or promissory note may pay double duty by affixing to such instrument a stamp or stamps to the amount thereof, or to the amount of double the sum by which the stamps affixed fall short of the proper duty, and by writing his initials on such stamp or stamps, and the date on which they were affixed; and where in any suit or proceeding in law or equity the validity of any such instrument is questioned by reason of the proper duty thereon not having been paid at all, or not paid by the proper party, or at the proper time, or of any formality as to the date or erasure of the stamps affixed having been omitted, or a wrong date placed thereon, and it appears that the holder thereof when he became such holder had no knowledge of such defects, such instrument shall be held to be legal and valid, if it shall appear that the holder thereof paid double duty as in this section mentioned so soon as he acquired such knowledge, even although such knowledge shall have been acquired only during such suit or proceeding.

Now, it is obvious that, whether the double stamps were affixed so soon as the plaintiffs acquired knowledge that the bill had not had affixed to it stamps to cover the single duty, was a question of fact which, assuming the point to have been properly in issue, it was the duty and province of the jury alone to solve. It was exclusively the province of the jury to determine what weight should be attached to the evidence of *James A. Tufts*, and what was the proper conclusion to arrive at in respect of the matter testified to by him. In arriving at this conclusion, it would have been quite

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proper for the jury to consider the fact admitted by him, that he knew that bills and notes required stamps, and also to take into consideration the means he had of acquiring knowledge, that a bill received by him in the course of his business had no stamps affixed to it when he received it; but as means of knowledge is not actual knowledge, all these considerations were but aids in enabling the jury to determine whether in point of fact they should find by their verdict that the plaintiff first acquired the knowledge, as testifie by him, on the 26th February, 1880. It was the exclusive province of the jury to weigh evidence, to draw inferences of fact—to find the fact, and accordingly as they should find that single material fact, to render their verdict for or against the plaintiffs.

There is nothing in the Act of Parliament to justify a contention that the Legislature contemplated so to neutralize—and in fact to revolutionize—trial by jury, as to authorize a judge presiding at a trial of an action the issues of fact in which the parties have put themselves upon a jury to try, to take from the jury the sole material question of fact it had been sworn to try and to substitute himself for the jury. When a judge tries questions of fact without a jury, he is by law substituted for a jury, and his duty is to find facts as a jury should, and his verdict is open to review if it should be arrived at by improper inferences drawn by him, or if it should be plainly at variance with the evidence; but where the parties have put themselves upon a jury, called and sworn to try issues of fact joined, and a true verdict to render according to the evidence, there is no law which authorizes a judge to withhold from the jury the evidence bearing upon those issues of fact and to substitute himself for the jury, and this was what in effect the judge in this case was asked by the defend-

ant's counsel to do, and what he would have done if he had ruled that there was no evidence to go to the jury, and that the plaintiffs should be non-suited. Even in a case where a question of reasonable and probable cause arises (which is held to be a legal question for a judge to determine) if the existence or non-existence of the reasonable and probable cause depends upon the existence or non-existence of certain facts, the jury must pass upon the facts before the judge can apply the law. The proper charge in the case before us would be that it was for the jury to say whether, all things considered, they believed the witness, *James A. Tufts*, when he swore that his first knowledge of the bill not having been stamped was acquired on the 26th February, 1880, and to render their verdict for the plaintiffs or defendant accordingly, as they should find upon that fact; but, as no question is raised here as to whether the point for the jury to determine was or not left to them with a proper direction, but simply whether there was any evidence to go to the jury, all that we have to do is to express our opinion upon that point, and, in my judgment, there can be no doubt that there was, and to have ruled otherwise would have been erroneous. It is, however, contended that a paragraph in the second section of 37 *Vic.*, ch. 47, not quoted above, but which comes immediately after that which I have quoted, has the effect of substituting the opinion of the judge for the finding of the jury upon the material question of fact in dispute, and that as he intimated his opinion to be that Mr. *Tufts* (although, as a fact, he knew the bill had no stamps on it when he received it, and that stamps were necessary) accidentally, and not intentionally, omitted to affix them until his attention was called to the omission by Mr. *Travis* in February, 1880, the effect of such intimation of opinion was to require the case to be withdrawn from the jury, and to entitle the

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defendant to have a judgment of non-suit entered. This contention appears to me to be based upon a misconception of the paragraph referred to. If the defendant's contention be correct, then it is apparent that the effect of the section referred to would be, not by express language, but by implication, to neutralize, and, in fact, to revolutionize trial by jury, a construction which would require the most express and unequivocal language to justify. The paragraph is :

> And if it shall appear in any such suit or proceeding to the satisfaction of the court or judge, as the case may be, that it was through mere error or mistake and without any intention to violate the law on the part of the holder, that any such defect as aforesaid existed in relation to such instrument,—then such instrument or any endorsement or transfer thereof shall be held legal and valid, if the holder shall pay the double duty thereon, so soon as he is aware of such error or mistake, but no party who ought to have paid duty thereon shall be released from the penalty by him incurred as aforesaid.

Now, what is meant by the words "if it shall appear, &c., to the satisfaction of the court or judge, as the case may be," especially of the words "as the case may be." The section, it is to be observed, is providing in respect of a question arising in a suit or proceeding in law or equity. Such questions in the ordinary course of the practice of courts of equity arise there sometimes before a single judge, sometimes before the full court, and in such cases the court or judge is judge of facts as well as of law. In law the question might arise before a single judge trying the case without a jury, in which case the judge discharges the functions of a jury, but more usually it arises before a Court of Assize and *nisi prius*, of which court a jury is a constituent part, having exclusive jurisdiction over all questions of fact. The words then "as the case may be," plainly, as it appears to me, apply to the case of the question arising either in a court of which a jury is a constituent part, or before a single judge or a court

consisting of more judges than one acting as a jury; before whatever tribunal, as the case may be, that the question arises in the suit or proceeding in law or equity, it is still the tribunal for determining facts in such case, to whose satisfaction the point of fact referred to must be made to appear. The tribunals referred to in the second paragraph are precisely the same as those referred to in the prior one, under the words:

> Whenever in any suit or proceeding in law or equity the validity of any instrument is questioned by reason of the proper duty not having been paid, &c., it appears that the holder thereof, &c.

To hold that a judge presiding at a jury trial may, under this language, withhold from the jury sworn to try the issues joined all consideration of the material matter of fact involved in such issues and assume to find the fact himself, would be, in my judgment, to put a forced and most unnatural construction upon the language used. The object of the first part of the section is to enable every holder (subject always to the liability to pay the pecuniary penalty imposed by the Act) to affix stamps for double duty to, and so to rehabilitate, a bill or note which had not a sufficient number of, or any, stamps to cover single duty when he received it, provided he can satisfy the constitutional tribunal in the given case, before which a question as to the validity of the instrument is raised in any suit or proceeding in law or equity, that he affixed such double stamps so soon as he acquired knowledge of the existence of the defect complained of; and this, whether his previous ignorance was ignorance of law or of fact; and the object of the second paragraph is to provide, that if he can satisfy such tribunal that the defect complained of was attributable to mere error or mistake, and not to any intention upon the part of the holder to violate the law, that shall be sufficient to enable him to put on double stamps and to recover in the suit or proceeding upon the

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instrument provided he shall put on such double stamps when he becomes aware of such error or mistake, even though that should be during the trial; but as questions of ignorance—whether of law or fact, and of error or mistake, and of intention—are all questions to be tried by the proper tribunal for trying facts in each case, whenever the question arises in a suit upon an issue found which a jury is sworn to try, the jury is that tribunal.

In the case before us, I am clearly of opinion that the question, assuming it to have been properly raised, was one for the jury and not for the judge to determine, and that the evidence could not have been withheld from them, and that the appeal should be dismissed with costs.

*Appeal dismissed with costs.*

Solicitor for appellant: *James Straton.*

Solicitor for respondents: *J. Travis.*

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*Oct. 28.

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*Jan. 12.

EDWARD SMITH..... .....APPELLANT;

AND

THE BANK OF NOVA SCOTIA, ASSIGNEE, &c..... } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

*The Banking Act* 34 *Vic., ch.* 5, *secs.* 19 *and* 58—*Rights of shareholders—Resolutions by directors and shareholders, not binding on absent shareholders—Equitable plea.*

Bank of *L.* brought an action against *S.*, the appellant, (defendant) as shareholder, to recover a call of 10 per cent. on twenty-five shares held by him in that bank.

By the 7th plea, and for defence on equitable grounds the

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

defendant said, "that before the said call or notice thereof to the defendant, the defendant made in good faith and for valid consideration in that behalf a transfer and assignment of all the shares and stock which he had held in the Bank of *L.* to a person authorized and qualified to receive the same, and the defendant and the transferees of the said shares or stock did all things which were necessary for the valid and final transferring of the said shares or stock; but the said plaintiffs, without legal excuse and without reason, refused to record such transfer, or to register the same in the books of the bank, or to recognize the said transfer. And the defendant prays that the said Bank of *L.* shall be compelled and decreed to make and complete the said transfer and to do all things required on its part to be done to make the said transfer valid and effectual, and the said Bank of *L.* be enjoined from further prosecution of this suit."

The plantiffs filed no replication to this plea, but at the trial of the action, which took place before *James*, J., without a jury, they attempted to justify the refusal to permit the transfer of the shares upon the ground that at a special general meeting of the shareholders of the Bank of *L.* held on the 26th June, 1873, it was resolved "that in the opinion of the meeting the Bank of *L.* should not be allowed to go into liquidation, but that steps should be taken to obtain a loan of such sum as may be necessary to enable the Bank to resume specie payments, and that the shareholders agree to hold their shares without assigning them until the principal and interest due on such loan shall be fully paid, and to execute, when required, a bond to that effect."

The defendant was not present at the meeting when this resolution was passed, and it appeared from the evidence that the Bank of *L.* effected a loan of $80,000 from the Bank of *S.* upon the security of one *B.*, who to secure himself took bonds to lesser amounts from other shareholders, including the defendant, whose bond was released by *B.* when the defendant sold his shares. This he did in 1877 to certain persons then in good standing, and powers of attorney executed by defendant and the purchasers respectively were sent to the manager of the Bank of *L.*, in whose favour they were drawn, to enable him to complete the transfer. The directors of the Bank of *L.* refused to permit the transfer, but the defendant was not notified of their refusal nor did they make any claim against him for any indebtedness on his part to the Bank; and it appeared also from the evidence that subsequently to the resolution of the 26th of June, 1873, and

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prior to the sale by defendant of his shares a large number of other shares had been transferred in the books of the Bank. In October, 1879, the Bank of *L.* became insolvent and the Bank of *S.*, the respondents, obtained leave to intervene and carry on the action.

At the trial a verdict was found by the judge in favour of the appellant; but the Supreme Court of *Nova Scotia, James,* J., dissenting, made absolute a rule *nisi* to set aside the verdict. On appeal to the Supreme Court of *Canada*, it was

*Held* (1), (Reversing the judgment of the Supreme Court of *Nova Scotia*): That the resolution of the 26th June, 1873, could not bind shareholders not present at that meeting, even if it had been acted upon, and under the facts disclosed in evidence the defendant could not be deprived of his legal right under the Banking Act to transfer his shares and to have the transfer recorded in the Books of the Bank; and the 7th plea was therefore a good equitable defence to the action.

2. Per *Strong* and *Gwynne*, JJ.: It is doubtful whether the strict rules applied in *England* to equitable defences pleaded under the C. L. Procedure Act should be adopted with reference to such pleas in *Nova Scotia*, where both legal and equitable remedies are administered by the same court and in the same forms of procedure.

APPEAL from the judgment of the Supreme Court of *Nova Scotia*, making absolute a rule *nisi* for a new trial granted to the plaintiffs, the respondents in this appeal.

The action was brought against the appellant as a shareholder in the bank of *Liverpool* to recover a call of 10 per cent. on 25 shares held by him in that bank.

The facts and pleadings are stated in the head note and in the judgment of Mr. Justice *Gwynne*.

Mr. *Lash*, Q.C., and Mr. *Graham*, Q.C., for appellant:

The bank could not arbitrarily refuse to complete the transfer. The restrictions on transfers imposed by the Banking Act are imposed with a view to having a complete and authentic record of transfers of stock in the hands of the bank, thereby checking fraudulent or double transfers, and also with a view to the bank

being able to enforce payment of a debt due to it by a transferor before allowing him to part with his shares, and possibly with a view to control in cases where a transfer would work a wrong to the bank. The enactments, in which are specified the times when and the reasons for which the completion of a transfer may be refused, show that sec. 19 does not authorize an arbitrary refusal. Thus: sec. 28 authorizes a by-law for the closing of the transfer book during a certain time, not exceeding fifteen days before the payment of each semi-annual dividend; sec. 19 authorizes the bank to demand payment of any debt due by the transferor before the transfer; and sec. 59 saves the recourse of creditors against transferors on transfers made within one month of suspension.

The resolution of 26th June, 1873, cannot be alleged as a reason to justify the refusal to complete the transfer, for the following reasons:

(*a.*) It was a mere agreement between the assenting parties, of whom defendant was not one.

(*b.*) It was a resolution passed at a meeting at which defendant was not present, nor was there evidence of his being notified to attend. The record of the proceedings should not have been admitted in evidence, and being in evidence cannot prejudice defendant.

The equitable plea was proved, and the defendant was entitled to judgment in his favor, although he prayed for other relief as well. Rev. Stat. of *N. S.*, 4th series, ch. 94, sec. 162; also cases cited by *James*, J. in the court below.

Mr. *Gormully* for respondents:

The shares in question have never, in fact, been transferred by the appellant to the firm of *Almon & Mackintosh*, and the appellant is still the registered holder thereof and liable to the calls thereon.

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It does not appear that any formal demand was ever made upon the board of directors by the appellant, or by his attorney, requiring the board to permit a transfer to be made. Even if there is evidence of such a demand, the appellant should have taken steps to compel the directors to comply therewith, and by his laches and delay he has precluded himself from equitable relief. The Supreme Court of *Nova Scotia* on its common law side has no power to give the relief demanded by the equitable plea pleaded herein. Under all the circumstances of the case—having regard to the understanding come to by the shareholders in 1873 and the position of the bank—the directors were justified in declining to permit the appellant to transfer his shares to *Almon & Mackintosh.*

RITCHIE, C. J.:—

The Chief Justice of the Supreme Court of *Nova Scotia* says:

> It may be that the statute intended that the directors of the bank should possess and exercise a discretion and control in the acceptance and registration of transfers of shares. But surely circumstances must exist calling for the exercise of such a discretion and justifying a refusal to accept and register transfers, in other words must there not be a reasonable cause for refusal? They surely cannot refuse to accept and register a transfer when no such reasonable cause exists.

Did not the directors, without reasonable or legitimate excuse, refuse to sign the transfer in this case?

The transfer was made in good faith to parties then in perfectly good credit and standing, whose financial standing is testified to as being first class by defendant *Smith*, against whom the manager of the bank says: "there was no claim or demand of the bank against defendant when the application for transfer was made," who states further, that by transfer books, "it appears that twenty shares were transferred on 28th June, 1873.

There were eighteen transfers accepted and registered between that date and the suspension of the bank These transfers represent about 2091 shares."

*Smith* was never notified of the refusals of the directors to register the transfer, nor was any claim made on him by the bank, nor was he required by the bank to discharge any debts or liabilities due by him to the bank, nor did any such exist, nor did the bank, nor do the now plaintiffs, claim that any such existed. But the bank, with full knowledge that the stock certificate and power of attorney had been transmitted to the manager to be acted on, retained possession of the same, and, as the manager says, "they remained in my possession as manager of the bank, until I handed them to the assignee after insolvency of the bank."

The defendant has nothing to do with any controversy that may arise between *Mackintosh* and *Almon*, and the plaintiffs; all he asks for is to be protected from this inequitable claim the plaintiffs are making against him, and against which the facts set forth, and proved, shew he is entitled to an absolute and perpetual injunction, this is all the relief the defendant asks for and can ever obtain, and, when obtained, does complete and final justice between the parties. With respect to the indebtedness of the bank to the bank of *Nova Scotia*, except so far as *Smith's* liability to *Black* was concerned, and from which liability he was released by *Black*, there clearly was no obligation on the part of *Smith*, as an individual shareholder, nor of any other shareholder, either to the bank of *Liverpool* or to the bank of *Nova Scotia*, beyond the indirect general liability of the shareholders to pay any legal call which might be made on the shareholders to meet the liabilities or to carry on the general business of the bank. I am of opinion to allow this appeal with costs.

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STRONG, J.:

I am of opinion that this appeal must be allowed. It is clear that the shares were, by the express provisions of the 19th sec. of the Banking Act, transferable at the will of the holder, and the directors were bound to register the transfer unless there were debts or liabilities due by the shareholder to the bank. This was the *primâ facie* right of the appellant, and it therefore appears to me that the seventh plea was a good defence to the action, and I am at a loss to see upon what principle the evidence of the resolution and loan by the bank of *Nova Scotia* was admitted in the absence of any replication to that plea. Upon this ground alone the judgment of the court below should have been for the appellant.

The case has, however, been argued upon the facts as they appear in evidence, and I will therefore consider them. The resolution adopted at the shareholders' meeting (held on the 26th June, 1873) is, in its terms, an expression of opinion only, and must consequently be considered as a mere recommendation to such shareholders who were not present at the meeting, and is not to be construed as an assumption by those present to bind those who were absent without their assent.

But had it been otherwise, and had it in terms expressed the determination of the shareholders present to bind those who were absent not to transfer these shares until the proposed loan should be paid, it would in law be entirely ineffectual and *ultra vires* of those constituting the meeting, for the meeting might as well have endeavored to restrain the absent shareholders from parting with any of their other property as to have attempted to restrain them from exercising their statutory right of selling and transferring their shares in the bank. Then it is not shewn that the appellant ever

assented to these terms or that the loan was raised with his assent upon the agreement or understanding that he would not transfer his shares. It is true, that at a subsequent meeting held on the 28th January, 1874, at which appellant was present, the directors made a report that a loan had been obtained from the Bank of *Nova Scotia* in accordance with the resolution passed at the preceding meeting in June, but there is nothing in this report to shew that the loan was made by the bank upon the terms that shares should not be transferred, on the contrary it is expressly said "this credit was obtained only with the assistance of *C. H. Black*, Esq., who with others of the shareholders became sureties for $60,000 of the loan." So far from shewing that the appellant assented to his shares being bound, the latter part of this report, that portion which I have just quoted, seems to indicate that the loan had been made upon other security altogether, as in fact the evidence shows that it had. It is sufficient, however, to say that there is nothing to show that the appellant ever agreed not to deal with his shares. There being then no evidence that the appellant ever agreed to his shares being held in security for the loan, or that his right to transfer them should be fettered by any restriction, it is impossible to say that this transaction of the loan interfered with his right to make any transfer he might think proper. Then it has not been, and, on the evidence could not have been, disputed that the transfer to *Almon & Mackintosh* was in every respect *bonâ fide*, that it was intended to be a real and not a colorable transaction, and that the transferees were at the time persons in good credit and unobjectionable on the score of solvency and in every other respect. I mention this, not because I think that it would have made any difference, had the appellant proposed to transfer to persons wholly insolvent, but only to show

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how groundless was the objection of the directors to register the transfer. The legal result of this must be that the respondent, as now representing the Bank of *Liverpool*, must in equity, at least, if not at law also, be considered as estopped from insisting on treating the appellant as still a shareholder and sueing him for calls. This defence is properly pleaded by the 7th plea and is a good equitable defence. I share with Mr. Justice *James* the doubt, which he expresses, whether the very strict and narrow rules applied in *England* to equitable defences pleaded under the C. L. Procedure Act should be adopted with reference to such pleas in *Nova Scotia*, where both legal and equitable remedies are administered, not by two separate jurisdictions as in *England*, but by the same court and in the same forms of procedure. This is, however, a matter concerning the practice of the Supreme Court of *Nova Scotia* upon which I do not desire to express any decisive opinion. It seems, however, that even tested by the English cases there can be no objection to this plea as a good equitable defence, as it shews that the appellant would, if he had instituted a suit in equity for the purpose, have been entitled to an unconditional and perpetual injunction. The prayer which is unnecessarily added to the plea cannot have the effect of making the plea bad, if it appears from the averments that the appellant would have been entitled to have had the action restrained without the imposition of any condition, and this, I am clearly of opinion, would have been his strict right, although if a suit in equity had been instituted the plaintiff, as representing the bank, might have had some cross relief. The prayer may therefore be regarded as surplusage.

I have not thought myself called upon to write more fully in this case for the reason that all the questions arising have been treated with great ability in the

judgment of Mr. Justice *James* in the court below, with whom I, in all respects, agree.

The appeal must be allowed and the rule *nisi* for a new trial discharged with costs to the appellant in both courts.

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FOURNIER, J., concurred.

HENRY, J.:

I concur in the views expressed by my learned colleagues. I think that in equity the transfer of the stock to *Almon* and *Mackintosh* would have been held as made and completed. The statute gave the stockholders in the bank of *Liverpool* the right, independently of any control over the directors, to transfer stock. The only reason they could have to refuse would be that the party was in debt to the bank. That is provided for, but I think that is the only reason, because the transfer of stock is provided for by power of attorney by the parties selling and purchasing, and requires no consent or other sanction of the directors. In this case the seller and purchaser did everything it was necessary to do to entitle them to a transfer in the books. This was a transaction not between creditor and debtor, but by the bank itself. It is the bank saying to these parties: You had the right to transfer this stock; you did all that the by-laws and the law required you to do on both sides; we did not allow you to do it, and we therefore hold you as against the other party. Now, the Act provides that the transferee shall be considered the owner of the stock. After that has been done—and it has virtually been done by the officer of the company, or would have been done formally but for the illegal interference of the directors —Mr. *Smith* had no reason to suppose he was any longer a shareholder in the company, and the first thing he

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knowsi s, that, after the failure of *Almon* and *Mackintosh*, he is called upon to pay up 10 per cent. on his capital. I think it would be neither legal nor equitable, and therefore I think the appeal should be allowed, and the original judgment and verdict given by Mr. Justice *James* of *Nova Scotia* should be maintained.

GWYNNE, J. :—

This is an action commenced upon the thirty-first day of May, A.D. 1879, by the Bank of *Liverpool*, a bank incorporated in the Province of *Nova Scotia* by the Dominion Statute 34 *Vict.*, ch. 42, subject to the provisions of the Act relating to banks and banking, 34 *Vict.*, ch. 5, against the defendant, *Edward Smith*, who in the writ and declaration filed in the cause is alleged to be a holder of twenty-five shares in the capital stock of the bank, and the action is for the recovery of two hundred and fifty dollars alleged to have become due on the 10th March, 1879, from him to the bank in respect of a call of ten dollars upon each of his said shares alleged to have been made by the bank upon him in respect of such shares.

To this action the defendant pleaded :

1st. That he never was indebted as alleged.

2nd. That he is not the holder of twenty-five or of any shares in the bank.

And among other pleas,

7th. (Which is the plea upon which the defence mainly rests) : For defence on equitable grounds the defendant says that before the said call the defendant made in good faith and for valid consideration a transfer and assignment of all the shares and stock which he had held in the capital stock of the said bank to a person authorized and qualified to receive the same, and the defendant and the transferee of the said shares or stock did all things which were necessary for the

valid and final transferring of the said shares, but the plaintiffs without reasonable or legal excuse and without reason refused to record such transfer or to register the name in the books of the said bank or to recognize the said transfer; and the plea concludes with a prayer that the said bank shall be compelled and decreed to make and complete the said transfer and to do all things required on its part to be done to make the said transfer valid and effectual, and that the said Bank of *Liverpool* be enjoined from further prosecution of this suit.

The appeal case brought before us does not shew that any special replication or any demurrer was fyled to any of the pleas, nor indeed is there entered upon it even a joinder in issue, but as the case has been tried we must assume that there was a joinder in issue upon the record.

Subsequently, and as it appears by the evidence, in the month of October, 1879, the bank became insolvent, and by an order of the Supreme Court of *Nova Scotia*, in which the action was pending, it was upon the 16th of February, 1880, ordered that the bank of *Nova Scotia*, assignee in insolvency of the plaintiffs, should have leave to intervene and to carry on and prosecute the suit against the defendant.

The case came down for trial before Mr. Justice *James* without a jury, and he, being of opinion that the equitable defence set up in the above seventh plea was established, rendered a verdict for the defendant. Upon a rule *nisi* to set aside the verdict, a majority of the learned judges of the Supreme Court of *Nova Scotia*, Mr Justice *James*, who tried the cause, dissenting, made the rule absolute for setting aside the verdict and granting a new trial. It is against this rule that this appeal is taken.

Now, the action having been commenced by the

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bank when a going concern and solvent must be considered by us wholly regardless of the fact that subsequently it became insolvent, and must be adjudicated upon according to the rights and interests of the bank and the defendant *inter se*, wholly irrespective of all consideration, whether or not under the circumstances appearing in evidence the defendant lies under any obligation or liability for any, and, if any, for what amount to any creditor of the bank under the provisions of the 58th sec. of the Act relating to banks and banking.

There seems to me, I confess, to be much force in the observations made by Mr. Justice *James* in his dissentient judgment to the effect that the difference between the jurisdiction of the Supreme Court of *Nova Scotia* and that of the English courts of common law, as they were constituted before the establishment of the High Court of Justice, divests the judgments of these common law courts as to the limits of their jurisdiction to entertain equitable defences to actions at law, of their applicability to cases of equitable defences pleaded to actions instituted in the Supreme Court of *Nova Scotia*, which is a Court of Equity as well as of Common Law, and has, therefore, the machinery necessary to give full effect to all decrees or orders it may make in respect of the equitable rights and interests of parties litigant which the English common law courts had not; but I do not think it necessary in this case to for many judgment upon this point, or to pursue the consideration of it further, because I entertain a clear conviction that, even within the rule, as laid down by the old English common law courts relating to equitable defences, the matter pleaded by the defendant to this action in his seventh plea, if established in evidence, is a good answer to the present action as a defence upon equitable grounds, if, indeed, it be not a good legal defence as well.

The rule to be collected from the cases is that a plea upon equitable grounds is a good defence when the equitable grounds relied upon are such as to entitle the defendant to relief in equity by an absolute unconditional injunction restraining the action, or, as it is sometimes expressed, when the common law judgment that the plaintiff take nothing by his writ, and that the defendant go thereof without day, would do complete and final justice between the parties in respect of the equitable grounds relied upon. *Mines Royal Society* v. *Magnay* (1); *Steele* v. *Haddock* (2); *Wodehouse* v. *Farebrother* (3); *Wood* v. *Dwarris* (4); *Luce* v. *Izod* (5); *Wake* v. *Harrop* (6); *Wakley* v. *Froggart* (7); *Solvency Mutual Guarantee Co.* v. *Freeman* (8); *Gee* v. *Smart* (9); *Allen* v. *Walker* (10).

In *Wake* v. *Harrop*, where the action was against agents who had signed a charter party thus: "For *A. Davidson & Co.*, of *Messina*. *J. C. Harrop & Co.*, agents," (treating the latter as principals,) the court held that under the circumstances pleaded, the defendants, *Harrop & Co.*, were entitled to an unconditional injunction restraining the action, and therefore the common law judgment *ut nil capiat* would do complete justice between the parties, and it being urged for the plaintiff that, as the plaintiff under the charter party as signed had no action against *Davidson & Co.*, all that the defendants could ask was a reformation of the contract, the court held that it was enough that under the equitable grounds pleaded it was inequitable for the plaintiff to sue the defendants, and that the court was not concerned with the objection that no person could

(1) 10 Ex. 489.
(2) 10 Ex. 643.
(3) 5 El. & Bl. 277.
(4) 11 Ex. 493.
(5) 1 H. & N. 245.
(6) 6 H. & N. 768, and in error 1 H. & C. 202.
(7) 2 H. & C. 69.
(8) 7 H. & N. 17.
(9) 8 El. & Bl. 313.
(10) L. R. 5 Ex. 187.

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be found liable to the plaintiff. In that case, *Bramwell*, B., and *Willes*, J., were of opinion that the plea was a good legal plea. But the principle upon which the House of Lords proceeded in *Bargate* v. *Shortridge* (1) is in my judgment conclusive that this 7th plea is a good defence to this action either as an equitable or a legal plea. Such principle may be thus expressed: if an act required to be done is within the power of directors of a company to do, or to permit to be done, and if it be their duty to do it, or to permit it to be done, and they neglect to do it, or refuse to permit it to be done, and by such neglect or refusal damage is done to a third person, neither a court of law or equity will allow the company to take advantage of such neglect or refusal of the directors, and if the directors neglect a form or obligation which they ought to perform, the company cannot insist upon the non-compliance with such form or the non-fulfilment of such obligation as against the person entitled to have had the form complied with and the obligation fulfilled, and in such case no question arises whether a creditor of the company could or could not take advantage of such non-performance in support of any legal demand the creditor might have against such party as a shareholder in the company.

I have gone thus at length into this point because it was entertained in the court below, and has been made a ground in the respondents' factum in support of the judgment of the court below and was relied upon in the argument before us; but in truth the appeal case laid before us shews that neither the sufficiency nor materiality of the seventh plea, but its truth only, has been put in issue upon the record.

Now, the charter which affects the rights of shareholders in this banking company is the Dominion statute 34 *Vict.*, ch. 5, the 19th sec: of which enacts that:

(1) 5 H. L. C. 297.

The shares and capital stock of the bank shall be held and adjudged to be personal estate, and shall be assignable and transferable at the chief place of business of the bank, or at any of its branches which the directors shall appoint for that purpose, and according to such form as the directors shall prescribe; but no assignment or transfer shall be valid, unless it be made and registered and accepted by the party to whom the transfer is made, in a book or books to be kept by the directors for that purpose, nor until the person or persons making the same shall, if required by the bank, previously discharge all debts or liabilities due by him, her, or them to the bank, which may exceed in amount the remaining stock, if any, belonging to such person or persons, and no fractional part or parts of a share or less than a whole share shall be assignable or transferable.

This is the only clause in the charter qualifying the rights of a shareholder in the plaintiff's company to dispose of his shares. In *Chouteau Spring Co.* v. *Harris* (1), the Supreme Court of *Missouri* in 1855 held that:

Stock in incorporated joint stock companies is always treated as property without any declaration in the charter to that effect, and when such a provision is inserted, it is considered as merely cumulative, except so far as it designates the peculiar character of the property, whether real or personal. One of the incidents of property is its transferability, and, of course, the power of disposing of this stock like the power of disposition of any other property is incident of common right to the ownership of it.

Then, citing *Sargent et al.* v. *Franklin Ins. Co.* (2), and *Bates* v. *New York Ins. Co.* (3), the court says:

The doctrine laid down in these cases is, that although the company have the power of regulating the transfer of stock, by prescribing the mode in which it shall be made, the transfer is valid as against the company, if they have notice of it and refuse to allow it the necessary formalities.

In *Isham* v. *Buckingham* (4), decided by the Court of Appeals of the State of *New York* in 1872, the provision of the charter of the company referred to in that case was similar to the clause above extracted from the act relating to banks, namely:

(1) 20 Missouri 383.
(2) 8 Pick. 90.
(3) 3 Johns. Cases 238.
(4) 49 N. Y. 216.

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The stock of every such corporation shall be deemed personal property and be transferred only on the books of such corporation in such form as the directors shall prescribe, and such corporation shall at all times have a lien upon all the stock or property of its members invested therein for all debts due from them to such corporation.

The court then says:

In this State it is well settled that the delivery of the certificate with a power of attorney to transfer passes the entire title, legal and equitable, as between the parties (the vendor and purchaser), and that the provisions referred to (as to mode and form of transfer in the company's books) are for the security of the corporation in securing its interests in its relations and dealings with stockholders, and that if a company did not provide a transfer book, or did not transfer the stock when required so to do according to the prescribed forms, the fault was its own, of which it could not take advantage.

And in *Angel and Ames*, on Corporations (1), several cases are referred to in support of this doctrine, that as between vendor and purchaser the delivery of the stock certificate, together with a power of attorney to transfer it in the books of the company, is a completed transaction which the vendor cannot after call in question. In *Weston's* case (2), the Lord Justices in appeal held, that shares in joint stock companies are transferable by virtue of the statute, and that the province of the articles of association is to point out the mode in which they shall be transferred, and the limitations, if any, to which a shareholder shall be subjected before he can transfer; and that neither the shareholders at large nor the directors can prevent a particular shareholder from transferring his shares unless by the force and effect of some clause in the articles of association authorizing them to do so. Sir *W. P. Wood*, L. J., says:

It would be a very serious thing for the shareholders in one of these companies to be told that their shares, the whole value of which consists in their being marketable and passing freely from hand to hand, are to be subject to a clause of restriction which they do not find in the articles of association.

(1) Sec. 564. (2) L. R. 4 Chy. App. 20.

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And Sir *C. J. Selwyn*, L. J., says:

We have the general Act of Parliament which constitutes these companies, one important effect of which is, that the shares which in an ordinary partnership would not be transferable are made transferable, and the 22nd section, which has been relied on in argument, merely refers the company to their own articles for determining the manner in which that transfer shall be effected, but leaves the general right to transfer to stand upon the provisions of the Act. Then when we look at the articles of association in the present case and find that the 14th clause imposes a particular limit upon the authority of the directors, and mentions two cases only in which they may refuse to register a transfer, I think that the rule of *expressio unius exclusio alterius* applies most strongly to this case. No doubt if the directors had reason to believe that the transaction was fraudulent or fictitious, they might refuse to be partakers in any such fraudulent or fictitious transaction, but in the absence of that—unless they could bring the case within the provisions of the 14th clause—in my opinion they would be bound to register.

So (to apply the decision in that case to the case before us) unless the directors of the plaintiffs' bank could bring their objection to permitting the transfer to be entered in due form in their books within the provisions of the 19th sec. of the Act relating to banks and banking, they were bound to permit the transfer to be entered in the transfer book of the company.

In *re National and Provincial Marine Insurance Co.* ex parte *Parker* (1), Lord Justice *Rolt* was of opinion that a transfer of shares made expressly to escape liability did not necessarily vitiate the transfer, but no question of that kind arises here, for there is no doubt that the sale by the defendant to *Almon* and *Mackintosh* was a *bonâ fide* sale made for value and to persons who were perfectly solvent and responsible. In *re Scranton Iron and Steel Co.* (2), V. C. Sir *James Bacon*, in 1873, speaks of the right to transfer shares in a joint stock company, as an incident to the ownership of the shares; and he says that it is the duty of directors of the com-

(1) L. R. 2 Ch. App. 690. (2) L. R. 16 Eq. 562.

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pany to receive and register, or to furnish some reason for refusing to do so; and *Weston's* case shews that it must be a valid and sufficient reason; and *Lowe's* case (1) is to the like effect. It appears that the general practice of the bank in perfecting the entry of transfers, when the the parties did not attend in person to sign the form of transfer approved by the directors in a transfer book kept for the purpose, and the acceptance of such transfer by the purchaser, was for the vendor and vendee respectively to give a power of attorney to an officer of the bank authorizing such officer to sign the transfer and perfect the same in the bank book kept for that purpose. Such officer, upon receiving such powers of attorney and the stock certificate held by the vendor, laid the matter before the board, who, unless there was sufficient reason for withholding their assent to the transfer, authorized it to be made, and the necessary entries for that purpose were accordingly made in the bank book by the officer having the powers of attorney, and a new stock certificate was issued in favor of the purchaser. Now, when the defendant sold his shares to *Almon & Mackintosh* and received from them the consideration money therefor, and delivered to them his stock certificate, and placed in their hands a power of attorney duly executed, constituting and appointing *John A. Leslie*, manager of the bank, to be his attorney for him, and in his name to transfer the shares, the sale and transfer of the shares, as between the defendant and *Almon & Mackintosh*, was complete, and the defendant never could have revoked that power of attorney to the prejudice of *Almon & Mackintosh*, neither could they repudiate the sale; but the defendant could compel them to have themselves entered in the books of the bank as holders of the shares, and to indemnify the defendant against all calls made

(2) L. R. 9 Eq. 593.

subsequent to the sale; and when *Almon & Mackintosh* wrote to *Leslie*, as manager of the bank, as they did, enclosing to him the defendant's stock certificate and the power of attorney executed by him in favor of *Leslie*, together with the power of attorney from themselves to *Leslie* authorizing him as their attorney to accept the transfer, and to do all lawful and necessary acts to complete the same, and directed the bank to consider them as the holders of the stock formerly owned by the defendant, *Almon & Mackintosh* could not afterwards be permitted to repudiate their liability to the bank upon the shares. Now, what appears to have been done by *Leslie*, upon receipt of the above documents, was to communicate them at a board meeting to the directors, who, although the bank had no demand whatever against the defendant, and although the credit and responsibility of *Almon & Mackintosh*, if that had been material, was never questioned, and if it had been, was above suspicion and good beyond controversy, refused to permit the transfer to be entered in the bank book without assigning any reason for such refusal.

In this action they have attempted to justify their refusal upon the allegation that upon the 26th June, A.D., 1873, at a special general meeting of the shareholders of the bank at which, as appears by the evidence, the defendant was not present, it was resolved as follows:

> That in the opinion of this meeting the bank of *Liverpool* should not be allowed to go into liquidation, but that steps should be taken to obtain a loan of such sum as may be necessary to enable the bank to resume specie payments, and that the shareholders agree to hold their shares without assigning them until the principal and interest due on such loan shall be fully paid, and to execute, when required, a bond to that effect.

Such a resolution, if binding upon the shareholders and directors, might have the effect of prejudicing the

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bank, if, for example, more solvent and wealthy persons than the then holders of stock should be willing to take the place of these holders by purchase of their stock, but whether such a resolution could have the effect of subjecting a non-assenting shareholder to the burthen of a condition restricting the rights acquired by him under the authority and sanction of an Act of Parliament, upon the faith of which he became a shareholder, and which the Act did not subject him to, it is not necessary now to enquire, because it is clear from the evidence that in truth the resolution was never acted upon, and the bank cannot now rely upon it as affecting the defendant's right of transfer in October, 1877. So far from its having been acted upon, it appears that twenty shares were transferred in the bank books two days after the passing of the resolution, and that between that day and the refusal to enter the transfer of the defendants stock in the bank books one thousand eight hundred and thirty-three shares were in like manner transferred, and that prior to the month of February, 1874, the bank effected a loan of $80,000 upon the security of a Mr. *Black*, who, to secure himself, took bonds to lesser amounts from other shareholders, and among those, from the defendant, which bond Mr. *Black* released upon the occasion of the sale by the defendant of his stock to *Almon & Mackintosh*. It appears therefore that the resolution relied upon, of the date of 26th June, 1873, was not a valid reason for the directors refusal to allow the transfer to be perfected in their books from the defendant to *Almon & Mackintosh*, and if such had been given at the time as the reason for such refusal it would not have afforded to the bank any justification, and they could have been compelled by bill in equity to permit the transfer to be entered; and as no other reason is suggested and the only justification for refusal mentioned in the Act of Parliament affecting the case,

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is proved not to have had any existence, I am of opinion that it was the duty of the directors to have permitted, and therefore they ought to have permitted, the transfer to have been entered in their books in October, 1877, and that having refused to do so without any good, valid and sufficient reason justifying such refusal they cannot now be permitted to avail themselves of their own wrong to the prejudice of the defendant.

The appeal must therefore be allowed with costs, and the rule for a new trial in the court below must be discharged with costs, and judgment be entered for the defendant upon the verdict rendered in his favor.

*Appeal allowed with costs.*

Solicitors for appellant: *Thompson, Graham & Tupper.*

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

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JOHN SHIELDS.....APELLANT;

AND

FRANCIS PEAK, *et al*.....RESPONDENTS.

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*Dec. 2.

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*May. 1.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

*Judgment on demurrer appealable—3rd section Supreme Court Amendment Act*, 1879—38 *Vic. ch.* 16, *sec.* 136—*Construction of—Purchase of goods by insolvent outside of Dominion of Canada—Pleadings—Insolvent Act* 1875, *ss.* 136, 137, *intra vires.*

*P. et al.*, merchants carrying on business in *England*, brought an action for $4,000 on the common counts against *J. S. et al.*, and in order to bring *S. et al.* within the purview of sec. 136 of the Insolvent Act of 1875, by a special count alleged in their declaration that a purchase of goods was made by *S. et al.*, from them on the 13th March, 1879, and another purchase on the 29th March of the same year; that when *S. et al.* made the said purchases they had probable cause for believing themselves to

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

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be unable to meet their engagements and concealed the fact from *P. et al.*, thereby becoming their creditors with intent to defraud *P. et al.*

*J. S.* (appellant) amongst other pleas, pleaded that the contract out of which the alleged cause of action arose, was made in *England* and not in *Canada*.

To this plea *P. et al.* demurred. It was agreed that the pleadings were to be treated as amended by alleging that the defendants were traders and British Subjects resident and domiciled in *Canada* at the time of the purchase of the goods in question and had subsequently become insolvents under the Insolvent Act of 1875. and amendments thereto.

*Held*,—(*Taschereau* and *Gwynne*, JJ., dissenting) That although the judgment appealed from was a decision on a demurrer to part of the action only, it is a final judgment in a judicial proceeding within the meaning of the 3rd section of the Supreme Court Amendment Act of 1879. (*Chevallier* v. *Cuvillier* (1) followed).

Per *Ritchie*, C.J., and *Fournier*, J.: 1st. That section 136 of the Insolvent Act of 1875 is *intra vires* of the Parliament of *Canada*.

2nd. That the charge of fraud in the present suit is merely a proceeding to enforce payment of a debt under a law relating to bankruptcy and insolvency over which subject-matter the Parliament of *Canada* has power to legislate.

3rd. Although the fraudulent act charged was committed in another country beyond the territorial jurisdiction of the courts in *Canada*, the defendant was not exempt for that reason from liability under the provisions of the 136th section of the Insolvent Act, 1875, and therefore the plea demurred to was bad and the appeal should be dismissed.

Per *Gwynne*, J.: The demurrer does not raise the question whether the sec. 136 of the Insolvent Act of 1875, is or is not *ultra vires* of the Dominion Parliament, for whether it be or not the plea demurred to is bad, inasmuch as it confesses the debt for which the action is brought, and that such debt was incurred under circumstances of fraud, and offers no matter whatever of avoidance or in bar of the action; therefore if the appeal be entertained it must be dismissed.

Per *Strong*, *Henry* and *Taschereau*, JJ.: There being nothing either in the language or object of the 136th section of the Insolvent Act to warrant the implication that it was to have any effect out of *Canada*, it must be held not to extend to the purchase of

(1) 4 Can. S. C. R. 605.

goods in *England* by defendant, stated in the second count of the declaration. In this view, it is unnecessary to decide as to the constitutional validity of the enactment in question, and the appeal should be allowed.

The court being equally divided the appeal was dismissed without costs.

APPEAL from the judgment of the Court of Appeal for the Province of *Ontario*, dismissing the appeal of the defendants, *James Shields* and *John Shields*, from the judgment of the Court of Common Pleas, ordering judgment to be entered for the plaintiffs on demurrer to the defendants' third plea.

The action was commenced by *Francis Peak*, *William Winch*, *W. Ray*, and *Herman Seidel*, against the said *John Shields* and *James Shields* to recover $4,000.

The first count of the declaration was for goods sold and delivered; and the plaintiffs in addition thereto charged "that the defendants have been guilty of fraud within the meaning of the Insolvent Act of 1875 and the amending acts, in this that the said defendants, on the thirteenth day of March, A.D. 1879, purchased from the plaintiffs on credit goods to the extent in value of seven hundred and twenty-four dollars and sixty-one cents, said goods being parcel of the goods the price of which is sued for herein.

"And on the twenty-ninth day of March, A.D. 1879, the defendant purchased for themselves from the plaintiffs, on credit, goods to the extent in value of two thousand nine hundred and thirty-four dollars and three cents, said goods being parcel of the goods the price of which is sued for herein, the said defendants, on each and every of the said several days on which said purchases were made, knowing or having probable cause for believing themselves to be unable to meet their engagements and concealing the fact from plaintiffs, thereby becoming their creditors with intent to defraud the plaintiffs.

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"And that although the several terms of credit so obtained on the purchase of each of the said several parcels of goods have elapsed, the said defendants have not paid or caused to be paid the debt or debts so incurred or any of them, and the plaintiffs claim four thousand dollars."

To this declaration and for a 3rd plea to the said 2nd count, the defendant *John Shields* said that the contract out of which the alleged cause of action arose was made in the United Kingdom of *Great Britain* and *Ireland*, to wit in *England*, and not within the Dominion of *Canada*.

To this plea the plaintiff demurred; and it was agreed that the pleadings were to be treated as amended by alleging that the defendants were traders and British subjects, resident and domiciled in the Dominion of *Canada* at the time of the purchase of the goods in question, and had subsequently become insolvents under the Insolvent Act of 1875, and amendments thereto.

Mr. *J. Bethune*, Q.C., for appellant.

We contend that sec. 136 of the Insolvent Act of 1875 was *ultra vires* of the Parliament of *Canada* if the clause is to be regarded as giving a civil remedy and not creating a criminal offence.

The exclusive jurisdiction to enact laws respecting bankruptcy and insolvency, it is admitted, belongs to the Parliament of *Canada*; however, this must carry with it only such power as may be necessary to wind up the estate, divide it amongst the creditors, and grant or withhold the bankrupt's or insolvent's discharge; it cannot carry with it the power to enact what remedy any particular creditor or creditors may have by actions in the ordinary courts of the province. This latter remedy must be within the competence of the provincial legislature.

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The remedy assumed to be given by sec. 136 is really imprisonment for debt.

Imprisonment for debt, as such, was long ago abolished by the Parliament of the Province of *Canada*, and the Legislature of the Province has never re-enacted it, but, on the contrary, on the revision of the statutes of the Provinces, has declared that it is abolished.

This statute assumes to give a right, in cases within it, to the creditor to take the body of the debtor and keep it in custody for a named period unless the debt and costs due to the creditor be sooner paid.

Manifestly this is not done in the interest of the general body of creditors, but only in favor of the creditor defrauded.

A judgment is to be got by the creditor by an ordinary action. The question whether the defendant was guilty of fraud is to be tried, and if the defendant be found guilty the defendant is to be imprisoned for a term not exceeding two years, unless the debt and costs be sooner paid.

The imprisonment is designed as a means of compelling payment to the creditor. Except that the imprisonment is limited to two years, it is the same kind of imprisonment as that formerly awarded on a Ca. Sa.

It is not said in this section that the discharge of the debtor is to be void. It only enacted that the creditor shall have a new remedy for enforcing payment of his debt.

Assuming that the parliament of *Canada* had not the power to repeal the similar sub-sections of the Insolvent Act of 1864 when it assumed to repeal the whole act, but that this power belonged to the legislature of the Province of *Ontario*, they have been repealed by that legislature by Revised Statutes ch. 67, sec. 4.

This seems to have been overlooked by the learned judges in the court below.

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It is submitted that even, if section 136 be *intra vires* of the parliament of *Canada*, it ought not to be construed to extend to the conduct of persons in *England*, although domiciled in *Canada*.

The intent of parliament was to provide for the conduct of traders while in *Canada*, and parliament did not intend to interfere with the conduct of Canadian citizens while in another country.

But if the statute be wide enough in its language to cover the case of a person domiciled in *Canada* and obtaining the credit referred to while abroad, then it is *ultra vires* on that ground and to that extent. The powers of parliament are to make laws for the peace, order and good government of *Canada*. This, it is submitted, does not extend to make laws respecting the conduct of its citizens while in *England*. Persons domiciled in *Canada* are under the control of English laws while within the kingdom of *Great Britain* and *Ireland*.

If section 136 be a criminal law it cannot apply to the obtaining of the credit in question in *England*; first, because the language of the section ought to be confined to conduct occurring in *Canada*, and secondly, because the parliament of *Canada* cannot enact a criminal law which shall be operative in *England*.

In answer to the objection taken in the respondent's factum that the case is not appealable, I submit that the decision in this court in *Chevalier* v. *Cuvillier* (1) is decisive.

Mr. *Rose*, Q.C., for respondents:

If the fradulent act complained of is a crime, it is congizable in the courts of this province, even though committed in another country. The said courts had conferred upon them common law jurisdiction, by the Imperial Parliament in 1792. The Imperial Parliament

(1) 4 Can. S. C. R. 605.

has power to enact that any offence against its laws, whether committed within or without its jurisdiction, is a crime, and punishable according to its laws whenever the offender is tried within the territorial limits of the British possessions, and the Imperial Parliament conferred upon the Dominion Parliament equal powers as to governing those resident in the dominion. See *Maxwell* on Statutes (1); *Valin* v. *Langlois* (2); *May's* Privileges of Parliament (3).

By the Insolvent Act of 1875, the word "creditor" is defined in sub-section "h" of section 2 to mean,—"Every person to whom the insolvent is indebted,"—and by section 101 foreign creditors are required to be notified of meetings of creditors; and section 136 contains the words, "Concealing the fact from the persons thereby becoming his creditors." Again, "With intent to defraud the persons thereby becoming his creditors." It is submitted, therefore, that the word "creditor" includes "foreign creditors;" and that section 136 expressly declares, that the fraud thereby legislated against is a fraud upon foreign as well as domestic creditors.

In view of the opinions expressed by the learned judges in the *Niagara* Election case (4), in *Valin* v. *Langlois* (5), and in *Cushing* v. *Dupuy* (6), it seems no longer open to question, that if the sections mentioned are enactments respecting "Bankruptcy and Insolvency," or "Criminal Law," then the Dominion Parliament has full power "to interfere if necessary, and modify some of the ordinary rights of property and other civil rights;" and that it is not *ultra vires* of the Dominion Parliament to provide procedure for the administration of its own laws. In dealing with dom-

(1) P. 126.
(2) 3 Can. S. C. R. 16.
(3) P. 39.
(4) 24 (U. C.) C. P. 275 & 279.
(5) 3 Can. S. C. R. 9.
(6) 5 App. Cases 409.

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inion laws, the Dominion Parliament does not recognize provincial limits. It enacts for the Dominion as a whole without territorial distinction, else the anomaly would exist of its being compelled to ask the several local legislatures to assist it in the administration of its own laws.

As to appellant's contention that as the law of *England*, where the contract was made, does not provide a penalty for the wrong in question, the defendants are not liable to a penalty by reason of any legislation in *Canada:* it is laid down in *Story* "On the Conflict of Laws," (1) that the better opinion now established both in *England* and *America* is, that it is of no consequence whether the contract authorizes the arrest or imprisonment of the party in the country where it was made, if there is no exemption of the party from personal liability on the contract; he is still liable to arrest or imprisonment in a suit on it in a foreign country whose laws authorize such a mode of proceeding as a part of the local remedy; and states that in a then recent case in *England*, where the plaintiff and defendant were both foreigners, and the debt was contracted in a country by whose laws the defendant would not have been liable to arrest, application was made to discharge the defendant from arrest on that account, but the court refused the application. Lord *Tenterden*, on that occasion, in delivering the opinion of the court said: "A person suing in this country must take the law as he finds it; he cannot by virtue of any regulation in his own country enjoy greater advantages than other suitors here, and he ought not therefore to be deprived of any superior advantage which the law of this country may confer; he is entitled to the same rights which all the subjects of this kingdom are entitled to. *Dela Vega* v. *Vianna* (2). And this doctrine

(1) P. 571. (2) 1 B. & Ad. 284.

has been confirmed in the case of *Dunn* v. *Lippmann* (1). In the case in question the plaintiffs have instituted their action in a court in the Dominion of *Canada*, and they are, by the laws of that Dominion, debarred from recovering their debt, for under the provisions of the Insolvent Act, the debt is discharged, unless it is one for which the imprisonment of the debtor is permitted. The Act which contains the provisions for discharging such debt, and which Act is invoked against the plaintiffs, also confers a benefit upon them. Invoking the principle of the above reported decision, the respondents are entitled to the advantages which the law intends to confer.

The respondents further submit that there is no final judgment in this case from which the appellant may appeal within the meaning of section 17, of the Supreme and Exchequer Court Act; and refer to the case of *Reid* v. *Ramsay* (2).

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

RITCHIE, C. J.:

This is a peculiar statutory liability placed on the debtor, to be put forward in an action brought for the recovery of a simple money demand, but which, if sustained, involves serious consequences, to which the insolvent debtor would be in no way liable on the simple money demand. It is therefore quite clear that as against the allegation of such a liability the insolvent must have the right to raise an issue to show that, though he may not be able to answer the money demand, he can answer the charge of fraud, and so relieve himself from the consequences which the statute attaches thereto. I think the declaration clearly shows on its face that the plaintiff in this action seeks

(1) 5 Cl. & F. 1, 13, 14, 15. (2) 2 Can. L. Times 206.

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to bring the defendant within the purview of sec. 136 of the Insolvent Act of 1875, and the plea was intended to meet this claim by shewing that the purchase was made in *England*, and so the debtor did not come within the provisions of the act; and the amendment agreed on, and the dealing of the court, clearly show the issues the parties raised and intended the court should decide were, whether the act was *intra vires*, and, if so, whether to a transaction between the insolvent resident in *Canada* and the creditor resident in *England* the provisions of the act applied?

Bankruptcy alters the ordinary relations of debtors and creditors; its object is to secure a speedy and equitable distribution of the bankrupt's assets, but its object is not confined to this, it has likewise in view the prevention of fraud and bad faith. The honest and unfortunate debtor and honest creditor is dealt with in one way, fraudulent debtors and collusive creditors in a very different manner; and acts as a preventative to fraud and collusion on the one hand, and as an encouragement to honest and cautious trading on the other.

The very first introduction of the Bankrupt Law was by 34 and 35 *Henry VIII.*, ch. 4, which was directed against fraudulent debtors only, who, as expressed in the act:

> Craftily obtaining into their hands great substance of other men's goods, so suddenly flee to parts unknown or keep their houses, not minding to pay, or return to pay any of their creditors, their debts and duties, but at their own wills and pleasures consume the substance obtained by credit from other men for their own pleasure and delicate living, against all reason, equity and good conscience.

By the Imperial Debtors Act of 1869, obtaining credit on false representation, or on false pretence of carrying on business, or fraudulently obtaining credit, &c., were made misdemeanors, and quitting *England* with property which ought to be divided among creditors, a felony.

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So soon as a debtor becomes insolvent and subject to any bankrupt or insolvent law passed by the Dominion Parliament, and proceedings are taken against him and his estate, under the provisions of such enactments, the provincial legislature ceases to have jurisdiction over his civil rights, either in relation to the disposition of his insolvent estate, or in relation to his dealings with his creditors, or their rights or remedies against his person or estate. Legislation on the subject of bankruptcy and insolvency, belonging exclusively to the Dominion Parliament, necessarily involves the exclusive right to deal alike with the rights of the debtor as of his creditor in relation to their dealings.

If the Imperial Debtors Act, 1869, for the punishment of fraudulent debtors, makes certain offences misdemeanors, punishable by imprisonment not exceeding two years, with or without hard labor, and certain other offences are made misdemeanors punishable by imprisonment with hard labor for one year, and the offence of absconding or attempting to abscond from *England* with property divisible among creditors, &c., is made a felony, punishable by imprisonment for two years, with or without hard labor, it would seem strange that the Dominion Parliament, having exclusive jurisdiction over bankruptcy and insolvency and over criminal law, should not have the power to (by way of dealing with a fraudulent debtor and securing the enforcement of the debt) confine a fraudulent insolvent, against whom the debt and the fraud are proved, for two years, unless he discharges the indebtedness.

The insolvency act intended to deal with all the liabilities and estate of the insolvent, recognizing the foreign as well as the domestic creditor, and could never have intended, in legislating against the fraudulent acts of the insolvent in his dealings with his creditors, to distinguish between such acts when com-

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mitted against the home creditor and similar acts committed against creditors abroad, and therefore the term creditors in the clause 136 and 137 refers, in my opinion, to all the insolvent's creditors without distinction. I cannot doubt that secs. 136 and 137 of the Insolvent Act of 1875 are *intra vires* of the Dominion Parliament.

The 136th section enacts that:

> Any person who * * purchases goods on credit * * knowing or believing himself * * to be unable to meet his * * engagements, and concealing, the fact from the person thereby becoming his creditor, with the intent to defraud such person * * and also shall not afterwards have paid or caused to be paid the debt or debts so incurred, shall be held to be guilty of a fraud, and shall be liable to imprisonment for such time as the court may order, not exceeding two years, unless the debt and costs be sooner paid: Provided always, that in the suit or proceeding taken for the recovery of such debt or debts, the defendant be charged with such fraud, and be declared to be guilty of it by the judgment rendered in such suit or proceeding.

But it is argued that this is a criminal offence, and as such was committed in *England*, and therefore *ultra vires*.

These sections, though of a *quasi* penal character, by no means constituted the acts referred to in them "crimes," in the legal technical sense of that term. In this suit could not the parties be witnesses? The proceeding contemplated by the act is in a civil suit, not in the nature of a prosecution for a crime, but as Attorney General *Cockburn* in *Attorney General* v. *Radloff* (1) expressed it:

> Where the proceeding is conducted with the view and for the purpose of obtaining redress for the violation of a private right only, the proceeding is a civil one.

That the legislature was not dealing with this as a crime is clearly deducible from sections 138 and 143 where "offences and penalties" are dealt with, and the

(1) 10 Ex. 84.

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prohibited acts are made misdemeanors by express enactments, and I think *Harrison*, C.J., in dealing with sections 92 and 93 of the Insolvent Act, 1869, substantially the same as 136 and 137 of the Act of 1875, correctly characterized the proceeding in these words:

> The coercive proceeding is in aid of or incident to the civil remedy for the collection of a debt and not at all for the punishment of a criminal.

I have no doubt the parties in this suit, both plaintiff and defendant, could be examined as witnesses, and if at any time after the suit brought, before trial or immediately after, the defendant should pay the debt and costs, the proceedings would end and no imprisonment could be adjudged.

This is, in my opinion, no more a criminal matter than a bill in chancery charging fraud and seeking redress against such fraud.

As to this being matter of civil procedure and *ultra vires* as interfering with property and civil rights, what I have stated in *Valin* v. *Langlois* (1) is an answer to this objection. The right to direct the procedure in civil matters in the provincial courts has reference to the procedure in matters over which the Provincial Legislature has power to give them jurisdiction, and does not in any way interfere with or restrict the right or power of the Dominion Parliament to direct the mode of procedure to be adopted in cases in which the Dominion Parliament has jurisdiction, and where it has exclusive authority to deal with the subject-matter as it has with the subject of bankruptcy and insolvency. This is also the view taken by the Privy Council in the case of *Dupuy* v. *Cushing* (2). I will only add that I am quite prepared to adopt the conclusion arrived at by the Court of Appeal, and to say that such a provision as the one in question comes fairly

(1) 3 Can. S. C. R. 1. (2) 5 App. Cases 409.

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within the general scope of any law relating to bankruptcy or insolvency.

STRONG, J.:

An objection was taken to the jurisdiction of the court to entertain this appeal, as not being an appeal from a final judgment within the meaning of section 3 of the Supreme Court Amendment Act of 1879. The words of that section are:

> An appeal shall lie from final judgments only in actions, suits, causes, matters, and other judicial proceedings originally instituted in the Superior Court of the Province of *Quebec*, or originally instituted in a Superior Court of Common Law in any of the Provinces of *Canada* other than the Province of *Quebec*.

In the case of *Chevalier* v. *Cuvillier* (1) it was determined that an appeal was well brought where the judgment in the court of original jurisdiction was not final, but was, as in the present case, a judgment on a demurrer to part of the action only; and this decision proceeded upon the ground that the judgment of the Provincial Court of Appeal, from which the appeal to this court was immediately brought, was a final judgment in a judicial proceeding within the meaning of this 3rd section of the Act of 1879. That case is not to be distinguished from the present and is an authority for this appeal.

The pleadings seem to be sufficient to raise the substantial question which was discussed on the argument of the appeal, both in this court and in the court of Appeal. The second count of the declaration is framed, not for the debt, but exclusively upon the statute, for the purpose of alleging the fraud, which section 136 of the Insolvent Act requires the defendant to be charged with before the provision of that section can be applied. It may not have been necessary to have pleaded to this

(1) 4 Can. S. C. R. 605.

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charge of fraud, as by the express words of section 137 the court could not act without proof of it, even if no plea had been pleaded. Section 137 seems, however, to imply that the defendant may plead, and, that being so, I see no objection whatever to a plea such as that which has been pleaded to the second count, a plea not containing any answer to the debt, but addressed exclusively to the second count of the declaration, which is confined to the case of fraud.

We are to read the second count of the declaration as amended by the allegation that the defendants were British subjects, domiciled in *Canada* at the time of the purchase of the goods mentioned in the declaration. With this amendment, and taking as I do the second count of the declaration to be confined to the case of fraud and not to be a count for the debt, and reading the plea demurred to as limited to the second count, I think we have before us a perfect record raising the substantial question, which was argued and decided in both the courts below, namely the question: whether section 136 of the Insolvent Act applies to a purchase of goods made by a British subject domiciled in *Canada*, under the circumstances of concealment made punishable as fraudulent by that section, when the purchase is made without the Dominion of *Canada*.

The view which I take of the case does not make it necessary to decide the constitutional question as to the power of Parliament to pass such an enactment as that in question, limited to the territory of the Dominion, the opinion at which I have arrived being formed exclusively on the construction of the clause in question. I may say, however, that I have heard nothing to raise a doubt in my mind as to the constitutional validity of such an enactment, (provided it is construed, as hereafter to be stated as limited to the territory of the Dominion,) under one or other of the

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powers conferred on Parliament by the *British North America Act* of legislation as to criminal law, bankruptcy and insolvency, or trade and commerce, and even if this view is incorrect, and the provision in question cannot be considered a proper exercise of any of these powers of legislating, the opinion of Mr. Justice *Burton* must then be correct, and the similar clause in the Insolvent Act of 1865 be held to be still in force.

The opinion which I have formed, and which accords entirely with that of the Chief Justice of the Common Pleas, proceeds altogether upon the construction of this 136th section, which, interpreted according to well established principles applicable to all statutes, must, in the absence of express words giving it an extra-territorial operation, be read as confined to offences committed within the territory subject to the legislature which enacted it. The statute is clearly penal in its terms, but it does not seem to me to be very material to enquire whether it creates what may strictly be called a criminal offence or not. Had it simply declared that a trader purchasing goods on credit, when he knew himself to be unable to meet his engagements, and concealing that fact from the vendor, should be guilty of a misdemeanor, and liable to the punishment prescribed of imprisonment for not more than two years, there could be no doubt that a new criminal offence would have been created. But supposing the degree and character of the offence by calling it a misdemeanor to have been left out, it would still have been an offence for which the party could only have been tried and convicted on an indictment for a misdemeanor. Then what difference can it make that a special statutory mode of trial is provided for instead of the usual proceeding at common law by indictment? None, that I can see; and the added condition that the party convicted shall in a certain event be entitled to a remis-

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sion of the punishment—a sort of statutory pardon —shews that the imprisonment is not intended to be merely by way of execution to enforce payment in the interest of the creditor. What proves this is, that a debtor, after having suffered the full term of imprisonment under a sentence pronounced in pursuance of this enactment, would be liable upon his release to be again imprisoned under a writ of *capias ad satisfaciendum* upon the unsatisfied judgment. I do not, however, think anything depends on this question whether a criminal or even a penal offence was or was not created. The rule of construction which applies, not being restricted to statutes creating offences or inflicting penalties, but being of much wider application, and appropriate to the interpretation of all statutes whereby any legal consequences are attached to the performance of a particular act, the rule to which I allude, and which I think must govern the decision of the present case, is that which establishes that the authority of a statute is not to be extended beyond the territory over which the legislature which enacts it has jurisdiction, unless by express words extra-territorial force is given to it.

In *Jeffreys* v. *Boosy* (1), *Pollock*, C. B., says:

> The Statutes of this realm have no power, are of no force, beyond the dominions of Her Majesty, not even to bind the subjects of the realm, unless they are expressly mentioned or can be necessarily implied.

Sir *Peter Maxwell*, in his work on statutes (2), states this principle of interpretation as follows:

> Another general presumption is that the legislature does not intend to exceed its jurisdiction.
>
> Primarily, the legislation of a country is territorial. The general maxim is that *extra territorium jus dicenti impune non paretur*; or, that *leges extra territorium non obligant*. It is true, this does not compose the whole of the legitimate jurisdiction of a state; for

(1) 4 H. L. C. 939. (2) P. 119.

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it has a right to impose its legislation on its subjects in every part of the world; but in the absence of an intention clearly expressed, or necessarily to be inferred from the language, or from the object or subject-matter of the enactment, the presumption would be that Parliament did not design its statutes to operate on them beyond the territorial limits of the United Kingdom, and they are to be read as if words to that effect had been inserted in them.

And numerous decisions bear out this statement of the law, and show its accuracy beyond dispute.

*Rosseter* v. *Cahlmann* (1); *The Amalia* (2); *Rose* v. *Himely* (3); *The Zollverein* (4); *Atty. General* v. *Kwok-A-Sing* (5).

In the case of bigamy, under the statute of *James I*, it was held that no indictment lay when the second marriage was solemnized out of the kingdom. And statutes regulating the ceremony of marriage, as Lord *Hardwicke's* Act, were also held to be restricted to the territorial limits of the kingdom. It is said, it is true, that the Parliament of the United Kingdom may make laws binding British subjects without the limits of the British Dominion, provided the intention of the legislation so to give an extra-territorial operation to the statute is apparent, either from express words, or from necessary implication. But this is for the reason that the Parliament of the United Kingdom is a sovereign legislature having unrestricted power over subjects owing allegiance to the Queen in all parts of the world. Can this, however, be said of a colonial legislature which is not in this sense sovereign, but derives its authority to legislate from the delegation of powers by act of the Imperial Parliament? By the 91st section of the *B. N. A. Act* the Parliament of *Canada* is empowered to make laws for the peace, order and good government of *Canada*. Does this warrant the enact-

(1) 8 Exch. 361.
(2) 1 Moo. P. C. N. S. 471.
(3) 4 Cranch 241.
(4) Swab. 96.
(5) L. R. 5 P. C. 179.

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ment of statutes binding British subjects in respect of acts done without the territory of the Dominion, merely because they happened at the time to have a domicile in the Dominion? Or are not such persons, like all other subjects of the Queen, liable to be affected by no legislation regulating their personal conduct without the limits of the Dominion, save such as may be enacted by the Imperial Legislature, the Parliament of the United Kingdom? I think these weighty and important questions would arise and have to be determined in the present case, if we found in the enactment under consideration, either from express words or necessary implication, that it was the intention of the legislature to apply it to traders, domiciled inhabitants of *Canada* making purchases without the Dominion, but as there is not the slightest indication of such a design as respects this 136th section, we are relieved from the obligation of determining such a grave question of constitutional law. I have been unable to find anything distinctly bearing on this question of constitutional power, but in Mr. *Forsyth's* work on Constitutional Law (1) he states that this identical point arose with reference to the power of the Indian Legislature to pass laws binding on native subjects out of *India*, and came before the law officers of the Crown and himself in 1867, (when Sir *Fitzroy Kelly* and Sir *Hugh Cairns*, were respectively attorney and solicitor general,) and they all, with the exception of the Advocate General Sir *R. Phillimore*, thought that "as the extent of the powers of the Legislature of *India* depended upon the authority conferred upon it by acts of Parliament," it was unsafe to hold the Indian Legislature had power to pass such laws. Although, as I have said, we are not now called on to decide this question, it is still not without relevance to the question of construction, since

(1) P. 17.

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it strengthens the presumption that all laws passed by the Parliament of *Canada* are, in the absence of any express language or unavoidable implication to the contrary, intended to be restricted in their operations to the limits of the Dominion.

There being nothing either in the language or object of this 136th section of the Insolvent Act to warrant the implication that it was to have any effect out of *Canada*, the ordinary rule of construction must apply to it, and it must be held not to extend to the purchase of goods in *England* stated in the second count of the declaration. In my opinion, therefore, the judgments of both courts below must be reversed.

FOURNIER, J.:—

I am in favour of dismissing the appeal. I agree entirely with the learned Chief Justice, as also with the reasons given by the judge before whom the case came in the first place, and Mr. Justice *Galt* and C. J. *Sprague*. I believe the enactment of 136th clause is clearly within the powers of the Federal Government, which has unlimited power to legislate upon the matter of insolvency.

HENRY, J.:—

I entirely concur in the judgment just rendered by my brother *Strong*. Although the provision contained in the 136th sec. is found in the Insolvent Act, it is not necessarily connected with the insolvency of any individual. A party need not be insolvent to come within the provisions of the enactment—need not be brought into the Insolvent Court—nor does it appear that it is at all necessary that he should be. Here is a provision separate and distinct altogether from the question of insolvency; although this section is to be found in the Insolvent Act it does not necessarily come under the Insolvent Act at all.

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Looking at that clause, what are the provisions which are applicable to this case? A party who, with intent to defraud, concealed the fact of his being insolvent from his creditors, or who by any false pretences obtains a credit for any loan of money or any part of the price of goods, wares or merchandize, &c., comes within the provision.

In the view I take of this question, I will not question the power of the Legislature to pass that Act, although there may be and have been raised serious doubts as to this provision being within the competency of Parliament. It has been most forcibly shown, whether correctly or not I am not going to say, that is a matter which rests with the Local Legislature. That question, however, I do not undertake to decide, nor do I consider it necessary in the view I take of the position, to do so. This Act was passed by the Parliament of Canada, which, for the purpose of this argument, I admit to be competent to pass it. Now, if a person is guilty of fraud, where is that fraud intended to be committed? It is not to be attributed to this legislature that it intended to punish fraud or felony committed outside of the Dominion. This is a fraud alleged to have been committed in England. If the legislature here had the power, which I doubt, to legislate for the punishment of fraud out of the country, it has not said so. I construe this, then, simply to mean that if a party within the jurisdiction of the Legislature of the Dominion is guilty of obtaining goods from another within that territory with intent to defraud him, and does not pay for them, he is liable. Here then a charge of fraud is made as committed in another country; the non-payment only is charged here. But if a party is not answerable here by the peculiar mode of procedure that is provided for in this section, then, of course, the offence is not com-

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pleted. There is only a portion of it—the failure to pay. Looking at the whole case from the best consideration I have been able to give to it, I cannot come to the conclusion that the Legislature intended a party guilty of fraud in any other country—foreign country (it might have been in the *U. S.* or *Egypt*)—is to be imprisoned here for fraud committed in some other country, and not against any subjects of the Dominion. I think we must construe this section as intended to protect the people over whom the Dominion Parliament had power to legislate and not to include within its terms a provision for the protection of foreigners outside of the Dominion. Further than that, I doubt that the constitutional rights of the Parliament would not go as far as to pass an act, under the peculiar circumstances of this country, to punish a party for fraud committed outside of the Dominion. On these two points, therefore, I am with the appellants and I think the appeal should be allowed.

TASCHEREAU, J.:—

I would have been of opinion with my brother *Gwynne* that no appeal lies in this case, but as the majority of the court hold otherwise, I am of opinion with Mr. Justice *Strong* that section 136 of the act does not apply to acts done out of *Canada*, whether in *England* or in a foreign country, and I doubt very much if the Parliament of *Canada* would have the power to legislate at all on dealings or actions which have taken place outside of *Canada*.

GWYNNE, J.:—

At the argument of this case it was contended by the learned counsel for the respondents, that the case was not appealable to this court, upon the ground that the judgment, which is one in favor of the plaintiffs

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upon a demurrer to a plea, which is one only of several pleas, upon all of which, including that demurred to, issues in fact have been joined which are not yet tried, is not a *final* judgment within the meaning of the Act constituting this court, and it was agreed that the argument should proceed subject to this objection. *Chevalier* v. *Cuvillier* (1) was referred to by the learned counsel for the appellant as an authority in support of the appeal, but the demurrer in *Chevalier* v. *Cuvillier* was to a particular specified portion of the claim asserted in the action, and the allowance of the demurrer in such case was undoubtedly a final judgment as to the claim demurred to. Upon that ground I concurred in allowing the appeal in that case, and to that extent, but no further, I consider myself bound by it. The case here is quite different; it is a judgment allowing a demurrer to one of several pleas, upon all of of which "issues" in fact are joined and yet to be tried. Such a judgment decides nothing as to the action or suit in which the plea is pleaded; the action remains still wholly undetermined, and the 9th sec. of 42 *Vict.*, ch. 39, declares that the words "final judgment" to be the subject of appeal means:

> Any judgment, rule, order, or decision, whereby the action, suit, cause, matter or other judicial proceeding is finally determined and concluded.

By this language I understand that a judgment, in order to its being appealable to this court, must be one which finally disposes of the whole, or of some specific part, of the subject of the claim in the action, suit or cause, when the point under adjudication arises in an action, suit or cause, or one which finally disposes of the whole, or of some part, of the subject of claim in any matter or judicial proceeding other than an action, suit or cause; a judgment finally determining and conclud-

(1) 4 Can. S. C. R. 605.

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ing some matter or judicial proceeding can not be the proceeding itself concluded and determined. The judgment of the court upon the demurrer in this case leaves the action wholly undecided, and, in my judgment, still is, as it has always been considered to be, interlocutory only.

While I am of this opinion, and that this case is not appealable to this court, it may, however, not be amiss to say also that in my opinion the demurrer does not raise the main question which was argued before us, namely, whether sec. 136 of the Insolvent Act of 1875 is or is not *ultra vires* of the Dominion Parliament, for whether it be or be not, the plea is clearly bad for the reasons pointed out by Mr. Justice *Patterson*. The plea confesses the debt for which the action is brought, and that such debt was incurred under circumstances of fraud and offers no matter whatever in avoidance, or in bar of the action, and the point attempted to be raised is whether the provisions of the 136th section of the Insolvent Act, as to imprisonment of the defendant, can be applied if the issue in fact raised upon the plea shall be found in favor of the plaintiffs. It will be time enough to raise that question when the issues in fact joined upon the pleas in bar of the action shall be found in favor of the plaintiffs. The question is probably raised by a replication to some of the other pleas, although it be not, as I think it is not, by a demurrer to a plea which, while it professes to be pleaded in bar of an action for goods sold and delivered, alleges as the sole ground of such bar that the cause of action arose in *England*. It is obvious that such a plea is no bar to an action for goods sold and delivered, even though it be alleged in the declaration, as it must be in order to obtain the benefit of the provision of the 136th section of the Insolvent Act, that the defendants con-

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tracted the debt under circumstances alleged to be fraudulent within the meaning of the Insolvent Act, that is to say, that the debt was contracted by the defendants when they knew or believed themselves to be in insolvent circumstances, which fact they concealed from the plaintiffs with intent to defraud them. Whether the 136th section of the Insolvent Act be or be not *ultra vires*, such a plea is no plea in bar of the cause of action on the *indebitatus assumpsit* stated in the declaration; and as the question as to the validity of the above section of the Insolvent Act does not, in my opinion, arise upon the demurrer, I express no opinion upon it; but in withholding my opinion upon this point, I must not be understood as intending to convey any expression of a doubt as to its validity; I merely express no opinion upon it, because, I think, the demurrer does not raise the question; and, as I am of opinion that the plea is bad, I concur that, if the appeal be entertained, it must be dismissed.

*Appeal dismissed without costs.*

Solicitors for appellant: *Bethune, Moss, Falconbridge & Hoyles.*

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

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THE BANK OF TORONTO .....APPELLANTS;

AND

ARTHUR M PERKINS, *es-qual., et al*...RESPONDENTS.

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*Nov. 13,14.

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*April 30.

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

*The Banking Act*, 34 *Vic., ch.* 5, *sec.* 40—*Advances on Real Estate.*

*B.*, on the 19th January, 1876, transferred to the Bank of *T*, (appellants) by notarial deed an hypothec on certain real estate in

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

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*Montreal*, made by one *C.* to him, as collateral security for a note which was discounted by the appellants and the proceeds placed at *B's.* credit on the same day on which the transfer was made. The action was brought by the appellants against the insolvent estate of *C.*, to set aside a prior hypothec given by *C.* and to establish their priority.

*Held*—(affirming the judgment of the Court of Queen's Bench) that the transfer by *B.* to the Bank of *T.* was not given to secure a past debt, but to cover a contemporaneous loan, and was therefore null and void, as being in contravention of the Banking Act, 34 *Vic.*, ch. 5, sec. 40.

APPEAL from a judgment of the Court of Queen's Bench for *Lower Canada* (appeal side) (1).

This action was brought against the respondents by the appellants as the assignees of an obligation granted by *Samuel S. Campbell* to *Walter Bonnell* on the 19th January, 1876, and on the same day transferred by *Bonnell* to appellants, to have declared fraudulent, illegal, null and void certain agreements and covenants in the declaration mentioned, to wit, an obligation executed by the said *Samuel S. Campbell*, on the 14th June, 1875, in favor of dame *Lucy Jane Stevens*, whereby he hypothecated in her favor, for considerations set forth in the said obligation, his certain real property therein described, an obligation by the said *Campbell* to *Brackley Shaw* aforesaid executed on the 1st June, 1876, whereby for security of a loan of money made to him by said *Shaw*, he hypothecated to *Shaw*, among other the real property hypothecated as above in favor of the said *Lucy Jane Stevens*; and lastly, a covenant in the obligation to *Shaw* whereby the said *Lucy Jane Stevens* gave to *Shaw* priority of his mortgage over that previously granted to her upon the said real property.

*Perkins*, as assignee of the insolvent estate of *S. S. Campbell*, one of the respondents did, not plead to the action; and *Lucy Jane Stevens*, *Campbell's* wife, and

(1) 1 Dorion's Q. B. R. 357.

*Brackly Shaw* severed in their defence. *Lucy Jane Stevens* pleaded that the obligation of the 14th June, 1875, was passed in good faith and for valuable consideration.

*Shaw* pleaded: 1st. That the said plaintiffs are not now and were not at the date of the institution of the present action, hypothecary creditors on the said lot of land mentioned and described in plaintiff's declaration. That the said obligation and hypothec from the said *Samuel S. Campbell* to the said *Walter Bonnell*, and which is alleged to have been transferred to plaintiffs, was transferred as security for the payment of a promissory note of the said *Walter Bonnell*, which has long since been paid by the proceeds of other collaterals, transferred to plaintiffs by the said *Walter Bonnell*, as security for the payment of the said promissory note.

2nd. That no legal consideration was ever given by the said *Walter Bonnell* to the said *Samuel S. Campbell* for the said obligation and hypothec, and the said *Samuel S. Campbell* was not then and never has been since indebted in any sum to the said *Walter Bonnell*, the said obligation and hypothec having been consented to by the said *S. S. Campbell*, simply to enable the said *Walter Bonnell* to borrow money on the security of the land thereby hypothecated. That the said mortgage and hypothec was transferred to the said plaintiffs by the said *Walter Bonnell* for money loaned and advanced by plaintiffs to the said *Walter Bonnell* on the said mortgage and hypothec, and as and for advances then and there directly and indirectly made by the said plaintiffs to the said *Walter Bonnell* on the security of land, the whole against the statutes in such case made and provided, and beyond the power and authority of the said the bank. That the allegations in the said transfer contrary and in opposition to the foregoing allegations are false and made with a

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fraudulent intent of avoiding the provisions of the statutes and the law of the Dominion respecting banks and banking.

3rd. That the obligations and hypothec by *Campbell* to his wife, was for good and valid consideration and that she could grant priority over her hypothec without binding herself for the debts of her husband.

4th. *Shaw* put in a general issue.

The answers of the appellants to these several pleas were general.

Issue being joined, the parties proceeded to evidence, and it was proved that *Campbell* gave the mortgage for $25,000 to *Lucy Jane Stevens*, his wife, for the price of the stock in trade belonging to her in a partnership which had existed between her and one *Charles Hagar*, including $10,000 to $11,000 interest on said price. That the mortgage given by *Campbell* to *Bonnell* on the 19th January, 1876, was transferred by deed executed before *T. Doucet*, N. P., by *Bonnell* to the appellants on the same day as collateral security for a note of $26,000, dated 26th December, 1875, and discounted on the said 19th January, 1876, the bank receiving at the same time other collaterals to secure the payment of the note, viz: an obligation due to him by one *Routh* for the sum of $6,145.00, and one due by *Girard* for $24,000. That *Bonnell* failed in 1876 and the bank fyled its claim against *Bonnell's* estate on the 20th April, 1877, for $78,682, valuing the three mortgages by them held as security for $25,000. That the bank collected $6,145 with interest under the *Routh* mortgage.

The Superior Court dismissed the appellant's action as to the three defendants by three separate judgments.

On appeal to the Court of Queen's Bench the judgment of the Superior Court was confirmed.

The appeal in this case was determined on the question whether the transfer by *Bonnell* to the bank of an

hypothec to secure a note discounted on the same day is null and void, as being contrary to the Banking Act 34 *Vic*, ch. 5, sec. 40, and therefore arguments of counsel on the other questions raised by the pleas need not be referred to.

Mr. *Laflamme*, Q.C., for appellants:

The taking of security in this case cannot be construed as being against public policy. If *ultra vires*, it is not necessarily illegal, and then it might be voidable but not void. It was not a direct transaction in violation of the statute. The bank never advanced the money on the security of the real estate, the original party to the mortgage had completed the transaction and advanced the money, and the bank, long afterwards, received this claim as security for advances made on a promissory note in the regular course of business.

All the circumstances connected with the granting of these securities, prove conclusively that the bank obtained them to guarantee the advances then made to *Bonnell* on bills and notes discounted, "a debt contracted to the bank" in the course of its business. The transfer states it in positive terms.

"Whereas the said *Walter Bonnell* stands indebted to the said bank of *Toronto* in the sum of twenty-six thousand dollars as represented by a certain promissory note signed by the said *Walter Bonnell*, and payable to his own order and endorsed by him."

"And whereas the said *Walter Bonnell* desires to furnish the said bank with collateral security for the due and faithful repayment of his said indebtedness assigns, &c."

When he gives the promissory note as representing his indebtedness fixed at $26,000, he authorizes the bank in the letter addressed to the manager to retain the note for collateral security for bills there or thereafter to be discounted.

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Banks as well as all joint stock companies with limited liability, first attained the most practical and complete organization and their fullest development and efficiency, in the *United States*, and there the courts were called to lay down the rules defining their powers and restricting them within the limits of their proper legal action.

Every bank charter in that country contains the provisions of our Banking Act, confining their operation to legitimate banking business, and prohibiting them from dealing in goods, wares and merchandise, and from loaning money on the security of land.

Nevertheless, the highest judicial authorities thought themselves bound to give a fair interpretation to these provisions, establishing restrictions and prohibitions in the interest of the commercial community and society generally, and universally held that the prohibition only applied when the receiving of goods was a direct purchase, or when the taking of security had, for direct object, the advance of money on security of real estate, and not when the security was given to secure regular banking facilities for genuine ordinary commercial transactions. See *Angell* and *Ames* on Corporations (1); *Bryce—Ultra vires* (2); *Ayers* v. *South Australasian Banking Company* (3).

Mr. *Benjamin*, for respondent.

The Banking Act of this Dominion (4) declares:—

"That a bank shall not either directly or indirectly lend money or make advances upon the security, mortgage, or hypothecation of any lands or tenements, &c."

Article 13 of the Civil Code of *Lower Canada* declares: "No one can by private agreement validly contravene the laws of public order and good morals."

(1) §§ 156, 264, 157.
(2) Pp. 208, 209, 210.
(3) L. R. 3 P. C. 548.
(4) 34 *Vic.*, c. 5, sec. 40.

Article 14th of same Code declares:—"Prohibitive laws import nullity, although such nullity be not therein expressed."

Article 15th of same code declares: That the word "shall" is to be construed as imperative," &c.

The transfer by *Bonnell* to the appellants, of the *Campbell* hypothec is an evasion of the law as above cited, therefore the hypothec claimed by the appellants under such transfer is null and does not exist in their favor, and consequently their right of action, as an hypothecary creditor, never existed.

RITCHIE, C.J.:

This was an appeal from a judgment of the Court of Queen's Bench (appeal side), Province of *Quebec*, affirming a judgment of the Superior Court, dismissing the appellant's action. [The learned Chief Justice then read a statement of the case.]

The plaintiffs based their claim on the validity of this mortgage, and the question of its validity is distinctly raised on the pleadings.

I agree with Chief Justice *Dorion* that the transfer made to the appellants of a mortgage to secure an advance made on a promissory note discounted at the same time that the transfer was made, was on the part of the bank in violation of the Banking Act, a clumsy attempt at evasion of the 34th *Vic.*, ch. 5, sec. 40, which enacts that:

> The bank shall not, either directly or indirectly lend money or make advances upon the security, mortgage or hypothecation of any lands and tenements.

And the same prohibition in the very same words, is contained in the charter of the Bank of *Toronto* 20 *Vic.*, ch. 160, sec. 28, which enacts that:

> The said bank shall neither directly or indirectly lend money or make advances upon the security, mortgages, hypothecation of any lands or tenements, &c.

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This prohibition, as Chief Justice *Dorion* justly remarks, is a law of public policy in the public interest, and any transaction in violation thereof is necessarily null and void; no court can be called upon to give effect to any such transaction or to enforce any contract or security on which money is lent or advances as thus prohibited are made.

It would be a curious state of the law if, after the Legislature had prohibited a transaction, parties could enter into it, and, in defiance of the law, compel courts to enforce and give effect to their illegal transactions.

STRONG, J.:

The evidence of *Joseph R. Hutchins*, a witness for the defendants, shews beyond question, in the entire absence of any contradictory proof, that the several notarial deeds of the 19th January, 1876, whereby *S. S. Campbell* transferred certain hypothecary claims or vendor's privileges to *Bonnell*, and *Bonnell* transferred the same claims to the bank as security for the payment of the promissory note of the 30th December, 1875, were both made in pursuance of an arrangement with the bank, whereby the bank agreed to discount the note on the faith of the security afforded by the transfer, that the deeds were parts of one and the same transaction, and that *Bonnell* was a party interposed to give the loan by the bank a colour of legality. Further, the evidence shews that the loan was, in fact, made directly to *Campbell*, and was not made until after the deeds of transfer were completed.

Mr. *Smith*, the manager of the bank, states distinctly that "the note was passed through the bank on the 19th January, 1876;" in other words, that it was discounted on that day. From this it is apparent that the bank on the last-mentioned day lent to *Campbell* $26,000,

less discount deducted, on what was substantially the security of a mortgage of landed property.

By the 40th section of the General Banking Act of 1871, it is enacted that—

> The bank shall not, either directly or indirectly, lend money or make advances upon the security, mortgage or hypothecation of any lands or tenements.

By the 41st section of the same Act the bank is empowered to take mortgages upon real property as additional security for debts contracted to the bank in the course of its business.

The question therefore arises, whether this advance of the proceeds of the note for $26,000, discounted as before mentioned, having been made upon the security of the hypothec mentioned, that security, which is the foundation of the present action, is now valid in the hands of the bank, so as to entitle them to maintain this action for the reduction of a prior mortgage upon the same subject.

Although it appears that *Campbell* was primarily indebted to the bank, there is no pretence for saying that the mortgage in question was given as a security for the old debt, and that the transaction was a mere giving of time and forbearance during the currency of the note, for it distinctly appears from the evidence of both the manager, Mr. *Smith*, as well as from that of Mr. *Hutchins*, who acted in the matter for *Campbell*, that there was a new advance to the amount of the proceeds of the note, which, though bearing an earlier date, was not discounted until after the security was completed and in the hands of the bank.

The question we have to determine is therefore reduced to one of law, arising on the construction and effect of the 40th section of the Banking Act, and all we have to decide is, whether a bank, making an advance or loan of money on a mortgage of real property

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in violation of the prohibition contained in the section referred to, is notwithstanding entitled to the benefit of the security. The only ground for an argument that the security is not invalidated, is that the Act does not in express words enact that it shall be void. This distinction, however, though it must be admitted to have the support of considerable American authority, cannot avail the appellants in the face, not only of the principles which the English courts have applied to the construction of statutes in analogous cases, but also of the decision of the Privy Council upon an enactment in all respects identical with the present.

In the *National Bank of Australasia* v. *Cherry* (1), the question arose as to the validity of an equitable mortgage of lands by deposit of title deeds originally given to secure advances to be made by a bank which was prohibited from lending money on such security by a provision in its statute of incorporation expressed in these words:—

> Provided always, that, save and except as hereinbefore specially authorized, it shall not be lawful for the said corporation to advance or lend any money on the security of lands or houses.

It was argued that this prohibition was not founded on any considerations of public policy, but was simply a regulation for the internal management of the bank, and therefore a security taken in infringement of the proviso was not void in the hands of the bank, and might be enforced as effectually as if it had been given to secure a past debt. The Privy Council, however, although holding under the particular facts of that case, that by force of a subsequent arrangement the security originally given for future advances had been converted into one for a pre-existing debt, virtually held that the clause of the Act there in question, although not in express words avoiding a mortgage for future advances

(1) L. R. 3 P. C. 299.

given in violation of its terms, did, in effect, make such a security void in the hands of the bank. It is true that in a case, reported in the same volume, of *Ayers* v. *The South Australian Banking Company* (1), the Privy Council expressed doubts as to the effect of a similar clause in the charter of a bank; whether the consequences of an infraction of it invalidated the security, or had any greater or other effect than to warrant proceedings on the part of the crown for a forfeiture of the charter. But the distinction between this last case and that first referred to consists in this, that whilst in the first case the prohibition was embodied in an Act of Parliament, in the latter it was a mere provision of a Royal Charter, so that it could not be said to be illegal in the sense in which a direct contravention of a statutory prohibition is to be so regarded.

In the case of the *National Bank* v. *Matthews* (2), the Supreme Court of the *United States* held, that under a provision in the National Banking Act prohibiting securities by way of mortgage (the language of the Act, however, not being so stringent as in the present case) the security was not avoided. This decision, however, proceeded upon a principle of statutory construction peculiar to the American courts, which admits considerations of the policy of an enactment as influencing its interpretation to an extent to which the decisions of the English courts are distinctly opposed (3). Whenever the doing of any act is expressly forbidden by statute, whether on grounds of public policy or otherwise, the English courts hold the act, if done, to be void, though no express words of avoidance are contained in the enactment itself.

In *Bartlett* v. *Vinor* (4) Lord *Holt* says:

> Every contract made for, or about any matter or thing which is

(1) L. R. 3 P. C. App. 548.
(2) 98 U. S. 621.
(3) *Cope* v. *Rowlands*, 2 M. & W. 157.
(4) Carthew 252.

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prohibited or made unlawful by statute, is a void contract, though the statute does not mention that it shall be so, but only inflicts a penalty on the offender, because a penalty implies a prohibition, though there are no prohibitory words in the statute.

In *Cope* v. *Rowlands* (1) Baron *Parke* says, with reference to a distinction formerly made between acts done in violation of statutory provisions made for the protection of the revenue and those based on grounds of public policy:

> Notwithstanding some dicta apparently to the contrary, if the contract be rendered illegal, it can make no difference, in point of law, whether the statute which makes it so has in view the protection of the revenue or any other object.

And Mr. *Sedgwick*, in his work on statutory construction, approves of this doctrine as a general rule of statutory construction, saying, this would result in a simple and uniform rule, making void all contracts, growing out of acts forbidden by law, and barring all actions upon them; and he condemns the opposite doctrine, as acted upon in the American case of *Harris* v. *Runnels* (2), as introducing "a distinction too nice and refined to be susceptible of practical application."

Numerous other authorities might be quoted to the same effect (3). If, however, it should be considered requisite to show that the clause in question prohibiting the taking of security on lands for contemporaneous advances was introduced to sustain some purpose of public policy, the observations of Lord *Cairns*, in delivering the judgment of the Privy Council in the case of the *National Bank of Australasia* v. *Cherry*, already cited, are directly in point. Lord *Cairns* there says:

> Now, in the first place, it was contended that the enactments contained in this clause were not founded upon any considerations of public policy, but were simply regulations for the internal management of the bank as between itself and its shareholders, and that

(1) 2 M. & W. 157.
(2) 12 Howard 79.
(3) In *Rex* v. *Gravesend* 3 B. & Ad. 240. *R.* v. *Hipswell*, 8 B. & C. 460. *Fergusson* v. *Norman*, 5 Bing. N.C. 76.

they were to be considered as rules merely for the conduct of the directors, and altogether unaffected by those considerations of public policy which might lead to a wider construction of the Act.

Their Lordships are unable to adopt that argument. They cannot but see in this clause that there was some object on the part of the Legislature to regulate, indeed, the internal management of the affairs of the bank, but to regulate those affairs not merely, if at all, with reference to the interests of the shareholders, for it is difficult to see how the interests of the shareholders could be prejudiced by taking securities of this kind, but rather to regulate those affairs with some regard to the interests of the public, who, for some reason or other, which it is not for their lordships to speculate upon, are, by this Act, supposed to have an interest in confining the bank to making advances of money without these solid items of security which are specified in this clause.

It appears, therefore, to their lordships that there are considerations of public policy involved in this clause, but it is also true to say, that those considerations of public policy look to and deal with the management of the bank, and have for their object the limitation of the powers and authorities of the bank.

This judgment of the Privy Council, therefore, warrant us in determining that the transfer made to the bank in the present instance was wholly avoided by the 40th section of the Banking Act.

The foregoing considerations are founded on the principles of statutory interpretation which are established by English law, which would appear to be applicable to the construction of a statute of the Dominion applying alike to all the provinces, and in the present case applied to limit the powers of a corporation domiciled in the Province of *Ontario*. If however this is an incorrect assumption and the interpretation of the statute is to be governed by the law of the Province of *Quebec*, the question is not open for discussion, for it is expressly concluded by the 14th article of the Civil Code, which declares that "Prohibitive laws import nullity, although such nullity be not therein expressed."

Had it been established in evidence that the proceeds of the promissory note for $26,000, which, according to

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the terms of the letter of *Campbell* to Mr. *Coulson*, the then manager of the bank, dated the 19th January, 1876, the day on which the mortgage was given him, were to be held by the bank as security for bills discounted, or thereafter to be discounted, or that any part of that amount had in fact been applied to take up bills upon which *Campbell* was at the time liable to the bank, that might have made the mortgage, wholly or *pro tanto*, as the case might be, a security for a pre-existing debt, and have thus taken it out of the operation of the 40th section, but I am unable to find the slightest proof of this. We must therefore take the transaction to have been a mortgage given, not to secure a past debt, but to cover a contemporaneous loan, and therefore void under the statute.

The other questions which were discussed in the Court of Appeal, namely, the question of the payment or satisfaction of the appellants' debt and the validity of the transaction between *Campbell* and his wife, therefore become immaterial, for the appellants must wholly fail in their action, if we determine the mortgage to be void under the Banking Act.

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

FOURNIER, J.:—

A new debt was really created by this $26,000, which was only discounted upon the security of this transfer. This certainly is in contravention of the Banking Act.

On this ground alone, I think the appeal should be dismissed.

HENRY, J.:—

I entirely concur in the views of my learned brothers. I think the act intended, though not clearly expressed,

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to void all such documents. There are other grounds on which, I think, the respondent would be entitled to judgment, but as this embraces the whole case, I think it is unnecessary to advert to them.

TASCHEREAU, J. :—

I am of opinion also that the judgment of the two courts below should be confirmed, and the appeal should be dismissed.

GWYNNE, J. :—

This is an action instituted by the Bank of *Toronto* against *Arthur M. Perkins* in his capacity of assignee of the estate of *Samuel S. Campbell*, *Lucy Jane Stevens*, wife duly separated, as to property from the said *Samuel S. Campbell*, the said *Samuel S. Campbell* and *Brackley Shaw*, defendants.

The plaintiffs in their declaration allege that by an indenture of mortgage duly executed upon and bearing date the 19th January, 1876, the said *Samuel S. Campbell*, since become insolvent, acknowledged himself to be indebted to one *Walter Bonnell* in the sum of $15,000, and for security for the said amount hypothecated in favor of the said *Walter Bonnell*, his heirs and assigns, certain property therein described, and that by another deed executed upon the same 19th day of January, 1876, the said *Walter Bonnell* being indebted as mentioned in the said deed to the plaintiffs in the sum of $26,000 as represented by a certain promissory note signed by the said *Walter Bonnell* and payable to his own order and endorsed by him, dated the 30th day of December, 1875, payable twelve months after the date thereof at the bank of *Toronto* and bearing interest at the rate of seven per cent. per annum, for collateral security for the repayment of the sum of $26,000, said amount of the said promissory note, or any balance or renewal thereof, the said *Walter*

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*Bonnell* assigned to the plaintiffs the said $15,000 secured by the mortgage of even date from *Campbell* to *Bonnell*.

That by deed of mortgage duly executed and bearing date the 14th day of June, 1875, in consideration of the said *Samuel S. Campbell* having, in manner therein alleged, become indebted to his said wife, Dame *Lucy J. Stevens* or *Campbell* in the sum of $25,000, he, the said *Samuel S. Campbell* for securing payment to his said wife of said debt of $25,000, mortgaged and hypothecated to, and in favor of his said wife certain real property therein mentioned, comprising the land described in the mortgage from *Campbell* to *Bonnell* of the 19th June, 1876, so as aforesaid assigned to the plaintiffs. That by a deed duly executed by the said *Samuel S. Campbell* and bearing date on the 9th day of November, 1875, certain errors of description of some of the lands in the said mortgage of the 14th June, 1875, were rectified.

That subsequently, and on the 1st day of June, 1876, the said *Samuel S. Campbell*, by a deed of obligation then executed by him, acknowledged himself to be indebted to the defendant *Shaw* present and accepting in the sum of $45,000, and for security of the payment thereof in one year from the date of the said deed, the said *Samuel S. Campbell* thereby mortgaged and hypothecated certain property therein described, which he declared to belong to him, comprising, among other property, the land hypothecated to *Bonnell* by the mortgage of the 19th January, 1876; and that the said *Lucy J. Stevens*, wife of the said *Samuel S. Campbell*, at the execution of the said deed of the 1st June, 1876, intervened and granted priority of hypothec to the said defendant *Shaw* over her claim of $25,000 created by the obligation in her favor of the 14th June, 1875.

The plaintiffs do not seek in this action to enforce payment out of the estate of *Samuel S Campbell* of any part of the amount of $15,000 received by the mortgage

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of the 19th January, 1876, so as aforesaid assigned to the bank; they merely insist that the mortgage and obligation of the 14th June, 1875, should be declared to be fraudulent, null and void as against the plaintiffs, for, the following, amongst other reasons: because by law no sale nor contract can be effected between husband and wife;—that the said mortgage and hypothec amounts to and must be considered as a sale by the wife effected in favor of her said husband for the supposed interest and value in a stock-in-trade in a business carried on by the wife previous to such sale or hypothec;—that, moreover, the said wife of the said *Samuel S. Campbell* never having conveyed or transferred to her said husband any property or assets of the value described or mentioned in the said deed of mortgage and obligation by him granted to his wife, the value of such assets was fictitious, simulated and collusively made with the view to defraud the creditors of the said insolvent;—that the said *Lucy J. Stevens* never had or possessed any interest to the amount stated in said deed; and further, that the said obligation and hypothec is null and void with respect to the plaintiffs as regards the property hypothecated, inasmuch as the declaration of ratification subsequently made by the said *Samuel S. Campbell* in favor of his wife, constitutes virtually a new hypothec which was never assented to or accepted by his said wife, who was not authorized in any legal manner to accept, execute or receive the same, and that the obligation and mortgage contained in the deed of the 1st June, 1876, executed by *S. S. Campbell* in favor of the defendant *Shaw*, and more particularly the declaration made by the said *Lucy J. Stevens*, granting priority of hypothec to the said defendant *Shaw* over her claim for $25,000 should be declared null and void with respect to the plaintiffs for the following amongst other reasons: Because the said obligation and

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mortgage was granted by the said *S. S. Campbell*, when insolvent, to the knowledge of the said defendant *Shaw*, and because by the said deed the said *S. S. Campbell*, with the concurrence of his wife, pretends to grant to the said *Shaw* a priority of mortgage or hypothec over the pretended hypothec obtained by her illegally as aforesaid, and that even in the event of such mortgage obtained by the said *Lucy J. Stevens* being valid and legal, she could not grant any priority of hypothec to the said *Shaw*, but could only renounce in his favor to the hypothec by her obtained, and the said plaintiffs are entitled to have it declared that the said defendant *Shaw* cannot claim or pretend to have any priority of mortgage by virtue of the pretended renunciation of the said *Lucy J Stevens*; the prayer of the plaintiffs' declaration is limited to the above purposes.

To this declaration *Perkins*, the assignee of *Campbell*, did not plead. *Lucy J. Stevens*, in short substance, pleaded that the deed of obligation and mortgage of the 14th June, 1875, sought to be set aside, was made in good faith and for valuable consideration, and after authority had been had to that effect from the court, and that the same was, and is, legal and valid, and ought not to be set aside.

The defendant *Shaw* pleaded among other pleas: 1st. That the plaintiffs were not, at the date of the institution of the present action, hypothecary creditors on the lot of land described in plaintiffs' declaration, that the said obligation and hypothec from *Campbell* to *Bonnell* and which is alleged to have been transferred to plaintiffs, was transferred as security for the payment of a promissory note of the said *Bonnell*, which has been long since paid by the proceeds of other collaterals transferred to plaintiffs by the said *Bonnell* as security for the payment of the said promissory note; and, 2nd. That the plaintiffs

cannot by law pretend to be hypothecary creditors on the lot of land mentioned in the plaintiffs declaration as being hypothecated by *Campbell* to *Bonnell*, and which is pretended to have been transferred to the plaintiffs, inasmuch as neither *Bonnell* nor *Campbell* were indebted to the said plaintiffs for the said sum of $26,000 mentioned in said deed of transfer from *Bonnell* to the plaintiffs, and no legal consideration was ever given by *Bonnell* to *Campbell* for the said obligation, and *Campbell* was not then, nor has he since, been indebted in any sum to *Bonnell*, the said obligation and hypothec having been consented to by *Campbell* simply to enable *Bonnell* to borrow money on security of the land thereby hypothecated, and that the said mortgage and hypothec was transferred to the said plaintiff by *Bonnell* for money loaned by plaintiffs to him on the security of the said mortgage and hypothec, and as and for an advance then made directly and indirectly on the security of land against the Statutes in such case made and provided and beyond the power and authority of the bank, and that the allegations in the said transfer to the contrary are false and made with the fraudulent intent of avoiding the provisions of the Statutes respecting banks and banking.

Evidence having been entered into upon the issues joined upon the above pleadings, the judge of the Superior Court, before whom the case came, being of opinion that the plaintiffs had failed to invalidate the mortgage from *Campbell* to his wife, and the grant of priority of hypothec in the obligation and mortgage from *Campbell* to *Shaw* of the 1st of June, 1876, dismissed the plaintiffs action as against Mrs. *Campbell* and defendant *Shaw* respectively with costs and against the defendant *Perkins* without costs.

Upon appeal from this decision the Court of Queen's Bench in *Montreal*, Mr. Justice *Monk* dissenting,

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affirmed the judgment of the Superior Court, not, however, for the reasons stated in that judgment, but upon the ground that as the Court of Queen's Bench found the fact to be that the bank had been paid the amount of the promisory note for $26,000 in full, and had, therefore no interest in contesting the hypothec given by *Campbell* to *Shaw*, nor the priority of hypothec given to him by Mrs. *Campbell*. The learned Chief Justice of the Court of Queen's Bench was of opinion that the deed of the 4th June, 1875, by which *Campbell* acknowledged to owe to his wife a sum of $25,000, and gave her a mortgage on his property for that amount, is null and void, and cannot be invoked against *Campbell's* creditors; that a married woman, separated as to property, could give to a creditor of her husband priority over her own claims upon the property; and lastly, that the transfer made to the plaintiffs of a mortgage to secure an advance made on a promissory note discounted at the same time that the transfer was made is an evasion of the Banking Act 35 *Vic.* ch. 5, s. 40, which forbids banks to advance on the security of real estate, and that this prohibition being in the public interest, a law of public policy, the transfer made by *Bonnell* to the plaintiffs was null and void.

The issue joined upon the above second plea of the defendant *Shaw* appears to be the primary issue to be disposed of, for if that issue should be determined against the plaintiffs, they have no *locus standi in curiâ*, and in such case it would not be proper to adjudicate in respect of the other issues upon the record as it is framed. If the plaintiffs have no *locus standi in curiâ* for the reason stated in the above plea of the defendant *Shaw*, the question whether anything, or if anything, how much, remains due to the plaintiffs upon the note for $26,000 or otherwise, is one which can arise only be-

tween the plaintiffs and the estate of *Bonnell*, and not between the plaintiffs and the parties to this record, and for the same reason the plaintiffs would have no right to call in question the validity of the mortgage executed by *Campbell* in favor of his wife, so that no valid judgment upon that point could be rendered upon this record. Now that *Shaw*, as a hypothecary creditor of *Campbell*, has such an interest in the land in question as entitles him to dispute the title of the plaintiff thereto, cannot, I think, admit of a doubt, and he has done so by a plea specially framed for the purpose. In *Ayers* v. *The South Australian Banking Co.* (1), a similar point was made upon a clause in a bank charter, which said that it should not be lawful for the bank to make advances upon merchandize, but as a decision was unnecessary for the determination of the case, none was given. Lord Justice *Mellish*, delivering the judgment of the Privy Council in that case, says:

> Unquestionably, a great many questions might be raised on the effect of that clause in the charter which may be of great importance, but which also, being of great difficulty, their lordships do not think it necessary to given any opinion upon. There may be a question as to what are the transactions which come really within the clause, and whether this particular case does come within it. There may also be a question whether, under any circumstances, the effect of violating such a provision is more than this, that the crown may take advantage of it as a forfeiture of the charter.

Their lordships, however, expressed no opinion upon the point. In the same volume, however, is reported a case more directly in point of *The National Bank of Australasia* v. *Cherry* (2). In that case it appeared that one *White*, who had an account with the bank in 1861, obtained leave to overdraw to the extent of £10,000 on the security of the deposit of certain title deeds respecting lands; having, however, in 1866 overdrawn to an amount exceeding £13,000, the bank brought an action

(1) L. Rep. 3 P. C. 559. (2) L. R. 3 P. C. 299.

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against him for that amount and recovered judgment, but agreed not to enforce such judgment in consideration that the title deeds so deposited should remain as security for the money then due, for which judgment was to be signed after the then approaching harvest, and the land sold for the liquidation of the debt. *White*, having become insolvent before sale of the land, a bill was filed by the bank against his assignees in insolvency, claiming the benefit of the security, to which the assignees demurred upon the ground that the deposit of title deeds was for future advances contrary to the provisions of the Act constituting the charter of the bank; the demurrer having been allowed by the Supreme Court of *Australia*, the case was appealed to the Privy Council, where it was held that there being in 1866, when the bank recovered their judgment, a valid subsisting debt between the bank and *White*, the agreement then made was within the enabling part of the 7th sec. of the Act. by which the bank was authorized, among other powers, to take and hold, but only until the same can be advantageously disposed of for reimbursement only, and not for profit, any freehold or leasehold lands and hereditaments and any real estate and any merchandise in ships which may be taken by the said corporation in satisfaction, liquidation or discharge of any debt due to the said corporation, or in security for any debt or liability *bonâ fide* incurred or come under previously, and not in anticipation or expectation of such security.

Provided always that save, and except as hereinbefore specially authorized, it shall not be lawful for the said corporation to advance or lend any money on the security of lands or houses or ships or on pledges of merchandise.

Lord *Cairns* in giving the judgment of the Privy Council in that case, says at page 306 (1):

(1) See citation in *Strong*, J's. judgment at foot of p. 614.

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And again he says (1):

> It would seem to have been the object of the legislature in this clause, not to make void the contracts for such advances as between the bank and their customers, in the same way, that in former times contracts open to the objection of the usury laws were made void, but rather to make it something *ultra vires* the bank to take, upon the occasion of contracts for those advances, securities of the kind mentioned in this section. And this construction of the section would harmonize with what was very properly, as their lordships think, admitted at the bar on behalf of the respondents, that upon a transaction of the kind described in this bill the contract for the loan of money would be perfectly valid, and the question would be confined to a question as to whether the bank had the power to take the security which it took for the advance.

He then proceeds to show that in 1866 at a time when *White* might have resisted any claim of the bank founded upon the deposit of the deeds, he preferred for valuable consideration to make a fresh agreement with the bank by which he authorised the bank to retain the deed and promised that they should stand as security for the sum for which judgment was about to be signed; and he concludes that the transaction fell within the enabling part of the 7th sec. There is not here a word of a suggestion that no person but the crown by process to forfeit the charter could raise the point. The whole judgment of the Lord Chancellor excludes the possibility of such an opinion being entertained by the Privy Council; however, all doubt, if there were any upon the point, was put an end to four years afterwards by the case of *Riche* v. *Ashbury Railway Carriage Co.* (2), which passed through the Courts of Exchequer and Exchequer Chamber and the House of Lords.

From the judgment of Lord Chancellor Lord *Cairns*, in which latter case a short extract is all that is necessary to establish upon the authority of the

(1) P. 307.

(2) The judgment in the two former courts being reported in L. Rep. 9 Ex. 224, and in the House of Lords L. R. 7 H. L. 653.

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House of Lords the principle applicable to this case. At p. 673, he says, and this is the principle upon which the judgment in the case rests:

I find Mr. Justice *Blackburn*, whose judgment (in the Court of Exchequer Chamber) was concurred in by two other judges who took the same view, expressing himself thus: I do not entertain any doubt that if, on the true construction of a statute creating a corporation it appears to be the intention of the legislature, expressed or implied, that the corporation shall not enter into a particular contract, every court, whether of Law or Equity, is bound to treat a contract entered into contrary to the enactment as illegal, and, therefore, wholly void and to hold that a contract wholly void cannot be ratified.

My lords, that sums up and exhausts the whole case. In my opinion, beyond all doubt, on the true construction of the Statute of 1862 creating this corporation, it appears that it was the intention of the legislature not implied, but actually expressed, that the corporation should not enter, having regard to its memorandum of association, into a contract of this description. If so, according to the words of Mr. Justice *Blackburn*, every court, whether of Law or Equity, is bound to treat that contract entered into contrary to the enactment, I will not say as illegal, but as *extra vires*, and wholly null and void, and to hold also that a contract wholly void cannot be ratified.

Now, the Act which constitutes the plaintiffs' charter is the Dominion statute 34 *Vic.*, c. 5, which enacts in sec. 39 that the bank shall have the power to acquire and hold real estate for its actual use and occupation and the management of its business, and to sell and dispose of the same and other property to acquire in its stead for the same purpose.

In sec. 40, that the bank shall not, either directly or indirectly, lend money or make advances upon the security, mortgage or hypothecation of any lands or tenements, or of any ships or other vessels, nor upon the security or pledge of any share or shares of the capital stock of the bank, or of any goods, wares or merchandise except as authorized by this Act; and in

Sec. 41, that the bank may take, hold and dispose of mortgages and hypotheques upon personal as well as real property by way of additional security for debts

contracted to the bank in the course of its business. Upon an Act similarly worded the late Sir *John Robinson*, C. J., in the Court of Appeal of the late Province of *Upper Canada* in *The Commercial Bank* v. *The Bank of U. C.* (1) thus expresses himself:

When it is shown that the mortgage in any case was taken by a bank "as an additional security for a debt contracted to it in the course of its business," then the question occurs whether that can only be taken to mean a debt that had been previously incurred with it in the course of its business, or whether a mortgage may not be taken as an additional security for a debt that had no previous existence, but which the bank were about to allow a party to contract by advancing him money at that time in the proper course of their business, as for instance if any merchant had brought to the bank on the 21st May, 1855, for discount, a bill drawn by *Henry Bull*, jun., on *Bull* brothers, and accepted by the latter, could the bank properly have taken a mortgage from either party to the bill, or from the person who brought it and got the money, to secure them in the money which they advanced upon the bill? That is not this case, and I shall only, therefore say, that as the words of the statute are not against it, so I think it might perhaps be held that the spirit and intention of the Act are not opposed to it, and that a mortgage so taken might be upheld when it appears that the mortgage was really and in truth taken to secure the transaction upon the bill, and not that the bill was created for the mere purpose of upholding and giving colour to the mortgage, that would be a question of fact upon which the conclusion that a jury might come to would be in general so uncertain that I dare say the banks will not think it prudent to risk their money on a real security in any such case, where the nature of the transaction might appear to be at all equivocal.

Now, I do not desire to call in question any part of the opinion of the learned Chief Justice as here expressed as to the validity of a mortgage *bonâ fide* given or assigned to a bank by way of collateral security for an advance made by the bank upon regular business paper, or in the ordinary course of their business as bankers, concurrently with the giving or assigning to them of a mortgage upon lands as additional security, or

(1) 7 Grant 430.

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to express any opinion upon that point inasmuch as sitting here as a juror, and having the duty imposed upon me of finding the facts in the case, I have been unable to bring my mind to the conclusion that this is such a case; on the contrary, the conviction formed in my mind by the facts is that the transaction between *Bonnell* and the bank, of the 19th January, 1876, was primarily based upon the security of the mortgages upon real estate assigned to the bank by the deed of that date. That the note for $26,000 recited in that deed had not then been, if ever it was, in fact, discounted or agreed to be discounted as an ordinary banking transaction. A note made by one payable to his own order twelve months after date is not ordinary business paper; that the note did not then constitute any debt due from *Bonnell* to the bank; that it was not made for the purpose of being discounted by them in the ordinary course of their business as bankers, but was given existence for the mere purpose of upholding and giving color to the assignment of the mortgages, the whole having been assigned, and contrived for the purpose of evading the statute, and the mortgages were not assigned really and in truth to secure an independent banking transaction on the note.

The transfer of the mortgage is based upon the following recital in the deed of transfer:

Whereas the said *Walter Bonnell* stands indebted to the said Bank of *Toronto* in the sum of twenty-six thousand dollars currency as represented by a certain promissory note signed by the said *Walter Bonnell*, and payable to his own order and endorsed by him, and dated at *Montreal*, the 30th day of December, 1875, and payable at twelve months from from the date thereof at the bank of *Toronto*, and bearing interest at the rate of seven per centum per annum; and whereas the said *Walter Bonnell* desires to furnish the said bank with collateral security for the due and faithful repayment of his said indebtedness.

The deed then assigns, among other things:

The sum of $15,000 currency being the amount of a certain mortgage granted by *Samuel S. Campbell* to the said *Walter Bonnell*, passed before the said undersigned notary, and bearing even date herewith and hypothecating lot No. 446 on the official plan of the *St. Antoine* ward, of the said city of *Montreal*.

Now, no such debt as that here recited did, in truth, then exist; no such note as that here recited had then been discounted by the bank or constituted a debt due from *Bonnell* to the bank, but upon the same day as the execution of the mortgage from *Campbell* to *Bonnell*, which was executed under instructions from the bank manager, and its transfer to the bank, namely, the 19th January, 1876, *Bonnell* addressed a letter to the bank manager enclosing to him the note for $26,000, which letter is as follows:

*Montreal*, January 19th, 1876.

To the Manager, Bank of *Toronto*, *Montreal*:

I hereby hand you my promissory note for twenty-six thousand dollars, made payable to my own order one year after date with interest at the rate of 7 per cent. per annum, the above note bearing date the 30th December, 1875, the proceeds of which you are hereby authorized to retain as collateral security for any sterling bills of exchange now or hereafter to be discounted by the bank of *Toronto* for me made by *L. J. Campbell & Co.*, on Messrs. *Hutchins* and *Macdonald* of *London*, *England*, or other parties in *Great Britain*, and bearing my endorsement.

(Signed) *Walter Bonnell.*

*Thos. Doucet*, witness.

The signature of Mr. *Doucet*, who was the notary before whom the mortgage and transfer of it was executed, indicates the time when the note was made, and that it was ante-dated for the purpose of upholding the recital in the transfer, is apparent. Now, the only drafts which are shown to have had then any existence upon which was *Bonnell's* name in any character were the following:—a draft dated 19th January, 1876, by *Bonnell* (not said upon whom) for £1,458 5*s.* sterling, endorsed by *L. J. Campbell and Co.*, payable in 90 days; another of same date by *Bonnell* upon *Hutchins* and

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*MacDonald*, also at 90 days for £2,000, also endorsed by *L. J. Campbell & Co.*; also notes drawn by *Campbell & Co.*, and endorsed by *Bonnell* for $1,850, $1,100 and $3,000 respectively.

Now, it will be observed that none of these drafts or notes come within the description of the drafts which, by the letter of the 19th January, 1876, endorsing the note for $26,000, were contemplated as drafts collateral to which the proceeds of the note for $26,000 were, by that letter, authorised to be held and applied. All drafts, such as those referred to in the letter, had, therefore, yet to come into existence. The note, therefore, for $26,000 had no original as collateral to which it could be held or applied, at the time it was enclosed to the bank; but further, a note payable at twelve months to one's own order, and endorsed to the Bank as collateral security for the payment of drafts and notes at ninety days discounted by the bank, upon which as drawer, maker or endorser, the bank had already the security of the maker of the note at twelve months, can, with no propriety, be said to be a banking transaction in the ordinary course of business, nor could the bank going through the form in their own books of putting the proceeds of an apparent discount of such note to the credit of the maker of it, to be held, however, by the bank as security for the due payment of the drafts actually discounted as banking paper, be said, with any propriety, to constitute a debt due to the bank contracted in the due course of banking business and due to the bank on the 19th January, 1876, when the note was first placed in their hands. Then, on the 20th April, 1877, when the bank manager, who negotiated the whole of this transaction, proves in *Bonnell's* insolvency for the debts due to the bank by *Bonnell*, no claim whatever is made as for a debt due to the bank upon this note for $26,000.

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Upon the whole, therefore, as I have said, I can come to no other conclusion than that the note was given existence for the sole purpose of upholding and giving colour to the mortgage and its transfer, which latter contained a false recital of a debt due for the purpose of eluding a discovery of the true nature of the transaction; for this reason, I am of opinion that the bank has no *locus standi in curiâ*, and that, therefore, we should not express any opinion upon the other points, which can only come into judgment if the bank had a *locus standi*, and that for the above reason, and not for those relied upon, either in the Superior Court or in the Court of Queen's Bench in appeal, the plaintiffs action should be dismissed, as also should this appeal, with costs.

*Appeal dismissed with costs.*

Solicitors for appellants: *R. & L. Laflamme.*

Solicitor for respondent: *L. N. Benjamin.*

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*Feb'y. 28.

*June 18.

GEORGE BENSON HALL, *et al*.....APPELLANTS;

AND

THE DOMINION OF CANADA LAND AND COLONIZATION COMPANY, (LIMITED).....RESPONDENTS.

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

*Injunction*—41 *Vic. ch.* 14 (*P.Q.*)—*Sale by Commissioner of Crown Lands of lands subject to current timber licenses, Effect of*—*Licensee's rights.*

Under the provisions of the *Quebec* Act, 41 *Vic.*, ch. 14, the *D.* of *C. L. Co.*, in November, 1881, alleging themselves to be proprietors and in possession of a number of lots in the township of *Whit-*

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

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*ton, P.Q.*, obtained an *ex parte* injunction, restraining *G. B. H. et al.* from further prosecuting lumbering operations which they had begun on these lots. *G. B. H. et al.* were cutting in virtue of a license from the government, dated 3rd May, 1881, which was a renewal of a former license By a report of the Executive Council of the Province of *Quebec*, dated 1st April, 1881, and approved of by the Lieutenant Governor in Council on the 7th of the same month, the Commissioner of Crown Lands was authorized to sell to the company the lands in question, and the company deposited $12,000 to the credit of the department to be applied on account of the intended purchase. On the 9th of May the company gave out a contract for the clearing of a portion of the land, and on the 19th July, 1881, the Commissioner executed a deed of sale in favor of the company, subject, amongst other conditions, "to the current licenses to cut timber on the lots." Upon the writ being returned, the injunction was suspended. *G. B. H. et al.* answered the petition and the Superior Court dissolved the injunction. On appeal to the Court of Queen's Bench, this judgment was reversed and the injunction applied for made perpetual. On appeal to the Supreme Court of *Canada* it was

*Held*,—(*Henry* and *Gwynne*, JJ., dissenting,) that the *D.* of *C. L. & C. Co.* had not acquired any valid title to the lands in question prior to the 19th July, 1881, and that by the instrument of that date their rights were subordinated to all current licenses, and *G. B. H. et al.* having established their right to possess said lands for the purpose of carrying on their lumber operations under a license from the Crown, dated 3rd May, 1881, the injunction granted *ex parte* to the *D.* of *C. L. & C. Co.* in November, 1881, under the provisions of 41 *Vic.*, ch. 14, (*P.Q.*,) had been properly dissolved by the Superior Court.

APPEAL from a judgment of the Court of Queen's Bench for *Lower Canada* (appeal side), reversing the judgment of the Superior Court and maintaining a writ of injunction issued in the cause and declaring the same perpetual.

The proceedings in the court of original jurisdiction were commenced by the respondents, who, alleging themselves to be proprietors and in possession of a large number of lots of land in the township of *Whitton*, district of *St. Francis*, obtained an *ex parte* injunction from

Mr. Justice *Doherty*, at *Sherbrooke*, restraining the present appellants from further prosecuting lumbering operations which they had begun on some of these lots, and ordering them forthwith to remove from the land in question, which comprised about 20,590 acres, their employees and contractors. Upon the writ being returned, the injunction was suspended; the defendants answered the petition by three pleas.

The first plea was a special denegation of the allegations of the petition or declaration.

The second plea alleged in substance that plaintiffs' title dated only on 19th July, 1881, and was therefore subject to the timber license expiring 30th April, 1882; that plaintiffs had been guilty of suppression of material facts in their petition, whereby they got an *ex parte* injunction; that defendants had the possession of a year contemplated by the injunction act; that plaintiffs had not placed settlers on the lands according to the conditions of sale, but were violating their contract with the Government.

By a third answer, the defendants pleaded that on the 7th April, 1881, the date of the order-in-council, they had a continuing right of possession in said lands for 20 years from the year 1872, and their rights could not be interfered with or affected by any other sales or locations than those made to *bonâ fide* settlers.

That the order-in-council of 7th April, and all proceedings thereunder, were and are *ultra vires*, null and void, in so far as the same could affect the defendants and their rights.

The following are the material facts of the case as appeared from the oral and documentary evidence given at the trial.

During the period of nearly ten years the respondents and their *auteurs* had continuously, during the lumbering business of each year, carried on business as lum-

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bermen on timber limits, in the said township of *Whitton*, complying with the Government regulations to which said limits were subject, and with the conditions of the licenses annually renewed and issued to them as grantees and owners of timber limits.

While respondents were thus in possession of said timber limits in December, 1879, and before the respondent company had corporate existence, Mr. *Stockwell*, now one of the company, and its manager, applied to the commissioner of Crown lands, on behalf of certain English capitalists, for a grant or purchase of 300,000 acres of unsettled lands in the townships.

This application was the beginning of a voluminous correspondence between *Stockwell* and the commissioner and resulted in an offer to sell 100,000 acres to a company to be organized as suggested by the commissioner in the correspondence.

The respondent company was incorporated in *England*, and proof of the fact furnished by *Stockwell*, and $12,000 deposited by him to pay the first instalment of the purchase money, so soon as the sale should be made to the company.

Of his negotiations and correspondence with *Stockwell*, apropos of the land in question, the commissioner drew up a journal report, embodying said correspondence, and submitted the same to a committee of the executive council, who, having considered the matter, presented it to the Lieutenant-Governor for his approval; and on the 7th of April, 1881, the report was approved by his honor—thus constituting by this correspondence, so approved, what the parties to this cause agreed to call "an order in council."

This order in council contained, *inter alia*, the following provisions:—

"The sale, if carried out, will be made upon the fol-
"lowing conditions;

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"3rd. The sale shall be subject, with regard to each "lot or farm settled upon, to all the conditions and "restrictions of an ordinary sale, as set forth in the "blank form of receipt for first instalment attached "hereto (as follows):

"No. 115, Crown Lands Agency.

"$ 187

[L.S.]

"Received from the sum of "being the first instalment of one-fifth of the purchase "money of acres of land contained in "lot, No. in the range of the township of " P.Q., the remainder payable in four equal "annual instalments, with interest from this date.

"This sale, if not disallowed by the Commissioner of "Crown Lands, is made subject to the following con- "ditions, viz.: The purchaser to take possession of the "land within six months from the date hereof, and "from that time continue to reside on and occupy the "same, either by himself or through others, for at least "two years, and within four years at farthest from this "date clear, and have under crop, a quantity thereof in "proportion of at least ten acres for every one hundred "acres, and erect thereon a habitable house of the "dimensions of at least sixteen by twenty feet. No "timber to be cut before the issuing of the patent, "except under license, or for clearing of the land, fuel, "buildings and fences. All timber cut contrary to "these conditions will be dealt with as timber cut "without permission on public lands. No transfer of "the purchaser's right will be recognised in cases "where there is default in complying with any of the "conditions of sale. In no case will the patent issue "before the expiration of two years of occupation of "the land, or the fulfilment of the whole of the condi- "tions, even though the land be paid for in full. Subject

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"also to current licenses to cut timber on the land, and "the purchaser to pay for any real improvements now "existing thereon, belonging to any other party."

And concluded as follows: "After due consideration "of the facts above detailed, the undersigned has the "honor to recommend, that he be now authorized to "carry out the terms and intentions of his letter of "30th December, 1879, addressed to the aforesaid *Frs. "W. Stockwell*, with the modifications allowed by sub- "sequent letter of the 13th April, 1880, above embodied, "and to sell to the Dominion of *Canada* Land and Colo- "nization Company the lands in question, in accordance "with the terms and conditions of the above mentioned "letters.

"The whole respectfully submitted.

"*E. J. Flynn*,

"Commissioner of Crown Lands."

On the 3rd of May, 1881, the appellants having in all respects complied with the conditions of their license, paid into the department the ground rent due for its renewal for the season of 1881-82, and after some delay received their license from the agent. This license was delivered to them on the 11th July, 1882. It is dated the 3rd May, the day on which the ground rent was paid.

When the order in council was passed there had been sold by the crown land local agents some of the lots included in the list of lands to be sold to plaintiffs, of which fact the department at the time was unaware; and on the 4th day of May, 1881, the Department, acting by Mr. *W. E. Collins*, the clerk in charge of the sales department, wrote to Mr. *Stockwell* as follows:

"*F. W. Stockwell*, Esq.,

"Township of *Gayhurst*, Lot 33, in 3rd Range, 100 acres.

"This completes the list of lands sold and approved "of by department previous to 7th April last, date of the

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"order in council, reserving certain lands in favor of "the Dominion of *Canada* Land and Colonization Com- "pany.

"Yours respectfully,
"*W. E. Collins.*

"Dept. of Crown Lands, Quebec, 4th May, 1881."

To this letter was annexed a list of lots "forming "part of reserve of Dominion Land and Colonization "Company, disposed of previous to date of order in "council authorizing such reserve, 7th April, 1881."

On the following day the assistant commissioner, Mr. *E. E. Taché*, wrote the agent in the *Saint Francis* agency and sent him a list of the lands sold to plaintiffs.

The letter is as follows:

"SIR,—You are hereby notified that all the lands "enumerated in the accompanying list have been "reserved in favor of the Dominion of *Canada* Land and "Colonization Co., by order in council of 7th ult.: you "will be therefore guided accordingly. With regard to "sales made by you of any of said lands since the date "of the above order in council, including those entered "in your April return, they of course are disallowed. "You should inform the respective purchasers of such "lots that they will have to deal with above company "as regards the purchase thereof, &c."

On the 9th of May the respondents concluded a contract for the clearing of the land and building of the houses, with the knowledge of the Crown lands department.

On the 10th May the assistant commissioner, under the directions of the commissioner, telegraphed the *Saint Francis* agent not to renew the timber license on the lands sold.

A copy of this order in council was shortly afterwards given to Mr. *Stockwell* by the commissioner of Crown lands, who told him at the same time, "that it was all

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right, to go ahead;" and in accordance with this permission, on the 9th of May the company gave out a contract for the clearing of a portion of the land.

On the 19th of July, 1881, the commissioner of Crown Lands, in accordance with the approval which he had asked and obtained, made and endorsed upon the order in council the following ruling, produced as defendants' exhibit No. 11.

"This is to certify that I the undersigned, commissioner of Crown lands, have sold, as by these presents, I do sell, in virtue of the authority in me vested by the preceding order in council, and the law, to the said Dominion of *Canada* Land and Colonization Company, the lots of land mentioned in the list hereunto annexed and authenticated by my signature, with the exception of the lots Nos. 10 and 11 in 5th range N. E. *Whitton*, and lot No. 17 in 7th range, and No, 8 in 9th range of same township; also of lot No. 44 in 6th range, *Spalding;* lots 42, 43, 47 and 48 in 5th range, lots No. 13, 14 and 42 in 6th range, and No. 31 in 3rd range of *Ditchfield*, all which lots had been sold at the date of the said order in council, to wit: on the 7th April last, and were not then disposable. The said sale is thus made for the price or consideration, and subject to all the terms, clauses and conditions mentioned and set forth in the said order in council, and specially to the conditions indicated in the blank form of receipt or location ticket annexed to the said order in council, to which no special derogation has been made, and amongst other conditions, to the current licenses to cut timber on the lots and to the payment by the said company of all real improvements which may have been made by third parties on said lands.

"I acknowledge having received from the said company the sum of twelve thousand dollars on account of, or as one instalment on the purchase money or price

of sale, as it is alleged in the said report or order in in council.

"In witness whereof my hand and seal at *Quebec* this 19th day of July, 1881.

"(Signed) *E. J. Flynn*,

"Commissioner of Crown Lands, *P.Q.*"

On the following day he wrote Mr *Stockwell* officially, as manager of the company, enclosing him the order in council of the 7th April, and informing him that he had confirmed the sale to the company, with some modifications.

The Superior Court held that the petitioners were not proprietors through a valid title of the lands in question and in lawful possession thereof so as to entitle them to the remedy by injunction. The Court of Queen's Bench, on appeal, held that petitioners had proved that they were proprietors in possession.

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

Mr. *Kerr*, Q.C., and Mr. *Brown* for respondents.

The arguments, statutes, and regulations, and cases relied on, are fully noticed in the judgments.

RITCHIE, C.J.:—

I think the judgment of the Superior Court dissolving the injunction should not have been disturbed; that the petitioners are not the proprietors through a valid title to the lands in question, and are not in such lawful possession thereof as to entitle them to the relief they seek by injunction. *Hall's* licenses were recognized as valid and subsisting by the government in dealing with the *D. L. Co.*, and such dealings were expressly subject to such licenses, whereby "the right to take and keep exclusive possession of the lands in question, subject to such regulations and restrictions as may be established by order in council," is conferred on the licensees by the

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Con. Stats. Can., ch. 23, sec. 2, and which can only be affected at the instance and in favour of the actual and *bonâ fide* settlers on their respective farms, in whose favour alone the reservations in the licenses are made.

STRONG, J.:

The respondents, who were petitioners in the court of first instance, sought an injunction to restrain the appellants from cutting timber on certain lands of the Crown, to which the petitioners claimed an actual title as purchasers under a conditional agreement or promise of sale entered into by the Crown, through the agency of the commissioner of Crown lands for the Province of *Quebec*, dated the 19th July, 1881.

This agreement was made under authority of an order in council, approved by the Lieutenant Governor of the Province of *Quebec* on the 7th of April, 1881. The respondents claim the right to carry their title back to the date of this order in council, but as it merely authorized the commissioner to carry out the terms of the proposals mentioned in it and approved by it, it is manifest that the order in council by itself conferred no title, and that the petitioners acquired none anterior to the 19th July, 1881, when, by an instrument under seal, endorsed upon the order in council, which is called "the commissioner's ruling," and which was, in substance, an agreement on behalf of the Crown to sell the lands to the petitioners, or, rather, to the locatees whom the petitioners should select, on the terms proposed, they for the first time acquired what I have called an inchoate title to the lands in question.

The appellants, however, assert a paramount title to cut timber on their lands under a license from the Crown, dated the 3rd May, 1881, and therefore prior in date to the title of the respondents, which did not accrue until the 19th of July following. This priority in point of

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time of the appellants' license would alone have been sufficient, in my judgment, to disentitle the respondents to the injunction which they asked for, but when it appears, as it does, both from the order in council and the agreement or "commissioner's ruling" of the 19th of July, that the rights of the respondents were expressly subordinated to all current licenses to cut timber, and that the location tickets which they were to issue to the actual settlers to whom they might make sales upon the lands in question, were also to be expressly subject to such current licenses, it is difficult to see how any serious doubt or question can possibly be raised as to the appellants' rights under the license of the 3rd May, 1881.

The order in council, as already stated, was a mere authority to the commissioner to make the sale if he should so think fit, and no rights were acquired by the respondents by force of it until the agreement of the 19th July was signed by the commissioner. Until the latter date nothing whatever had been done to interfere with the right of the Crown to sell the lands to other parties, if it should be thought fit, or to grant or renew licenses to cut timber; consequently the words "current licenses," in the instrument of the 19th of July, 1881, must mean licenses then current, and cannot be restricted to licenses which were current on the 7th April, 1881, the date of the order in council. The license which had been issued or renewed to the appellants on the 3rd May previously was, therefore, according to the most strict and rigorous construction which can be given to the words, a valid and current license within the meaning of the exception. Then it is apparent that the rights of the petitioners, being thus made subject to those of the holders of timber licenses, the petitioners are not within the exception contained in the license in favor of actual settlers. They are not

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actual settlers, as it is contemplated by the agreement that there shall be no actual settlement, except by the persons to whom the petitioners may re-sell; and the exception contained in the agreement by the Crown with the petitioners, and which is also required to be inserted in the location tickets, rendered this provision in the licenses inoperative against the appellants. Another sufficient reason for refusing an injunction is that the petitioners do not bring themselves within the *Quebec* statute, 41 *Vic.*, ch. 14, sec. 1, sub-sec. 2, inasmuch as the Dominion Land Company are neither proprietors under a valid title, nor were they ever in possession of the lands in question.

I may add that, in my opinion, the learned judge of the Superior Court at *Sherbrooke* was also entirely right in dissolving the injunction on another ground, that of insufficient disclosure of the facts on the applications for the *ex parte* injunction.

My judgment is therefore that this appeal should be allowed, and that the judgment of the Court of Queen's Bench be reversed, and the order of the Superior Court be restored with costs to the appellants in both courts.

FOURNIER, J.:

For the reasons given by Mr. Justice *Tessier* in the Court of Queen's Bench, and by Mr. Justice *Doherty* in the Superior Court, I am in favor of allowing this appeal.

HENRY, J.:

The question before us in this case is whether the judgment of Mr. Justice *Doherty*, quashing and annulling the injunction previously granted by him on the petition of the respondents' company, should be sustained or reversed.

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On an appeal to the Court of Queen's Bench that judgment was reversed; and, from the judgment of the latter, an appeal was taken to this court. The case was fully and ably argued before us, and now awaits our decision.

The interests involved are large, and I have given my best consideration to the law applicable to the peculiar circumstances of the parties and their relative positions and interests when the injunction was granted. The right of the respondents to an injunction, at the time when that in this case was granted, depends upon the legal position of the parties at the time, not only as to the title, but also as to the actual possession of the lands in question, or to the right of possession depending on title.

To determine the question at issue it is necessary, in the first place, to ascertain the actual position of the respondents' company, both as to title and possession.

The evidence shows that, after negotiating with the respondents' company and others in its interests, for a period of about a year and a half, an order in council was passed, on the seventh day of April, 1881, by which the Government of *Quebec* agreed to sell to the company one hundred thousand acres of crown lands in that province, including the lands now in dispute, on certain terms and conditions. That order in council embodied the result of the negotiations previously had, and, as such, was on the following day communicated to the agent and manager of the company by the Commissioner of Crown lands, who gave him to understand that he might "go ahead." He at the same time handed him a copy of the order in council, and gave him to understand that all had been done that was necessary to authorize the company to take possession of the lands under the terms of the order in council. The company had previously paid

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the first instalment required by the order in council and the regulations of the department, and almost immediately afterwards, in April, 1881, the company entered into and took possession of the lands they had so purchased, and commenced to work thereon, and, before the issuing of the injunction, had expended between forty and fifty thousand dollars in cutting down 627 acres, on 86 of which the wood cut down had been piled, 475 acres cleared up, four houses built, and two saw mills erected. This is shown by unimpeachable and uncontradicted evidence to have been the position of matters in October, 1881. It is also shown that the company, at that time, was in the actual possession and occupation of the land immediately in question herein, and cleared on it ten acres. Such being the case, I am clearly of opinion, that they were so in possession under a good title; and could bring an action for any trespasses committed upon the lands so in their possession, against any one interfering with such possession, unless under a paramount title. The company had purchased from the government, and had, up to the time of the issuing of the injunction, fully kept the terms of the agreement they entered into. Apart from objections which I shall hereafter refer to, the government would have been estopped from forcing the company to give up the possion of the lands sold, and of which, by the consent of the former, the company went into possession, and expended money so largely, notwithstanding the peculiar mode provided by the previous regulations for the sale had not been adopted. I consider that, without any statutory provision, the government might, by its inherent power, have sold and conveyed crown lands in the province. Before, however, a commissioner or other subordinate officer of the government could do so, legislative authority would be necessary; and, in conferring that power the mode and manner, and the terms upon

which, he should act, would also be necessary to be prescribed, or in some way provided for. They were so provided for by orders in council from time to time. The act made certain provisions in regard to the sale and transfer of crown lands, but much was left to be provided for by orders in council. Sec. 10, sub-sec. 2, provides that:

> The Lieutenant Governor in Council may, also, from time to time, make such orders as are necessary to carry out the provisions of this act, according to their obvious intent, or to meet cases which may arise, and for which no provision is made by this act. * * * But no such order shall be inconsistent with this act, save, that the powers herein given to the commissioner may be exercised by the Lieutenant Governor in Council and shall be subject to any order in council regulating or affecting the same from time to time.

Sec. 15 provides that:

> The Lieutenant Governor in Council may, from time to time, fix the price per acre of the public lands and the terms and conditions of sale and of settlement and payment.

Sec. 16 provides that:

> The Commissioner of Crown Lands may issue under his hand and seal to any person who has purchased, or may purchase or is permitted to occupy, or has been entrusted with the care or protection of any public land, or as a free grant, an instrument in the form of a license of occupation, &c.

It makes further provision that:

> The licensee may maintain suits at law and equity against any wrong doer or trespasser, as effectually as he could do under a patent from the Crown. * * * But the same shall have no force against a license to cut timber existing at the time of the granting thereof.

There are certain limitations of the executive power in the statute, but none applicable to the circumstances of this case; but, on the contrary, notwithstanding the power given to the commissioner and other subordinate officers, the Lieutenant Governor in Council is, by sub-section 2 of section 10, fully authorized from time to time to make such orders as are necessary to

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carry out the provisions of the act, "or meet such cases which may arise, and for which no provision is made by this act," and by section 15 the Lieutenant Governor in Council is authorized "from time to time" to "fix the price per acre of the public lands, and the terms and conditions of sale and of settlement and payment;" and, by the concluding paragraph, it is provided "that the powers herein given the commissioner may be exercised by the Lieutenant Governor and Council, and shall be subject to any order in council regulating or affecting the same from time to time."

The order in council of the 7th of April, 1881, having closed the negotiations with the company for the sale of the lands agreed upon, and the company having, during that month, gone into the possession of them, and commenced working thereon, the Assistant Commissioner of Crown Lands addressed a letter to the local agent as follows:

> Province of *Quebec*, Department of Crown Lands, *Quebec*, 5th May, 1881:—Sir, your are hereby notified that all the lands enumerated in the accompanying list have been reserved in favor of the Dominion of *Canada* Land and Colonization Company by order in council of 7th ult. You will therefore be guided accordingly.
>
> With regard to sales made by you of any of said lands since the date of the said order in council, including those entered in your April returns, they of course are disallowed.
>
> You should inform the respective purchasers of such lots that they will now have to deal with the above company as regards the purchase thereof. The amount paid on those disallowed sales are placed in deposit, to be refunded on orders to that effect.
>
> I have the honor to be,
>
> Sir,
>
> Your obedient servant,
>
> (Signed) *E. E. Taché*,
>
> Assist. Com.
>
> Charles Patton, Esq.,
> Crown Lands Agent,
> *Robinson.*

It will thus be seen that on the part of the Government it was fully considered that an absolute sale had been made to the company, and that those who had

purchased from the agent after the Order in Council of the 7th April, 1881, should, in the language of the assistant commissioner, in his letter just recited, "have to deal with the above company as regards the purchase thereof." Under the plenary powers given by the statute to the Lieutenant-Governor in Council, the company was put into possession under the sale. The company had paid the first instalment as agreed upon, and, having gone into possession and conformed to all the conditions of the sale, had such an equitable title and interest as would, between individuals, have entitled them to specific performance when all the conditions on their part were fulfilled. Up to the issuing of the injunction the company had performed all the prescribed conditions; and the Government could not, at that time, have legally dispossessed them. They were therefore in a position to prosecute any mere wrong doer, who would have had to respect their possessory rights. This position cannot, I think, be successfully combatted. How, then, does the claim of the appellants stand? They claim, under a timber license dated the 3rd of May, 1881, signed by the agent of the Commissioner of Crown Lands at *Robinson*, but not issued until the 10th of July, 1881, a month or two after the company was in possession under their purchase. That license was subject, amongst others, to the following condition embodied in it:

That all lots sold or located by authority of the Commissioner of Crown Lands prior to the date hereof, are to be held as excepted from this license, and lots so sold or located subsequently shall cease to be subject to it after the April following. And whenever the sales of any such lots shall be cancelled the said lots shall be restored to this license.

The party then who obtained a timber license took it with the full understanding that all lands sold or located, though included in such license, were excepted from it, and that the license was as to such lands a nullity; and

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a licensee, by accepting the license in that form and substance, virtually and effectually agreed that, as to lands so sold, he would consider the license as inapplicable. I have before shown that, by the statute, the Lieutenant Governor in Council was authorized to perform all acts as fully as the Commissioner of Crown Lands; and, therefore, a sale by the Order in Council carries with it the same results and consequences, as if made by the Commissioner. The sale in this case is shown to have been made immediately upon his report and recommendation, and by his sanction and authority, as a member of the council. The subsequent document signed by the Commissioner on the 19th of July, could not affect the rights or position of the company under the previous Order in Council of the 7th April. The appellants took the license with the condition I have just stated; and is it for them to resist the rights of the company by questioning the propriety or regularity of the sale? If the government had previously sold or located, by the terms of the timber license the lands so sold were, at the time of its issue, excepted from those covered by the license, and no right to cut timber thereon passed by it to the appellants, and they are estopped from questioning any such sale. I think they are entirely estopped from so questioning the sale. If A lets to B certain lands for a specified term, and at a certain rent, but it is agreed that if A should sell any part or parts of such lands during the currency of the lease, such lands should thereupon cease to be included in such lease, could B after a sale by A question the propriety of the sale? Could he be permitted to say to A you have sold at too low a price, or you have given too long terms for payment, or you have sold on improper conditions or without sufficient authority? But the case before us is much stronger, for the lands in question were sold and located before the license claimed

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under was issued and were never included in the license. Such, however, is set up in this case as a defence by the appellants.

It has, however, been contended that under the "regulations" the appellants were entitled by law to a renewal of the license for one year, from the 30th April, 1881. If such were the case, they had to some extent an equitable claim, as between them and the government, for the renewal, which the government under other circumstances might have recognized. On looking, however, at clause 5 of the regulations of 1881, it will at once be seen that no such position could be sustained in the total absence of proof of the performance of conditions precedent to their acquiring such equitable right. On the 30 of April, 1881, not only their license had expired, but their right also to demand a renewal thereof for another year. We must, therefore, look at the license issued to them on the 10th July, 1881, exactly as we would had it been issued to one who had held no previous license. Their right of possession of the lands covered by the previous license ended on the 30th April, 1881, and unless a new license issued they would be trespassers, if going upon the lands and cutting timber thereon. From the 30th of April, 1881, to the 10th July following, they were strangers to the possession, and, as between them and the Government, only got the right of entry on any of the lands included in the license on the day last named. Then come the questions: 1st, whether the government *having sold*, and received an instalment of the payment as agreed upon for the lands in question, and put the company in possession under the terms of the sale, could give the appellants the right to cut the very timber which had been previously sold to the company, and included in their purchase? If the government did not on the 10th July, 1881, own the timber on the lands

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*sold* to the company, how could it legally give the right to another to cut it down and convert it? The company had a legal right to all the timber growing and being on the lands they purchased, and, when subsequently complying with the prescribed conditions, would be entitled, not to bare stumps, but to growing and valuable timber. It would be inequitable in the highest degree for the government, after selling the lands, including the timber, which in many parts of them most likely constituted its principal value, and securing full payment of the sum agreed upon, to re-sell the same timber and then get paid twice for it. This, however, is the position we are asked to sustain. If this contention had been raised by the Government the doctrine of estoppel would be available, and courts of law and equity would so answer it. The doctrine of estoppel applies equally to and affects the appellants as privies of the Government as fully as it does the latter. If the Government had no ownership of the timber on the lands in question—if it was transferred with the lands to the company—it could give no title to another. But even if the Government really, under all the circumstances, did not wholly part with that ownership, but merely gave the company the right to the possession of the lands with a quasi right of property in the timber for certain prescribed purposes, another important difficulty to the appellants' contention arises—and that is, whether the licenses issued on the 10th of July, 1881, gave the appellants the right to intrude upon the possession of the company and cut and carry away timber in which the company had an interest, were excepted from those covered by the license before recited, which provided that all lots sold or located, up to the date of the license, should be held as excepted from its operation. In this case the lots were not only sold and partly paid for, as provided

by the Order in Council of the 7th April, 1881, but they were ascertained and located and set apart by metes and bounds, and the company put into possession. They had been sold, and if so, the right to cut timber on them was not included in the license.

It has been contended that the only evidence of a sale is a patent or grant; and that after a party has purchased from the government, and been put into possession of the land purchased, the government can go on issuing timber licenses over the same lands, between the time of the purchase and the granting of a patent. It is, to my mind, a monstrous proposition that the Government could, under any circumstances, sell the same property twice and get doubly paid for it.

I am of the opinion that the license of the 10th July, 1881, did not include the lands in dispute; and that the acts complained of by the respondent company were illegal and without justification.

The lands in question were sold to the company at the rate of 60 cents per acre. One-fifth of the purchase money to be paid down (which was done even before the passing of the order in council in question) and the remainder in four equal annual instalments with interest from the date of sale. The second instalment did not fall due until the 7th April after the issuing of the injunction. The company was to establish at least 40 families on the lands during the first year, &c., and but half that time elapsed from the date of sale.

The sale was subject, with regard to each lot, or farm, settled upon, to all the conditions and restrictions of an ordinary sale, as set forth in the blank form of receipt for the first instalment attached to the report of the commissioner.

By the terms of that blank form of receipt, the purchaser was:—

To take possession of the land within six months from the date

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hereof; and from that time continue to reside on and occupy the same, either by himself or through others, for at least two years; and within four years at furthest from this date, clear and have under crop a quantity thereof in proportion of, at least, ten acres for every one hundred acres, and erect thereon a habitable house of the dimensions of, at least, sixteen by twenty feet * * * * In no case will the patent issue before the expiration of two years of occupation of the land or the fulfilment of the whole of the conditions, even though the land be paid for in full, subject also to *current licenses* to cut timber on the land, and the purchaser to pay for any real improvements now existing thereon, belonging to any other party.

Such then are the conditions referred to, as contained in the blank form of receipt; and the company, when the injunction was issued, was actively engaged in performing them all within the prescribed time. The patents were not to issue except as provided for; and it matters not in my opinion whether they were provided to be issued to the immediate purchasers, or to their assignees or appointees. If the conditions were performed, the patents were earned as provided for; and until the lands were sold by the company they had a good equitable title to them.

That equitable title was given by the Lieutenant Governor in Council duly authorized in that behalf, and legally bound to complete the titles for the benefit of the company, when the conditions of the sale were fully performed. I think it makes no difference, as to the *interim* interests of the company, it having been provided that the patents, as to the greater part of the lands, were not to be issued to the company, but to their assignees or appointees. The company was given the whole right of dominion over the lands to sell to whom, for such prices and upon such terms as the company should decide upon. The government reserved nothing in the shape of interest, but merely annexed to the sale certain conditions upon the performance of which the patents should issue. Having sold and received the

consideration therefor, the government parted with its immediate interest in the lands as owners, and if so, to whom was the transfer made? It could be to none other than the company. The latter did not take it in trust for any other party, but as its own. It had to run the risk of re-selling either at a profit or a loss. It was not in the position of an agent or trustee of the government, having only a naked trust, which in many cases creates no interest. It was, on the contrary, a purchase for value, and for a good consideration, by the terms of the contract, of the purchased property. There is nothing in the statutes or regulations, or the law, against the company occupying the position it held when the injunction was issued; and the only other question open is whether that position entitled it to that remedy.

To entitle a party to a writ of injunction, the statute requires, that a petitioner for such a writ, must be a proprietor through a valid title of the lands in question, and be in lawful possession. I have already shown that, in my opinion, the respondent company had a valid title. The statute does not require anything more than such a title as would enable a party to recover damages done to the possession, as he might do when in possession under any license of occupation or ticket of location issued by a commissioner of Crown lands, and I consider the order in council of the 7th of April, 1881, a copy of which was on the following day given by the commissioner of Crown lands to the agent of the company with instructions to act thereunder, as effectual for the purpose of giving the right of possession as a ticket of location, but independently of that proposition the company was in possession under a valid purchase, and it matters not whether that sale was made by the government or by a private party. The law applies in the one case as effectually as in the other. The actual possession of the company was clearly proved,

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and the statute provides that the writ may issue against "any person who has not acquired the possession one year, and who has no valid title to the property."

I have already shown that the possession of the appellants—which, at best, was only for the specific purpose of cutting and carrying away timber—ended on the 30th April, 1881, that the appellants were not therefore in possession for one year as the statute provides, and that the license to them subsequently did not cover the lands in question. The provisions of the statute are therefore fulfilled in all particulars as to the right of the respondent company to the injunction.

The statute limits the common law right as we find it in *England;* as, in the latter, an injunction will be allowed to restrain even a party in long possession from cutting down timber or in any way doing a permanent injury to the estate.

In the case of *Loundes* v. *Bittle* (1), Vice-Chancellor *Kindersley* gave an exhaustive judgment on the subject of injunction; and after reviewing the leading cases up to that time, (1864), says:—

> I have gone into the cases on this subject at more length on account of the difficulty in finding the principle upon which to act. That principle, however, appears to me this: where a defendant is in possession and a plaintiff claiming possession seeks to restrain him from committing similar acts to these, the court will not interfere, unless indeed (as in *Neal* v. *Cripps*) the act is so flagrant an act of spoliation as to justify the court in departing from the general principle. But, where the plaintiff is in possession, and the person doing the acts complained of is an utter stranger, not claiming under the colour of right, then the tendency of the court is not to grant an injunction, unless there are special circumstances, but to leave the plaintiff to his remedy at law, though where the acts tend to the destruction of the estate the court will grant it. But where the person in possession seeks to restrain one who claims by adverse title, then the tendency will be to grant the injunction, at least, where the acts done either did or might tend to the destruction of the estate.

(1) 10 Jur. N. S. 226.

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In that case a perpetual injunction was granted.

It will be observed, that in the second case put by the learned Vice-Chancellor, he says :—

That where the plaintiff is in possession, and the person doing the acts complained of is an utter stranger, not claiming under the color of right, then the tendency of the court is not to grant an injunction unless there are special circumstances. * * * Though where the acts tend to a destruction of the estate, the court will grant it.

Here, then, the cutting down and the carrying away of the timber could be nothing less than the destruction of the estate. In large districts of the country the land is worthless for cultivation, as is the case with a good deal of that in question, and becomes worthless as soon as the timber is removed from it. The principal utility of an injunction is to prevent such spoliation by irresponsible parties, but it will also be seen that, where the person in possession seeks to restrain one who claims by adverse title, the tendency is to grant an injunction, at least where the acts done either did or might tend to the destruction of the estate.

I am of the opinion that both by provisions of the statute and common law as above referred to the respondent company was entitled to the injunction, and I agree with a majority of the court below, that the same should be made perpetual with costs in all the courts.

TASCHEREAU, J.:

For the reasons given by Mr. Justice *Tessier* in the Court of Queen's Bench, I think that the plaintiff had no right to this injunction, and that the judgment of the Superior Court which quashed it was right. I am of opinion, therefore, to allow this appeal. The contention, that without an injunction the plaintiff would have necessarily been exposed to suffer an irreparable injury, is not serious. It is only since four years that

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this writ has been introduced into *Quebec*, and to maintain the plaintiff's contention on this point, would be to say, that it is only since four years that, in the province of *Quebec*, a plaintiff can stop a defendant, *pendente lite*, from destroying or damaging the property in contestation. I would call this a libel on our laws.

GWYNNE, J.:—

I am of opinion that this appeal should be dismissed with costs and that the judgment of the Court of Queen's Bench in *Montreal* in appeal should be affirmed. A contrary judgment would in effect place it in the power of a single officer of the Executive Government to defeat what must have been known to be the intent and object of the land company in paying their money and in entering into the contract, which with the sanction and upon the suggestion of such officer they had entered into with the Executive Government of the Province of *Quebec*, and so, in fact, to deprive the land company of the benefit of that contract after the payment of that portion of the purchase money which was accepted as such by the government of the province when the contract was entered into, and after the disbursement by the company of a large sum of money upon the faith of the contract, and after the fulfilment by the company of all the terms and conditions of the contract upon their part agreed to be performed.

The circumstances under which the contract with the land company was entered into will best appear by reference to the report of the Commissioner of Crown Lands to the Executive Government of the Province of *Quebec*, dated the 3rd March, 1881, which contains the terms of the contract, and which is entituled: "On the application of the Dominion of *Canada* Land and Colonization Company for the purchase of certain public lands in this province." In that report "the under-

signed Commissioner of Crown Lands has the honor to set forth that on the 13th December, 1879, he received the following application from *Francis W. Stockwell*, Esq., dated the fifth of said month."

On behalf of several English capitalists I have the honor to apply for three hundred thousand acres of crown lands situated in the townships of *Price, Whitton, Marston, Ditchfield, Spalding, Gayhurst, Risborough, Marlow, Jersey, Shanley* and *Metgermette*, or elsewhere, provided that the whole quantity is not obtainable in those townships. The object of the purchasers is to settle the lands in different sized farms, or to dispose of them to farmers from the Old Country, who intend more especially to go into the breeding of cattle for exportation to foreign markets, the purchase money to be paid cash in exchange for deeds at the prices named in the Settlers' Guide of 1877.

(Signed,) *Francis W. Stockwell.*

That to this communication the following reply was addressed, dated 3rd December, 1879, and approved in council same date:

In reference to your written application of the 5th instant, which you have since, at different interviews with members of the Government, renewed verbally, on behalf of several English capitalists for three hundred thousand acres of Crown lands in certain townships therein mentioned with a view of settling the lands in different sized farms and disposing of them to farmers principally from *Great Britain*, who intend more especially to go into the breeding of cattle for exportation to foreign markets, I am duly authorised by the executive council of the Province of *Quebec* to state that if the parties whom you represent form and organize themselves into a company for the purpose of such scheme as above set forth, and furnish proof of the legal existence of such company within two months from this date, and state their readiness to pay the first instalment of the purchase money and to conform to the other conditions hereinafter mentioned, the Government of the Province will be prepared to pass an order in council for the sale to such company of one hundred thousand acres of land to be designated by mutual agreement between the Government, or the commissioner of crown lands, and the company in some of the following townships, viz: *Prince, Whitton, Ditchfield, Gayhurst, Risborough, Marlow, Jersey, Shanley, Adstock, Forsyth, Humqui, Arvaitjish, Nictalick, Wemtaye, Langevin* and *Watford*. The sale, if carried out, will be made upon the following conditions:

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1st. The lands shall be sold at 60 cents per acre, one-fifth of the purchase money shall be paid down immediately upon the passing of the order in council, and the remainder in four equal annual instalments, with interest from the date of sale.

2nd. The company shall establish at least forty (40) families on the lands herein referred to during the first year after the sale, at least sixty (60) families during the second year, and fifty during each of the third and fourth years, in no case allotting more than five hundred acres to any one family or settler.

3rd. The sale shall be subject with regard to each lot or farm settled upon to all the conditions and restrictions of an ordinary sale as set forth in the blank form of receipt for first instalment, attached hereto as follows:

No. 225. Crown Lands Agency,

$ 187

[*L.S.*]

Received from the sum of being the first instalment of one-fifth of the purchase money of acres of land contained in lot No. in the range of the township of , *P. Q.*, the remainder payable in four equal annual instalments with interest from this date.

The sale, if not disallowed by the Commissioner of Crown Lands, is made subject to the following conditions, viz: The purchaser to take possession of the land within six months from the date hereof and from that time continue to reside on and occupy the same, either by himself or through others for at least two years; and within four years at furthest from the date clear and have under crop a quantity thereof in proportion of at least ten acres for every one hundred acres, and erect thereon a habitable house of at least sixteen by twenty feet. No timber to be cut before the issuing of the patent, except under license, or for clearing of the land, fuel, building and fences. All timber cut contrary to these conditions will be dealt with as timber cut without permission on public lands. No transfer of the purchasers' right will be recognised in cases where there is default in complying with any of the conditions of sale. In no case will the patent issue before the expiration of two years of the occupation of the lands, or the fulfilment of the whole of the conditions, even though the land be paid for in full, subject also to current licenses to cut timber on the land, and the purchaser to pay for any real improvements now existing thereon belonging to any other party.

Agent.

*Caution.*—If the Commissioner of Crown Lands is satisfied that any purchaser of public lands or any assignee claiming under him,

has been guilty of any fraud or imposition, or has violated or neglected to comply with any of the conditions of sale, or if any sale has been made in error or mistake, he may cancel such sales and resume the land therein mentioned and dispose of it, as if no sale thereof had been made. Extract from 20 sec. Act, 32 *Vic.*, ch. 11. Also to the provisions of the fifteenth section of the regulations for the sale of mineral lands approved by the Lieutenant Governor in Council on the 11th May, 1874, and now in force, said section having reference to the sale of lands in gold mining divisions, and it shall also be subject to the provisions of the fifteenth section of the Phosphate Mines Act, 41 *Vic.*, ch. 4.

4th. No letters patent shall be issued for any of the lands sold to the company until the full price of the whole 100,000 acres be paid and all conditions of the sale be fulfilled.

5th. If the purchase money be not paid as above stated, or failing the fulfilment of any of the conditions of sale, the sale shall be cancelled in accordance with the provisions of the law 32 *Vic.*, ch. 11, sec. 20, and the land shall revert to, and remain the absolute property of the Crown, as if the same had never been made; and the company shall forfeit any and all sums of money that may have been paid to the Government on account of these lands, and all improvements that may have been made thereon.

6th. No patent shall be issued for any of these lands in the name of the company, but only at the instance of the company, or in virtue of assignments made by it, to and in favor of the actual and *bonâ fide* settlers on the respective farms; nor shall any patent be issued in favor of any one individual for more than four hundred acres of land.

(Signed) *E. J. Flynn, C. C. L.*

"That on the 28th February, 1880, the undersigned received notification by telegraph of the incorporation of the company on whose behalf Mr. *Stockwell* applied, and on the 18th April following he also received, through Mr. *Stockwell*, a notarial copy of an extract from the minutes of a meeting of the directors of the Dominion of *Canada* Land and Colonization Company (limited), held at No. 80, *Bishopsgate* street, *London*, on the 16th March, 1880, the subject of which was to the effect of authorizing the said *Francis W. Stockwell* to act as agent of said company, especially in communicating with the Government of this Province relative to said

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company's application; also for the obtaining of certain modifications in the terms of the letter of 30th December, 1879, above embodied, and instructing him (*Stockwell*) to state to the Government that the company were prepared to pay the first instalment of the purchase money and conform to the other conditions of the before-mentioned letter upon an Order in Council being passed with certain suggestions, alterations, &c.

"That the document was accompanied by a letter from *Henry C. Barker*, Esq, solicitor, pointing out the modifications required.

"That the said letter and document were acknowledged by the following reply, dated 13th April, 1880.

SIR,

I have the honor to acknowledge the receipt of your letter of the 12th instant, enclosing the following documents:

1st. An extract from the minutes of a meeting of the directors of the Dominion of *Canada* Land and Colonization Company (limited).

2nd. A letter dated *London*, 18th March, 1880, addressed to yourself by *Henry C. Barker*, Esq., solicitor, and recommending that certain modifications be made to clauses 4, 5 and 6 of the letter addressed by me to you in the name of the Government of this Province of the 30th December last, in reference to the sale of 100,000 acres of land to the above mentioned company, and in answer thereto I am authorized by the executive council of the Province to state that the clauses above referred to will be modified in the following manner:

Clause 4.—The following words to be added thereto: Nevertheless, after the expiration of the two years occupation required to entitle settlers to letters patent, and after the payment by the company of the second instalment of the purchase price of the 100,000 acres a settler may pay up the balance, if any due on his lot; and on proof of his having fulfilled all the settlement conditions as regards the said lot he will be entitled to obtain letters patent for the same; and should the whole purchase money for the 100,000 acres be paid up at the time *à fortiori*, any settler on proof of the settlement conditions being performed as regards his lot, may obtain letters patent therefor.

Clause 5 to be construed in such a manner as not to be in contradiction to clause 4 as modified.

Clause 6.—The following words to be added:

Nevertheless, the company shall be entitled to receive in their own name for the purposes mentioned in Mr. *Barker's* letter a grant for five thousand acres on their paying the full purchase money for the same, on clearing the number of acres required by the regulations of the department, to wit: ten acres for every hundred acres, and erecting thereon buildings of the value of at least one thousand dollars. The regulations of the department in reference to the cutting of timber and the transfer of the rights of the purchaser before letters patent are issued as embodied in the location ticket annexed to my letter of the 30th December, 1879, to be adhered to until the company shall receive letters patent for the said five thousand acres.

As to the rate of interest on the different instalments from the date of purchase, it is the legal rate, to wit: six per cent.

You will observe by the second clause that the company is bound to establish at least forty families during the first year after the sale; at least sixty families during the second year, and fifty during each of the third and fourth years. It is obvious that the company shall be at liberty to establish as many as they can of the two hundred families at the earliest possible period, the number mentioned for each year being fixed as a minimum.

(Signed), *E. J. Flynn, C. C. L.*

"That on the 13th March, instant, Mr. *Stockwell* fyled in the office of the Department of Crown Lands the certificate of incorporation and articles of association of the aforesaid company, the said articles embodying among other subjects the following:—

To purchase, lease, obtain concessions of or otherwise acquire lands and hereditaments of any tenure, or to obtain any interest in any lands and hereditaments in the Dominion of *Canada* or elsewhere, and to work, manage, and develop the same in such manner as the said company shall think fit, and to erect warehouses, factories, wharves, dwellinghouses, stores, and such other premises, buildings, machinery and plant, and to make such roads, tramways and canals, or other works of a like or similar nature as may be necessary for the purposes of the company. To carry on the business of farming in all its branches, breeding sheep, cattle and horses, or any other business, trade, or undertaking, the carrying on of which may be deemed by the company conducive to the development of its property or interest therein, and particularly to do all acts conducive to the colonization and settlement of the lands of the company, &c., &c.

That the legal status of the said company in this province, according to the above mentioned certificate of incorporation, received the

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approval of the Honorable Solicitor General on the 24th March, instant.

That the said company has selected lands amounting to 99,998½ acres as arranged and specified in the annexed lists, and has also on the 29th January last deposited to the credit of the Department of Crown Lands the sum of twelve thousand dollars ($12,000) to be applied on account of the purchase of the lands in question.

After due consideration of the facts above detailed the undersigned has the honor to recommend that he be now authorized to carry out the terms and intentions of his letter of the 30th December, 1879, addressed to the aforesaid *Frs. W Stockwell*, with the modifications allowed by subsequent letter of the 13th April, 1880, above embodied, and to sell to the said Dominion of *Canada* Land and Colonization Company the lands in question in accordance with the terms and conditions of the above mentioned letters.

The whole respectfully submitted.

(Signed,) *E. J. Flynn*,
Com. of Crown Lands.

*Quebec*, 30th March, 1881.

To the above report was annexed the lot of lands selected and agreed upon between the company and the Commissioner of Crown Lands as the lands affected by the above report, and for the first instalment of the purchase money for which the company had, as stated in the report, deposited the sum of $12,000 to the credit of the Department of Crown Lands.

Now, it will be observed, that as appears by the above document, the whole of the negotiations for the purchase of the said lands by the company were carried on by the company with the Executive Council of the province, through the instrumentality and intervention of the Commissioner of Crown Lands, of which Executive Council he was himself a member, and that the terms and conditions of the proposed purchase and sale were settled and agreed upon by and between the company and the said Executive Council, the Commissioner of Crown Lands being the medium adopted for communicating to the company the terms and conditions of the sale as agreed to and required by the Executive Council

of the province, and that all this had taken place before the whole, as a matter of form merely, was submitted to the Lieutenant Governor in Council for his approval, which was done by a report of a Committee of the Executive Council, as follows:—

*To the Honorable Theodore Robitaille, Lieutenant Governor of the Province of Quebec, &c., &c.:*

Report of a Committee of the Executive Council on matters referred to their consideration.

PRESENT:

The Honorable Mr. *Chapleau*, in the chair.
" Mr. *Ross*.
" Mr. *Loranger*.
" Mr. *Lynch*.
" Mr. *Flynn*.

In Council on land matters.

*May it please Your Honour:* The Committee have had under consideration the annexed report of the Honorable the Commissioner of Crown Lands, dated the thirteenth of March last, 1881, concerning the application of the Dominion of *Canada* Land and Colonization Company for the purchase of certain lands in the Province of *Quebec* and submit the said report for the Lieutenant Governor's approval.

(Signed,) *J. A. Chapleau*,
Chairman of Committee.

Upon this report the Lieutenant Governor signed his approval upon the 7th April, 1881.

Upon the following day the recognised agent of the company having expressed to the Commissioner of Crown Lands his desire to give out a contract for the purpose of fulfilling the terms agreed upon by the company, and to commence clearing, the Commissioner delivered to such agent a copy of the above document, (with the list of lands thereto attached,) so approved by the Lieutenant Governor, informing such agent at the same time that all was right, and that he might go ahead as soon as he liked, in consequence of which the company entered into contracts for the outlay of, and did expend, a large sum of money amounting to from $40,000 to $50,000 in fulfilment of the terms and

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conditions upon which the sale had been agreed to by the executive council, as embodied in the above document or act of council.

Now, upon the delivery by the Commissioner of Crown Lands to the company's agent of a copy of the document so prepared by him with the sanction and under the direction of the executive council, which, upon their report, was approved by the Lieutenant Governor if not *eo instanti* of the original having been signed by the Lieutenant Governor, I am of opinion that a complete contract of sale of the lands specified was entered into by the executive government of the Province with the company upon which the company had paid, and the Government had received, the sum of $12,000 as and for the first instalment of the purchase money agreed upon, and that the Commissioner of Crown Lands could not thereafter by any act of his impose any terms, conditions or obligations upon the company greater than those contained in the document so approved, or detract from the rights intended to be conferred upon the company and contracted for by them as embodied in such document so prepared and approved, without, at least, the special consent of the company in that behalf obtained. I cannot doubt that the company became liable to pay interest upon the balance of the purchase money from the date of the order in council defining the terms and conditions of the sale, one of which was that the interest should accrue from the date of sale. That this order in council was regarded as the contract of sale is apparent not only, as it appears to me, from the terms and conditions agreed upon—from the reception of the first instalment of the purchase money—and from the delivery of a copy of the terms and conditions of sale as agreed to by the council and signed and approved by the Lieutenant Governor with directions to the agent of the company

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to enter into possession and to proceed with the fulfilment of the terms and conditions of the sale upon the part of the company to be fulfilled, but also from the acts of the department of Crown lands as appearing in the letter of the 5th May, 1881, from the department to the Crown land agent, in whose district the lands selected by the company and for which they had paid the first instalment of purchase money were situate, informing him that all the lands enumerated in the list forwarded to him had been reserved in favor of the Dominion of *Canada* Land and Colonization Company by order in council of the 7th April, and that he should therefore be guided accordingly; and that with regard to any sales, if any were made by him since the date of the said order in council, *they are of course disallowed*, and that he should inform the respective purchasers of such lots that they would now have to deal with the above company as regards the purchase thereof; and by the telegram of the 10th May from the Crown lands department to the same agent, directing him not to renew licenses for timber lands comprised in the townships of *Whitton*, *Spaulding*, *Louise* and *Ditchfield* until advised to the contrary. So perfected was the contract of sale that, in my opinion, there can be no doubt that upon the 8th of April it was lawful for the company to enter upon the lands and to proceed as they did in the fulfilment of the terms and conditions embodied in the document approved and signed by the Lieut.-Governor on the 7th April; and that upon the fulfilment of those conditions by themselves and their assigns and nominees to be performed, they would be entitled to demand and have letters patent issued to themselves as to the five thousand acres and to their nominees or assignees as to the residue.

It might be quite competent for the commissioner of

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Crown lands, in consequence of the contract for sale of the lands to the company having been so perfected, to issue to the company under his hand and seal under the provisions of 32 *Vic.*, ch. 11, sec. 16 of the statutes of the Province of *Quebec*, a license of occupation or a certificate of sale under 39 *Vic.*, ch. 10, but no such license or certificate was necessary in order to effect a completion of the contract between the executive Government of that Province and the company; this had already been completed by the terms and conditions of sale having been concluded and agreed upon, and if any such license of occupation or certificate should be issued it could not operate in the slightest degree to make any variation by addition to, or detraction from, the terms of sale which had already been agreed upon with the company, upon the faith of which, the instalment of purchase money paid and accepted at the time of the contract of sale being entered into had been paid and accepted. The above statutes, while they authorize the Commissioner of Crown Lands and his deputies or agents to issue licenses of occupation and certificates of sale after contracts of purchase have been entered into, under the powers conferred upon the commissioner by orders passed in council prescribing the terms and conditions upon which ordinary contracts may be entered into by the commissioner and his deputies upon behalf of the Government, never contemplated depriving and, in my opinion, do not deprive the executive Government of the power vested in it to enter into contracts of sale of a special character upon such special terms in each case as may be agreed upon between it and applicants for the purchase of Crown lands, and expressed in orders in council passed *pro re natâ*. The 32nd *Vic.*, ch 11, the 16th sec of which enacts that "The Lieutenant-Governor in Council may, from time to time, fix the price per acre of the public

lands and the terms and conditions of sale, and of settlement and payment," is as potential to enable the Government to enter into a special contract, as it is to enable it to prescribe the terms upon which the Commissioner of Crown lands and his deputies may, in the ordinary course of business of the Crown lands office, enter into contracts upon behalf of the Government with intending purchasers. The authority which the Commissioner of Crown Lands and his deputies have under orders in council to bind the Government by contracts entered into by them upon behalf of the Government, is given for the purpose of facilitating the business of the Government with applicants for land upon the ordinary terms sanctioned by the council, but the fact that a portion of the power of the executive council is, for convenience and the better despatch of business, conferred upon the commissioner, cannot deprive the council (which prescribes and sets in its discretion limits to the powers of the commissioner) of its own independent power, of itself entering into special contracts as the supreme executive department of the Government, with applicants for land upon terms not authorized by the order in council regulating ordinary sales. The power given to the Commissioner of Crown Lands to issue licenses of occupation by the 16th sec. of the Act is limited to granting them to any person who has purchased, or who may purchase, or who is permitted to occupy, or who has been entrusted with the care or protection of any public land, or as a free grant, and the object and effect of such license if, and when issued, is not to create a contract, but to afford evidence of a contract of some character having been entered into, and to enable the person to whom the license is given, although not in actual possession, upon the production of it in any court of law or equity, to assert title against any person in

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possession equally as he could under letters patent, subject to the sole qualification that the license of occupation should have no force against a license to cut timber existing at the time of the granting of the license of occupation; as to wrongs of the nature of trespass upon a person in actual possession, such possession alone without any license of occupation would enable the person in possession to maintain an action of trespass against the trespasser. Contracts of sale entered into by the government with a purchaser and a license of occupation, are two wholly distinct things; as appears not only from the 16th section of the Act above referred to, but from the 20th also and the 21st. By the 20th provision is made enabling the Commissioner of Crown Lands in certain cases of fraud or imposition, or in case of non-compliance with any of the conditions of a sale, grant, location, lease, or license of occupation, "to cancel such sale, grant, location lease, or license of occupation," and the 21st section makes provision for the case of any person refusing to give up possession of any land "after the revocation or cancellation of the sale, grant, location, lease, or license of occupation thereof as aforesaid," shewing plainly that the legislature regarded a sale and a license of occupation as two distinct things. The office of the contract of sale is to define the rights of the purchaser to the thing contracted for, and to show what the thing contracted for is; the office of the license of occupation is merely to afford evidence of the existence of a right to possession sufficient to enable the holder of the license upon its mere production to maintain actions without necessitating any enquiry into the nature or terms of the contract in pursuance of which the license was issued, namely, whether it was a contract of sale, or of lease, or for mere temporary occupation, or for the protection of the land by the holder as caretaker, or for a free grant.

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In the case of ordinary sales contracted for with the Commissioner of Crown Lands, it may be convenient that the license of occupation given to a purchaser should contain the terms of the sale, but it is not necessary that it should, no form for such license is given by the statute, and it would be just as effectual for the purpose for which it is intended, namely, to enable the holder to maintain actions at law or equity, if it should not contain any of the terms of sale. But where the terms of sale are of a special character, and are embodied in a written document prepared for the purpose of showing the terms and conditions of the sale, or in several written documents, as in this case, in letters addressed by the applicants to the Government, and in documents showing the action of the council thereon communicated by the council through the commissioner to the applicants, these written documents containing all the terms and conditions of the contract constitute the contract, and effectually raise the question in issue between the parties to this litigation which is, what is the proper construction to be put upon this contract, and what is its effect as against the appellants who are claiming under another species of contract with the Government, called a timber license, in virtue of which they assert a right to cut and carry away the timber growing upon the lands which are the subject of the contract of purchase and sale entered into by and between the land company and the Government ?

The contention of the appellants is that the land company's title dates only from the date of the certificate of the Commissioner of Crown Lands of the 19th July, 1881, endorsed upon the original order in council, prescribing the terms and conditions as approved by the Lieutenant-Governor after having been agreed upon by and between the company and the executive coun-

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cil of the Province, but no such certificate was necessary to perfect the contract, that had already been perfected and concluded by the signature of the Lieutenant-Governor upon the 7th April, 1881, to the document containing the terms and conditions of sale as agreed to by and between the company and the executive council and acknowledging the receipt by the Government of the first instalment of the purchase money, or, at least, upon the delivery to the agent of the company by the Commissioner of Crown Lands upon the 8th of April, of a copy of the document so approved and signed; any certificate signed by the Commissioner of Crown Lands, if any had been issued, should have been, as it appears to me, to the effect that the executive government had upon the 7th April concluded a contract for the sale of the lands in question to the company upon the terms and conditions embodied in a document signed and approved upon that day by the Lieutenant Governor in Council. Such a certificate is the only one which, in my opinion, would correctly state what had taken place. I can conceive no object to be served by, or any necessity whatever for, the issuing of any certificate signed by the Commissioner of Crown Lands after the terms and conditions of the sale had been conclusively agreed upon between the company and the executive, and the receipt of the first instalment of purchase money, unless it be to serve as evidence of a contract of sale having been previously entered into, a fact which independently of any certificate abundantly appears by the evidence in this case, which sets out at large all the negotiations for the contract, which was so, as aforesaid, consummated by the formal approval of the Lieutenant Governor in Council to the terms and conditions as agreed upon between the applicants and the Executive Council.

The rights of the company, therefore, must be ascer-

tained by putting a construction upon the document so signed, containing, as it does, all the terms and conditions of the sale, wholly independently of, and without any reference to, the certificate of the Commissioner of Crown Lands endorsed thereon, to which the company have no occasion to refer, upon which they do not rely, and by which they cannot be prejudiced in the enjoyment of any of the rights contracted for by them as embodied in the document containing all the terms and conditions of their purchase. In construing this document, it is, however, necessary to consider the title upon which the appellants rely as giving them the timber growing upon the lands purchased by the company.

The appellants appear to have had, for several years, licenses issued in each year to cut timber upon the lands in question; those licenses terminated on the 30th of April in each year; it was a term and condition of these licenses, and was so of that in existence on the 7th April, 1881, when the terms and conditions of the sale to the land company were finally and formally concluded by the signature of the Lieutenant Governor in approval of the terms as previously agreed to by the members of his executive council, the party constitutionally competent to prescribe the terms of the contract with the land company—that all lots of land mentioned in the timber license which should be sold, or located by authority of the Commissioner of Crown Lands subsequently to the date of such license, should cease to be subject to it after the following 30th day of April, and that whenever the sales of any such lots should be cancelled, the said lots should be restored to the license. Now, it is apparent, that the words "sold" or "located," as used here apply, the former to "contracts" of sale, and the latter to locations under license of occupation, whether to lessees, caretakers,

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persons having free grants, or having possession otherwise than as purchasers. That the word "sold" refers to the contract of sale is apparent from the provision that "whenever the sales of any such lots shall be cancelled" (which could only be done while the contract is *in fieri*, "the said lots shall be restored to the license." The effect therefore of this provision in the timber licenses is that all lots contracted to be sold during the year while the license is in force shall cease to be subject to any renewal of such license made after the 30th day of April next, after the date of such contract of sale.

If, then, the contract between the Executive Government of the Province of *Quebec* and the land company was complete, as I am of opinion that it was upon the 7th, or, at least, upon the 8th of April, 1881, the lots so contracted to be sold became exempt from the operation of any renewal of the appellants timber licenses, and consequently the renewal of their license in the month of July, 1881, by the local agent of the Commissioner of Crown Lands was ineffectual to give to the appellants any right to any timber growing upon the lands so contracted to be sold to the company, which timber constituted a very material part of the thing which they had contracted to purchase, and for which they had paid, and the Government had received from them the first instalment of the purchase money agreed upon. Clause 3 in the terms and conditions of the sale to the company, which was relied upon by the appellants as in support of their contention that the timber was not to be exempt from the appellants license until letters patent should issue proves, to my mind, quite the contrary. The first condition of the sale is that one fifth of the purchase money was to be paid down immediately after the passing of the order in council, namely, the order in council which, in the preceding sentence of the Commissioner of Crown

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Lands report, it is stated that he was authorised by the Executive Council of the Province of *Quebec* to state to the agent of the applicants, that if the parties whom he represented would form themselves into a company for the purpose of the scheme of colonization which they proposed, and would furnish proof of the legal existence of such company, and would state their readiness to pay the first instalment of purchase money and to conform to the other conditions hereinafter mentioned, the government of the province would be prepared to pass an order in council for the sale to such company of 100,000 acres of land, to be designated by mutual agreement between the Government or the Commissioner of Crown Lands and the company in some of the following townships, &c., &c.

The sale to be upon the following conditions: Then the third condition provides that "the sale shall be subject," &c., &c. What sale can this be other than the sale which the Executive Government thus became pledged to make to the Land Company, and in respect of which it was provided in the first clause that the first instalment of the purchase money should be paid immediately upon the passing of the order in council, and which in a subsequent part of the document signed by the Lieutenant Governor is acknowledged to be paid; but to remove all doubt, the third clause provides that the sale upon which the first instalment of purchase money is to be paid, and which, as matter of fact, was paid before the execution by the Lieutenant Governor of the document containing the terms and conditions of the sale, shall be subject with regard to each farm or lot settled upon, to all the conditions and restrictions of an ordinary sale as set forth on the blank form of receipt for first instalment attached hereto; and not content with such reference adds, "as follows": "This sale is, &c., &c., made subject to the following condi-

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tions." Now what is the effect of this, but plainly to import into this sale to the Land Company the conditions endorsed upon the blank form of receipt for first instalment of purchase money in the case of ordinary sales, in so far as consistently with other special terms and conditions of this sale to the Land Company, they could apply the condition. That the purchaser shall take possession of each farm or lot settled upon within six months from the date hereof, and from that time continue to reside on and occupy the same by himself or through others for at least two years, and within four years at furthest from this date clear, and have under crop a quantity thereof in proportion of at least ten acres for every one hundred acres, and erect thereon a habitable house of the dimensions of at least sixteen by twenty feet, could not apply, for special provision to the contrary is made by the 2nd clause of the conditions of the sale by which it is prescribed that the company shall establish at least forty families during the first year after the sale, at least sixty families during the second year and fifty each of the third and fourth years, in no case allotting more than five hundred acres to any one family or settler, but the other conditions of an ordinary sale can and do apply; that is to say: "This sale to the land company is made subject to the condition that no timber is to be cut upon any of the lots or farms settled upon before the issuing of letters patent for such, except &c., &c., &c.;" and that "all timber cut contrary to this condition will be dealt with as timber cut without permission on public lands;" and that "no transfer of the purchaser's (that is, the land company's) rights will be recognized in cases where there is default "in complying with any of the conditions of sale;" and that "in no case will the patent issue for any farm or lot settled upon (such farm or lot not to exceed 500 acres) before

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the expiration of two years from the occupation of the farm or lot by a settler, or before the fulfilment of the whole of the conditions" of this sale to the land company, even though the land be paid for in full; and "this sale is subject also to current licenses to cut timber on the land, and the purchaser (that is, the land company) to pay for any real improvements now existing thereon belonging to any other party."

It is, to my mind, plain that it is this sale to the land company, the terms of which were being arranged between the land company and the Government of the Province of *Quebec*, that was to be subject to all these conditions, including this last as to current licenses to cut timber on the land; the only current license to cut timber was that which expired upon the 30th April, 1881. It is, to my mind, therefore, clear that the contention of the appellants, which would have the effect of depriving the land company of the chief value of the thing which they contracted to purchase from the Government and the Government contracted to sell to the company, and for which the latter have paid, and the former received, the purchase money agreed upon, cannot be allowed to prevail.

The only other point is as to the right of the plaintiffs in the court below to obtain a writ of injunction under 41 *Vic.*, ch. 4.

That the land company as purchasers for value under a valid contract entered into with them directly by the executive Government of the Province are in lawful possession of the lands in question, through a valid title in virtue of their contract of purchase made with the executive Government, wholly independently of any certificate signed by the commissioner of Crown lands within the meaning of the above Act, and so as to entitle them to the benefit of its provisions, does not appear to me to admit of a doubt, and as against the

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defendants asserting a title which, in my opinion, they fail to establish, to take the timber growing on the land purchased by the company, the latter are entitled to protection by injunction, as indeed the only effectual remedy to enable them to protect the property they have purchased from irreparable injury amounting to the absolute destruction of the chief part of the estate purchased, and the existence of which, as constituting part of the thing purchased, we can well understand, as indeed is sworn to in the case, formed the chief motive which induced the company to make the purchase. The appeal therefore should, in my opinion, be dismissed, and the judgment of the Court of Queen's Bench in *Montreal* in appeal, granting the injunction, affirmed.

*Appeal allowed with costs.*

Solicitors for appellants: *W. & A. H. Cook.*

Solicitors for respondents: *Ives, Brown & French.*

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*Feb'y.12,13, 14.

*Feb'y. 25.

JOHN JOSEPH HAWKINS.....APPELLANT;

AND

WILLIAM THOMAS SMITH *et al.*.....RESPONDENTS

ON APPEAL FROM GALT, J., SITTING FOR THE TRIAL OF THE BOTHWELL CONTROVERTED ELECTION CASE.

*Ballots—Scrutiny—Irregularities by Deputy Returning Officers—Numbering and initialing of the ballot papers by Deputy Returning Officer, effect of—The Dominion Elections Act*, 1874, *Sec.* 80—*Corrupt practices—Recriminatory case—Evidence.*

In a polling division No. 3 *Dawn* there was no statement of votes either signed or unsigned in the ballot box, and the deputy

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

returning officer had endorsed on each ballot paper the number of the voter on the voters' list. These votes were not included either in the count before the returning officer, the resumming up of the votes by the learned Judge of the County Court, nor in the recount before the Judge who tried the election petition.

*Held*,—(Affirming the decision of the court below,) that the ballots were properly rejected.

Certain ballot papers were objected to as having been imperfectly marked with a cross, or having more than one cross, or having an inverted V, or because the cross was not directly opposite the name of the candidate, there being only two names on the ballot paper and a line drawn dividing the paper in the middle.

*Held*,—(Affirming the ruling of the learned Judge at the trial,) that these ballots were valid.

Per *Ritchie*, C.J., *Fournier*, *Henry*, and *Gwynne*, JJ., concurring: whenever the mark evidences an attempt or intention to make a cross, though the cross may be in some respects imperfect, the ballot should be counted, unless from the peculiarity of the mark made it can be reasonably inferred that there was not an honest design simply to make a cross, but that there was also an intention so to mark the paper that it could be identified, in which case the ballot should be rejected. But if the mark made indicates no design of complying with the law, but on the contrary a clear intent not to mark with a cross as the law directs, as for instance by making a straight line or round O, then such non-compliance with the law renders the ballot null.

Division I, *Sombra*—During the progress of the voting, at the request of one of the agents, who thought the ballot papers were not being properly marked, the deputy returning officer, who had been putting his initials and the numbers on the counterfoil not on the ballot papers, initialled and numbered about twelve of the ballot papers, but finding he was wrong, at the close of the poll, he, in good faith and with an anxious desire to do his duty, and in such a way as not to allow any person to see the front of the ballot paper, and with the assent of the agents of both parties, took these ballots out of the box and obliterated the marks he had put upon them.

*Held*,—(*Gwynne* and *Henry*, JJ., dissenting,) that the irregularities complained of, not having infringed upon the secrecy of the ballot, and the ballots being unquestionably those given by the deputy returning officer to the voters, these ballots should be held good, and that said irregularities came within the saving

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provisions of sec. 80 of the Dominion Elections Act, 1874. *Jenkins* v. *Brecken* followed. 7 Can. S. C. R. 247.

Per *Henry*, J., that although the ballots should be considered bad, the present appellant, having acted upon the return and taken his seat, was not in a position to claim that the election was void.

The Judge at the trial refused to allow a witness to be examined on a supplemental charge of a corrupt practice before the evidence on the principal charges had been closed.

*Held.*—That it was in the discretion of the Judge when to receive the evidence, and as no tender of it was subsequently made, the refusal of the Judge could not be made the subject of appeal,

APPEAL from the judgment of *Galt*, J., rendered on the 12th January, 1884, declaring that the appellant (*J. J. Hawkins*,) was not duly elected a member of the House of Commons for the electoral district of *Bothwell*, but that the Honorable *David Mills* was elected, dismissing the petition against the respondent *James Stephens* (the returning officer at said election,) with costs to be paid by the petitioners, and giving judgment in favor of the petitioners with costs to be paid by the appellant (*J. J. Hawkins*), other than the costs of the said *J. Stephens*, which were directed to be paid by the petitioners.

The petition, pleadings, and the facts of the case fully appear in the judgments hereinafter given, and more particularly in the judgment appealed from, which is as follows:

"GALT, J.:—The petition, briefly stated, charges the returning officer *Stephens* with having "wilfully, unlawfully, and improperly neglected and refused to include in his addition of the votes the number of votes given for each candidate from the statements in the ballot boxes returned by two of the deputy returning officers, and which two statements gave the Hon. *David Mills* a majority of votes over those given for the said *John Joseph Hawkins*, the result of which was to give to the respondent *Hawkins* a majority of votes.

"The petition further charges the returning officer with having improperly and unlawfully permitted the deputy returning officers for certain polling sub-divisions after the ballot boxes were opened to amend or put in statements as to the voting at their polling sub-divisions, and in adding up and determining the number of votes for each candidate, which gave the respondent, *Hawkins*, a majority. That the returning officer declared the said *Hawkins* elected and declared his intention of making his return to the writ of election accordingly, whereupon proceedings were, within the time in that behalf limited by the 14th section of 41 *Vic.*, duly taken to have a final addition or summing up of said votes made by the proper judge in that behalf, and such proceedings were thereupon had before such judge that the number of votes given for each candidate, from the statements contained in the several ballot boxes returned by the deputy returning officers, was re-summed up, and the said judge duly certified to the said returning officer, that upon adding and summing up the votes given at the said election for the respective candidates, as shewn by the said statements, he found and declared that 1,576 votes were given for the said *Mills*, and 1,564 for said *Hawkins*, and that the said *Mills* was elected for the said electoral district by a majority of 12 votes; that thereupon it became the duty of the said returning officer to declare the said *Mills* elected, and to make his return to the said writ accordingly; but that he unlawfully and improperly refused to declare the said *Mills* elected, but made a special return to the writ in which he declared the said *Hawkins* as having a majority of votes, and setting forth the foregoing certificate of the learned judge, but that he, the returning officer, had been served with no certificate of a re-count of said ballots, nor had the said ballots been re-counted. The petitioners then

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allege that the said *Mills* had a majority of the votes, and claim the seat for the said *Mills*. The petition then charges corrupt practices, etc., etc.

"The answer of the respondent *Hawkins* may be shortly stated to be that he was duly elected, that his majority had been reduced by the improper conduct of certain of the deputy returning officers, that the judge of the county court had improperly refused to recount the ballots, and charging corrupt practices, etc., etc.

"The answer of the respondent *Stephens* sets out the circumstances under which he refused to count the votes given in No. 3 Division of *Dawn*, and in No. 1 *Camden*, but as I shall have occasion to refer to these cases at length it is unnecessary to set forth the particulars of the defence, and he denies all improper conduct on his part. After the case was at issue an order was made for the production of all the ballots and papers, and the whole of the ballots were examined and corrected before me at the trial, so that, except in so far as the returning officer is concerned, the course pursued by the deputy returning officer, in either signing or omitting to sign the different statements of votes, is of no consequence. The result of the counting before me showed a majority in favor of Mr. *Mills* of 9, the totals being for *Mills* 1,574, and for *Hawkins* 1,565.

"There are three sub-divisions at which the statements of votes were in question before me, viz.: No. 3 *Dawn*, No. 1 *Sombra*, and No. 1 *Camden*. The facts as regard No. 3 *Dawn* are very simple, there was no statement of votes either signed or unsigned in the ballot box, and consequently the returning officer very properly refused to include them in his addition of the votes, and, singular to say, when the different parcels were opened each of the votes must have been rejected, the deputy returning officer having endorsed on each ballot paper the number of the voter on the voter's list, so that there could be

no difficulty whatever in ascertaining how each elector had voted; fortunately this mistake cannot be said to have had any effect on the result, as the numbers were so close, there being a difference of only five in favor of Mr. *Mills*. These votes are not included, either in the count before the returning officer, the re-summing up of the votes by the learned judge of the county court, nor in the re-count before myself.

"Division 1, *Sombra*: The returning officer included the votes in this division in his count so that he has nothing to answer respecting it. When the packages of ballots for this division were opened and examined before me it was found that none of the ballot papers were initialled by the deputy returning officer, and Mr. *Cameron* contended that all these votes should be disallowed.

"The gentleman who had acted as agent for Mr. *Hawkins* was examined as a witness; he stated that the deputy returning officer had put his initials and the numbers on the counterfoil, not on the ballot paper; this was precisely what was done in the case of *Jenkins* v. *Brecken*, reported in the current volume of Supreme Court reports, and on the authority of that case I overruled the objection. The witness, however, stated that he told the deputy returning officer he thought this was wrong, that he put no mark on the ballot; the officer looked over the Act, but found nothing to satisfy his mind; he did, however, initial and number some of the ballot papers, about twelve, but when at the close of the day he took these ballots out of the box he carefully obliterated the mark he had put upon them. Mr. *Cameron* then urged that these must necessarily be rejected as the deputy returning officer had no right to interfere in any way with the ballots after they had been placed in the box, and that as it was not known for which of the candidates the votes had been given

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the whole should be disallowed, and therefore the election should be declared void, as it could not be said that the disallowance of these votes might not change the majority. It is quite plain that whatever the deputy returning officer did, he did in good faith and with an anxious desire to do his duty; no person was allowed to see the front of the ballot papers, and as there can be no reason for supposing they were not the very papers furnished by him and used by the voters, I see no reason why they should now be rejected. I may say I looked at the ballot papers when they were before me, and I could see no trace of any mark on any of them. The deputy returning officer was not examined, I presume, because, on the evidence given by the respondents' agent, I had overruled the objection.

The case of division 1, *Camden*, remains to be considered. This is by far the most important, as it was in conseqence of the returning officer refusing to count these votes, the respondent *Hawkins* appeared to have a majority and was declared elected by the respondent *Stephens*. It was represented to me by *Meredith*, Q.C., who appeared for Mr. *Stephens*, that that gentleman had been bitterly attacked and all sorts of improper motives imputed to him, and he was desirous of giving his evidence to exonerate himself from all such charges. The evidence on this part of the case (that is to say the re-count of the votes) had been closed when this was said. I told Mr. *Meredith* I could see no evidence whatever of any improper conduct on the part of the returning officer; he appeared to me to have acted with a desire to do his duty, and that it was quite unnecessary for him to refute charges which, in my opinion, had no foundation; and if he had made a mistake in rejecting the statement in question it was after he had exercised an impartial judgment. When the returning officer on the day appointed proceeded to add up the

votes as set forth in the statement enclosed in the ballot boxes, it was found that in several cases the statements were unsigned; the returning officer stated that he did not feel authorized to add in the votes set forth in these statements. On this being said, several of the deputy returning officers who were present came forward and signed their statements, which were then received and counted by the returning officer. These statements are all in the form under sec. 57. The deputy returning officer for 1 division, *Camden*, was not present, and he swore that he had been advised to be absent from home on that day: the consequence was that the returning officer refused to accept the statement contained in the ballot box, and virtually disfranchised all the voters in that division. It was proved that the gentleman who had acted as agent for Mr. *Mills* at this poll, and who had received a certificate from the deputy returning officer, under sec. 58 of 37 Vic. ch. 9, signed by him, produced the certificate to the returning officer and desired him to accept that in lieu of the unsigned statement; this he refused to do, and, in my opinion, acted properly in so doing, as there is nothing in the Act which authorizes him to act on anything but the statement contained in the ballot box The simple questions then are:—Should the returning officer have acted on the unsigned statement, and if not, should he have acted on the certificate of the re-summation by the learned judge of the county court? The answer to these questions are of no consequence now so far as the election is concerned, as all the ballots have been re-counted, but they are of importance to the returning officer.

"By sec. 10 of 41 *Vic*, amending sec. 55 of 37 *Vic.*, ch. 9—

"Immediately after the close of the poll the deputy returning officer shall open the ballot box and proceed to count the number of votes given for each candidate.

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In doing so he shall reject all ballot papers which have not been supplied by the deputy returning officer, all those by which votes have been given for more candidates than are to be elected, and all those upon which there is any writing or mark by which the vote could be identified. The other ballot papers being counted and a list kept of the number of votes given to each candidate and of the number of rejected ballot papers, all the ballot papers indicating the votes given for each candidate respectively shall be put into separate envelopes or parcels; and those rejected, those spoiled and those unused shall each be put into a different envelope or parcel, and all those parcels being endorsed so as to indicate their contents shall be put back into the ballot box.

"By sec. 57 of 37 *Vic.*, ch. 9—

The deputy returning officer shall make out a statement of the accepted ballot papers, of the number of votes given to each candidate, of the rejected ballot papers, of the spoiled and returned ballot papers, and of those unused and returned by him, and he shall make and keep by him a copy of such statement, and enclose in the ballot box the original statement, together with the voter's list, and a certified statement at the foot of each list of the total number of electors who voted on each such list, and such other lists and documents as may have been used at such election. The ballot box shall then be locked and sealed and shall be delivered to the returning officer, or to the election clerk, who shall receive or collect the same. "The deputy returning officer and the poll clerk shall respectively take the oaths in forms Q. and R. to this Act, which shall be annexed to the statement above mentioned."

"The statement found in the ballot box is as follows:

'Statement under sec. 55.

'Election for the electoral district of *Bothwell*, held on Tuesday, the 20th day of June, 1882.

| | |
|---|---|
| Votes given for *Hawkins*, | 44 |
| Votes given for *Mills*, | 72 |
| Rejected, | 5 |
| Unused, | 101 |
| Spoiled, | 1 |

'I certify the within statement to be correct.

'Deputy Returning Officer.'"

"On this being produced, Mr. *Cameron* objected that there is no statement under 57, that this is a statement under sec. 55, but not signed by the deputy returning officer, and that there is no affidavit annexed. No statement is signed under sec. 55, what is required by that section is that upon opening the ballot box the deputy returning officer shall proceed to count the number of votes given for each candidate, and to reject certain votes; then the other ballot papers being counted and a list kept of the number of votes given to each candidate and of the other ballot papers, shall each be put into a separate envelope, and all these parcels shall be put back into the ballot box; nothing is said about placing the list in the ballot box. Then comes sec. 56, which has no bearing on this question; and then sec. 57, which requires a statement of the number of votes etc.; and by sec. 59 the returning officer shall 'add together the number of votes given for each candidate from the statements contained in the several ballot boxes returned by the deputy returning officers.' This, therefore, is the only mode by which the returning officer can make his return, as he has no authority to re-count or even inspect the different parcels. I have examined the forms furnished to the deputy returning officer, not only in this division, but also at the other divisions in which the returning officer allowed the statements to be signed. In all these cases I find forms

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under sec. 55, and one under sec. 57, so that it appears impossible that a deputy returning officer could with the slightest attention to his duty make a mistake between them. It appears to me there were two under sec. 55 and one under sec. 57. I have already pointed out that there is no statement required under sec. 55, but these forms are used in giving certificates to the agents of the candidates. The certificate given to the agent of Mr. *Mills* was produced; it is exactly the same, the writing the same and the figures the same, as that found in the ballot box, which is unsigned. I was under the impression at the trial, not having had an opportunity of ascertaining the difference between the statements contained in the paper furnished to the deputy returning officer, that the only error was in the deputy returning officer having omitted to sign a proper statement. I find now that I was mistaken. There was no statement prepared under section 57, and moreover, as was urged by Mr. *Cameron*, there was no affidavit annexed to the unsigned statement. It is true there was an affidavit in the prescribed form, but it was not annexed to any statement or other paper, and it is specially required by section 57 that it shall be annexed to the statement required by that section, and by which alone the returning officer is to be guided in adding up the votes. I find, therefore, the returning officer was right when he refused to count the so-called statement in his recapitulation of votes.

"The question that remains is, whether the returning officer was justified in returning Mr. *Hawkins* after receiving the certificate of the learned judge of the County Court. By section 14, 41 *Vic.*, ch. 6, 'in case it is made to appear within four days after that on which the returning officer has made the final addition of the votes for the purpose of declaring the candidate elected, on the affidavit of any credible witness, to the County

Judge of any county in which the electoral district, or any part thereof, is situated, that such witness believes that any deputy returning officer at any election in such electoral district in counting the votes has improperly counted or rejected any ballot papers at such election, or that the returning officer has improperly summed up the votes, etc., the said judge shall appoint a time, within four days after the receipt of the said affidavit by him, to re-count the votes, or to make the final addition, as the case may be, and shall give notice in writing to the candidates, or their agents, of the time and place at which he will proceed to re-count the same, or to make such final addition, as the case may be, and shall summon and command the returning officer and his election clerk to attend then and there with the parcels containing the ballots used at the election, which command the returning officer and his election clerk shall obey.'

"It is plain from the foregoing that there are two courses open to a party interested in disputing the return, and these depend on the nature of the objection. The returning officer, having no control over the ballots, has nothing to do with them or a recount of them, but he is responsible that his addition of the different statements is correct; if therefore the complaint is against the action of the returning officer it must necessarily be for a re-summation. But if the objection is that the ballots themselves have been mis-counted or improperly counted by the deputy returning officers, then there must be a re-count of the ballots, and the learned judge is, by the 4th sub-section, directed to re-count the votes according to the rules set forth in section 55 of the Dominion Elections Act of 1874. Within the time limited by the Act, application was made to the learned judge for a re-summation of the statements, not for a re-count of the votes, on the ground that the returning

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officer had improperly refused to count the statements from 3 *Dawn* and 1 *Camden;* the learned judge thereupon made the following order, addressed to the candidates, the returning officer and the election clerk:

"'You are hereby required to take notice that I, on the application of *Matthew Wilson*, Esq., solicitor for *David Mills*, one of the candidates at said election, and on reading the affidavit, etc., have appointed Monday, the twenty-sixth day of June, A.D. 1882, at the hour of eleven, in the forenoon, at my chambers in the town of *Chatham*, to make the final addition of votes taken at said election on 20th June, 1882, and that at said time and place I will proceed to make such final addition, etc."

"The parties did attend before the learned judge, upon which occasion a protest was delivered by Mr. *Atkinson*, as counsel for respondent *Hawkins*, protesting against any alteration being made in the return, unless on a general re-count of the votes. This objection was over-ruled by the learned judge, who made the following order:—

"'Pursuant to an appointment and order made by me on 24th June, 1882, and in the presence of *David Mills* and *John Joseph Hawkins*, and of *James Stephens*, returning officer, and *Charles Stephens*, election clerk, and after hearing counsel for all parties, and adding and summing up the vote given at said election for the respective candidates, as shewn by the statements of the various deputy returning officers, I find and declare that fifteen hundred and seventy-six votes were given at said election for said *David Mills*, and fifteen hundred and sixty-four votes for said *John Joseph Hawkins*, and that the said *David Mills* is elected for said electoral district by a majority of twelve votes. To which I hereby certify, and of all of which I notify you, the said *James Stephens*, returning officer.'"

"This result was obtained by adding to each of the candidates the number of votes given at No. 1, *Camden*, there being no mistake in the original summation by the returning officer.

"The returning officer made a special return to the Clerk of the Crown in Chancery, setting out all the facts and concluding: 'I have not been served with any certificate by the Judge of the County Court of the county of *Kent* of the result of the re-count of votes made by him, as provided by sub-section four of section sixty-seven of said act, nor with any other certificate or document other than the paper marked B, hereto annexed.—(already set out.)

"'Having received no certificate of a re-count of ballots, or of a result of a re-count of the votes at said election, as provided in sub-section four of section sixty-seven of said Act, I have deemed it my duty under the circumstances set out in this, my report, to allow the declaration made by me to stand, and make the return accompanying this report, and which return is so made upon the grounds and for the reasons mentioned in this my report.'"

"For the reasons already given, I consider that on an application for a resummation only, the learned judge has nothing to do with the deputy returning officer; his duty is simply to reconsider the addition of the different statements as made by the returning officer. In the present case the recapitulation of votes made by that officer stated that there was no statement signed by the deputy returning officer at division 1, *Camden*, and therefore the learned judge should have taken some steps to ascertain the number of votes given at that division before altering the recapitulation of the returning officer; and this could only have been done by a re-count of the ballots, as there was no statement with an affidavit annexed, nor in truth any statement under

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section 57 of the statute; and he should have certified the result to the returning officeer. This was not done, and I therefore think the latter was not bound, nor would he have been justified in altering his return. It is to be observed the returning officer, in his return to the clerk of the crown in chancery, set forth fully all the circumstances of the case, and it does appear to me that so far as his conduct in adhering to his original return is concerned it was quite unnecessary to make him a party to the present petition, as an application might have been made to the court to amend the return.

"There were a number of charges of corrupt practices by the respondent *Hawkins*, but as I had declared that I found Mr. *Mills* had a majority of votes, they were not proceeded with. The respondent *Hawkins* then proceeded to call witnesses in support of charges of corrupt practices against *Mills* by himself and his agents. A number of witnesses were examined, but I find that none of the charges were proved.

"I give judgment declaring that *John Joseph Hawkins* was not duly elected, but that the Honorable *David Mills* was duly elected.

"I dismiss the petition against *James Stephens*, with costs to be paid by the petitioners.

"I give judgment in favour of the petitioners, with costs to be paid by the respondent, *John Joseph Hawkins*, other than the costs of the said *James Stephens*, which are to be paid by the petitioners.

"(Signed,)

"*Thomas Galt.*"

12th Jan., 1884.

From this judgment, the respondent in the court below (*Hawkins*) appealed to the Supreme Court of *Canada*, limiting his appeal in his notice of appeal as follows:

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"And further take notice that the said respondent, *Hawkins*, limits his said appeal to the following questions, viz., the learned judge should not have held the Hon. *David Mills* entitled to the seat, but should have held the respondent, *Hawkins*, entitled to retain his seat, or should have ordered a new election upon the grounds:

"1. The learned judge upon the count of the ballots counted a number of ballots in favour of Hon. *David Mills*, which should not have been counted, on the ground that the same were improperly marked, or were marked so that the same could be identified, and refused to count a number of ballots for the respondent, *Hawkins*, which were properly marked and should have been counted for him.

"2. The learned judge should have refused to count any of the ballots cast in polling division number one for the township of *Sombra*, said ballots not appearing to be initialled by the deputy returning officer, and no evidence having been given at the trial to identify them as the ballots supplied by the deputy returning officer.

"3. The learned judge should have disallowed as many of the ballots cast at number one polling division in the township of *Sombra*, as appear by the evidence to have been initialled and numbered by the deputy returning officer, and such initialling and numbering to have been after the close of the poll obliterated by the deputy returning officer.

"4. The learned judge should have refused to count any ballots for polling division number one for the township of *Camden*, there being no proper statement or verification of the ballots cast, or of the result of the poll at said polling division.

"5. The learned judge should not have declared Hon. *David Mills* entitled to the seat in consequence of it appearing upon the scrutiny of the ballots at polling

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division number three for the township of *Dawn* were so marked as to enable the voters to be identified.

"6. The learned judge should have held charges number two, twenty-one and twenty-three in the schedule to the objections of the respondent, *Hawkins*, filed, to have been proved, and should have held that *David Mills* was incompetent to take his seat, on the ground that the evidence upon said charges showed corrupt practices committed by the agents of said *Mills*, and that one vote should have been struck off from the number of votes cast for said *Mills* for each of the persons referred to in said charges, or proved by the evidence thereunder to have been guilty of corrupt practices and the learned judge should have admitted further evidence of agency in respect of said charges and such evidence should now be admitted.

"7. The learned judge should have allowed the respondent, *Hawkins*, to give evidence upon the additional charges of corrupt practices set forth in the schedule put in at the trial, and evidence upon said charges should now be admitted. Dated this 26th day of January, 1884."

The principal question upon which the appeal in this case was decided, was as to the validity of the votes in Division No. 1, *Sombra*. The rulings of the learned judge at the trial as to the ballots in the other divisions, which were objected to as being imperfectly marked, were affirmed.

Mr. *Hector Cameron*, Q.C., for appellants:

Upon a scrutiny of the ballots at the trial it appeared that none of the ballots cast at polling division number one for the township of *Sombra* contained the initials of the deputy returning officer for that polling division, and no evidence was given to show that the ballot papers were those supplied by the deputy returning

officer. These ballots ought to have been rejected by the deputy returning officer under the provisions of sec. 55 of the Dominion Elections Act, 1874, inasmuch as *primâ facie* they are not the ballot papers supplied by the deputy returning officer and there is no evidence contra, and if these ballots are held good and counted the secrecy of the ballot might in any polling place be evaded and the evident intent of the Act frustrated. Sec. 80, Dominion Elections Act, does not remove the difficulty inasmuch as it cannot be said that the election at this particular polling place was conducted in accordance with the principles laid down in the Act.

These ballots, to the number of ten or twelve, were, before being deposited in the ballot box, initialled and numbered by the deputy returning officer of that polling division, and after the close of the poll, when the ballots were being counted, the deputy returning officer improperly obliterated said numbers and initials, and it was his duty, under the provisions of sec. 55 of the Dominion Elections Act, 1874, to have rejected these ballots on account of their having upon them a writing or mark by which the voter could be identified.

Under these circumstances the petitioners cannot show that the said *Mills* has a majority of legal votes. The ballots cast at number one polling division for the township of *Sombra* are illegal votes, or at least ten or twelve of these votes were improperly counted, and if so, the court cannot say which candidate has a majority of legal votes; therefore the election should be declared void. The case of *Jenkins* v. *Brecken* (1), relied on by the petitioners, is clearly distinguishable.

The irregularities in regard to the voting at number one polling division for the township of *Sombra*, and at number three polling division for the township of *Dawn*, resulted practically in open voting, and does not

(1) 7 Can. S. C. R. 247.

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come within the saving provisions of sec. 80, Dominion Elections Act 1874, and there should be a new election.

I submit further on behalf of the appellant that corrupt practices have been proved to have been committed on behalf of the Hon. *David Mills*, sufficient to entitle the appellant to have such a number of votes struck off from the votes polled for the said *Mills*, as to disentitle the said *Mills* to the seat and to leave the appellant with a majority of legal votes, and that corrupt practices have been shown to have been committed by agents of the said *Mills*, by reason whereof the said *Mills* is disentitled to the seat, under the provisions of the Dominion Elections Act, 1874.

[The learned counsel then reviewed the evidence on this part of the case.]

The learned judge at the trial erred in refusing to permit the appellant to enter upon evidence in respect to the various corrupt practices set out in the supplementary list put in at the trial, inasmuch as no order had been made limiting any time within which the appellant should give particulars of the charges of corrupt practices upon which he intended to rely, and inasmuch as there is no provision for obtaining such particulars from the appellant. It is submitted, therefore, that the appellant should have been allowed as a matter of right to enter upon such evidence and that at any rate, as a matter of discretion, such particulars should have been allowed at the trial, and that the appellant should now be allowed an opportunity of giving evidence thereunder. (Rule VIII., under Dominion Elections Act, 1874.)

Mr. *Lash*, Q. C., for respondents:

Upon the authority of the case of *Jenkins* v. *Brecken* in this court, it is not competent for Mr. *Hawkins* to affirm the validity of the election by taking his seat

thereunder and claiming still to hold it, and at the same time to disaffirm the election and seek to have it avoided because of alleged irregularities by those who conducted it.

It is contended that the ballots at No. 1 *Sombra* should all be rejected because not initialled by the deputy returning officer. The case of *Jenkins* v. *Brecken* settles this question, and such ballots should be counted. Then as no objection was raised to such ballots before the deputy returning officer, the appellant cannot now raise such objection under sec. 66 of the Dominion Elections Act, 1874.

Though the ballots cast at No. 1 *Sombra* appeared to have by the evidence borne initials and numbers which were afterwards rubbed off, yet there are no means now of ascertaining for whom such ballots were cast, and as the appellant has not filed a petition or otherwise attacked the election on this ground he cannot now claim that it is void because of the irregularity. The secrecy of the ballots was preserved, and no objection was taken at the close of the poll.

The irregularities complained of are such as are covered by section 80 of the Act.

Then, as to the corrupt charges against Mr. *Mills* none of them were proven, and the judge came to a proper conclusion with respect to them. Even if any such practice had been committed the person guilty thereof was not an agent of Mr. *Mills*, and the evidence to prove the agency was not properly tendered. It was in the discretion of the judge at the trial when to allow evidence as to additional charges.

RITCHIE, C J.:

This is an appeal from a decision of Mr. Justice *Galt* unseating the sitting member and declaring that Mr. *Mills* was duly elected as member for the House of Commons for the electoral district of *Bothwell*.

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Objections were taken before us with reference to individual ballots which have imperfect crosses or marks on them. During the argument we sustained the rulings of the learned judge as to these, with the exception of some which were retained for further consideration, but, however decided, they cannot have any effect on the result of this case. After a good deal of consideration, I find it impossible to lay down a hard and fast rule by which it can be determined whether a mark is a good or bad cross. I think that whenever the mark evidences an attempt or intention to make a cross, though the cross may be in some respects imperfect, it should be counted, unless, from the peculiarity of the mark made, it can be reasonably inferred that there was not an honest design simply to make a cross, but there was also an intention so to mark the paper that it could be identified, in which case the ballot should, in my opinion, be rejected. But, if the mark made indicates no design of complying with the law, but, on the contrary, a clear intent not to mark with a cross as the law directs, as for instance, by making a straight line or a round O, then such non-compliance with the law, in my opinion, renders the ballot null. The irresistible presumption from such a plain and wilful departure from the terms of the statute being that it was so marked for a sinister purpose.

I am aware that in coming to this conclusion I am differing from the decision in the case of *Woodward* v. *Sarsons* (1), but I cannot bring my mind to the conclusion that a ballot should be refused when there is evidence of an honest attempt to make a cross. One ballot objected to which was marked, as may familiarly be said, by an inverted V, thus $\wedge$. I think this good as showing an intention to make a cross and no indication of an intent at identification. There are also two ballots upon which are to be found more

(1) L. R. 10 P. C. 773.

crosses than one. If the principle I have just referred to is a correct one, then these ballots should be received. However, as there are two ballots on the other side marked in the same way, it would make no difference in the conclusion if we ruled otherwise.

In poll No. 4, *Chatham*, there was a ballot good on its face found in the spoiled ballot envelope, and not among the rejected ballot papers. This ballot could not either affect the election. There was nothing on the ballot to show that it could have been rejected on the ground alleged, viz: because it was marked for both parties. Now, I have looked at it, and I cannot discover the slightest mark of any kind whatever on the ballot, except the × opposite the name of *Mills*. The returning officer swears "none rejected." No hypothesis has been put forward which could justify the ballot being rejected except that it is alleged it was treated as marked for both candidates. My own eye sight tells me that there is on this ballot nothing whatever to justify this allegation, on the other hand there is, in my opinion, a very reasonable hypothesis that the voter may have wrongly marked the ballot, and discovering his mistake returned it to the officer as spoiled and got another in its place.

The returns of the officers show that 139 voted at this polling place, and 139 were counted without the two, of which this is one, alleged to have been spoiled, which is conclusive that this could not have been a rejected ballot.

Then there are the statements given by the deputy returning officer under secs. 55 and 57, in which it appears that the accepted ballot papers were 139 in number, and then the sworn statement that "one hundred and thirty-nine votes were polled in polling district No. 4, *Chatham*. In my opinion, therefore, the judge was right in treating this ballot as a spoiled ballot and not a rejected ballot.

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Then really the only point in this case which could affect the election is the one raised in reference to No. 1 *Sombra*. I entirely agree with the learned judge that the case of No. 1 *Sombra* is directly within the principle of the case of *Jenkins*, v *Brecken* (1). The learned judge thus summarizes the evidence as to No. 1 *Sombra*.

[The learned Chief Justice then read from the judgment of *Galt*, J., (2).]

The agent of Mr. *Hawkins* and the deputy returning officer appear to have been equally at fault, as to the strictly correct course to be pursued, and both appear to have been acting in good faith and desirous of doing what was legal and right. The opinion of the deputy returning officer, influenced no doubt by what Mr. *Hawkins's* agent said, changed his mode of procedure, which was exactly that pursued in the *Brecken* case, and initialled and numbered about 12 of the ballot papers when he seems to have thought he was in error in changing the course he at first adopted, and returned to his original mode of procedure; but does not meddle with the ballots so irregularly initialled. On the close of the poll, however, having evidently, from changing his mode of numbering and initialling, and reverting to his original practice, become satisfied that the course he had adopted was not regular and proper, he obviously endeavored, in the presence of the agents of the parties, to remedy the irregularities; and so when the poll was closed and the ballot box opened, as the learned judge expressed it: "The returning officer in good faith and with an anxious desire to do his duty," endeavored to remedy the wrong he had committed by carefully and effectually obliterating the marks he had put on these ballots so completely, the learned judge says, "that he could see no trace of any mark on any of them." He also says that no person was allowed

(1) 7 Can. S. C. R. 247. (2) *Ubi supra* 681.

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to see the front of the ballot papers, (and which I think is the fair inference from the evidence,) whereby the secrecy of the ballots was preserved and the identity of the ballots, as furnished by him and used by the voters, clearly established, because they must have been the very papers furnished by him and used by the voters, otherwise they could not have had the numbers and initials of the deputy returning officer on those which he obliterated, and all this in the presence of the agents of both parties without the slightest objection on their part, but, on the contrary, the fair inference is, with their implied, if not expressed, assent and concurrence. And this is the fair inference from the evidence of *Dawson*, the respondents' agent, and I may say if they had been seen by the deputy returning officer, I should doubt whether even this would affect the question, because the secrecy in such a case would be as much preserved by the oath of the deputy returning officer as in the case of ballots he marks for illiterate voters.

It seems to me that this in no way differs from the principle acted on in *Jenkins* v. *Brecken*, but is a much stronger case for the application of that principle. The only difference being the rectification of the error or irregularity by the officer at the close of the poll. The appellant's contention is, that this rectification made a ballot bad in the box good out of the box, but this, though on the surface plausible, is, in my opinion, by no means a legitimate or accurate way of stating the case; if literally so, it is no more nor less in effect than was done in the *Brecken* case. In what respect does the present case differ substantially from that of an officer inadvertently marking a ballot and giving it to a voter and before being used he discovers that he has improperly marked it, and then and there effectually expunges the mark and hands it to the voter? In such a case he

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immediately, before any harm is done, corrects his error. In the present case the officer, in the fair and legitimate discharge of his duty, innocently, but irregularly, marks a ballot; discovering his error at the very first moment it could be done, in the presence of the agents of the parties, he proceeds to undo what he had improperly done, and he accomplishes this in such a manner that the secrecy of the ballot is preserved, and also in such an effectual way that there is no possibility that any party could be injured thereby, and this, too, in the presence and without the slightest objection or protest on the part of the agents of the candidates. Under such circumstances I can discover no difference practically between the case of correcting the error before or after the polling, the effect being precisely the same in both cases. I am therefore by no means prepared to hold that, in the case of an accidental and innocent irregularity, honestly and *bonâ fide* rectified on the spot before any injury has or can have resulted either to the candidates, the voters, or to the public, such rectification can be ignored and the irregularity relied on as invalidating the election. At the same time I am free to say I think the actions of the deputy returning officers should be always watched and subjected to rigid scrutiny.

But assuming this to be an irregularity and the rectification of it equally irregular, if ever there was a case to which section 80 of the Dominion Statute is applicable it seems to me this is peculiarly that case. That section is as follows:—

No election shall be declared invalid by reason of a non-compliance with the rules contained in this act, as to the taking of the poll or the counting of the votes, or by reason of any want of qualification in the persons signing a nomination paper received by the returning officer, under the provisions of this act, or by any mistake in the use of forms contained in the schedules to this act, if it appears to the tribunal having cognizance of the question, that the election was

conducted in accordance with the principles laid down in this act, and that such non-compliance or mistake did not affect the result of the election.

Now, as regards these votes, it cannot be doubted the election was conducted in accordance with the principles laid down in the act, and I think it equally clear that any non-compliance with the rules contained in the act, as to the taking of the poll or the counting of the votes, did not affect the result of the election.

The secrecy of the ballot was not infringed, the ballots are unquestionably those given by the deputy returning officer to the voters, the voters have freely marked them for the parties for whom they desired to vote, the candidates have got the benefit of the votes marked for them, the public have had the benefit of the votes so cast so far as they affect the return of one or other of the candidates. On what principle, then, or with what object, should the election be set aside? The only reason alleged, as I understand the contention, is that as the ballots alleged to have been marked were bad ballots when put in the box and cannot now be identified, and so picked out, it cannot be told for whom the parties using them voted, and therefore all the votes polled at that polling place should be excluded from the count. But this contention answers itself, and so far from establishing the invalidity of the election furnishes, in my opinion, an overwhelming reason why the validity of the election under sec. 80 should, so far as this polling place is concerned, be sustained; this construction, while it strictly preserves the principles on which it is provided the election shall be conducted, prevents to a large extent the election from being jeopardized or defeated by the default or innocent action of the returning officers, which evidently was the intention of the legislature in enacting section 80. Therefore, with regard to

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these votes also, I concur with the learned judge, who tried this case, that they should be held good.

There were some charges of corrupt practices by reason whereof the appellant claims that Mr. *Mills* is disentitled to the seat. One is the *Mowat-Gordon* case; the second, the *Bachard* case, and the 3rd, the *Craig* case. These the learned judge who tried the case thought had not been sustained as there was not any proof of agency. I have carefully read the reasons given by the learned judge and looked at the evidence, and I am not prepared to say that he has arrived at a wrong conclusion in any of these cases, even if he was wrong in concluding that the loan of five dollars by *Gordon* to *Mowat* was not a bribe (a rather doubtful case) as there is clearly no evidence to show that *Gordon* was the agent of *Mills*, the most that could be done would be to strike off that vote and that would not affect the election.

There is one point which, it is alleged, was not dealt with by the learned judge, but is now relied on by Mr. *Cameron*, though not included in the notice of appeal, viz., the right to tender evidence of agency in the case of *Craig*, I think the counsel has not placed himself in a position in the lower court to claim that privilege on appeal. As to another point, viz., the refusal to allow charges to be added, the learned judge exercised his discretion, which he had a perfect right to do.

For these reasons, I am opinion, that the appeal should be dismissed with costs.

STRONG, J.:—

While agreeing that the ballots in this case were sufficiently marked, I am not prepared to lay down any general rule as to what is or is not to be deemed a sufficient marking, or whether a cross or an attempt

to make a cross is indispensable. I desire also to add that by assenting to the grounds upon which the judgment proceeds, I do not mean to preclude myself from the right to consider in any future case in which the question may arise, whether *any* mark put on a ballot by mistake and in good faith by a deputy returning officer is to be held a ground for rejecting the ballot. Subject to these observations, I concur with the Chief Justice.

FOURNIER, J. :—

Par leur pétition les Intimés ont réclamé pour l'honorable *David Mills*, le siège de la division électorale de *Bothwell* à la Chambre des Communes, actuellement occupé par l'Appelant. Celui-ci a répondu qu'il avait été duement élu pour la dite division, mais n'a pas produit de contre-pétition attaquant la validité de la dite élection. Cependant, comme il en avait le droit en vertu de la sec. 66 de l'acte d'élection de 1874, il a allégué des actes de corruption commis par l'Intimé et ses agents, suffisants s'ils sont prouvés, pour empêcher son adversaire d'être déclaré duement élu.

L'honorable juge *Gall*, qui a procédé au procès de cette pétition, a déclaré que M. *Mills* avait obtenu une majorité de neuf votes sur son concurrent et déclaré qu'il avait droit au siège de la dite division. Il a en même temps renvoyé les accusations de menées corruptrices.

C'est de ce jugement qu'il y a appel à cette cour.

L'Appelant ayant, en vertu de la sec. 48 de l'acte de Cour Suprême réglant l'appel à cette Cour en matière, d'élections,—donné avis qu'il limitait son appel à certaines questions énumérées dans son avis, la Cour est en conséquence appelée à ne se prononcer que sur les questions suivantes :—

1. Les bulletins trouvés dans la boîte de scrutin du

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poll no 1 du township *Sombra* ne portant pas les initiales du député officier rapporteur devaient-ils être rejetés pour cette raison ?

2. Comme il est en preuve que dans le même poll dix ou douze bulletins portant les initiales du député officier-rapporteur et le numéro du votant sur la liste électorale ont été déposés par le député officier-rapporteur dans la boîte du scrutin—et qu'au dépouillement du scrutin, les initiales et les numéros mis par le dit député officier-rapporteur ont été par lui effacés—ces dix ou douze bulletins ne devraient-ils pas aussi être retranchés ?

3. L'état du poll trouvé dans la boîte du scrutin au poll n° 1, township de *Camden*, n'étant pas signé par le député officier-rapporteur tous les bulletins du poll ne devraient-ils pas être rejetés ?

4. Tous les bulletins déposés au poll n° 3, township de *Dawn*, étant numérotés, ont été rejetés par le juge ; au lieu de simplement rejeter les bulletins n'aurait-il pas dû, comme le prétend l'Appelant, déclarer l'élection nulle en conséquence de cette irrégularité et de celles qui ont eu lieu au poll n° 1, *Sombra* ?

5. Enfin, les accusations de menées corruptrices sont-elles prouvées ?

Dans l'examen des bulletins nous en avons trouvé un certain nombre marqués d'une manière qui n'est pas strictement conforme à la loi qui exige que le voteur fasse une croix dans la division du bulletin où se trouve le nom du candidat pour lequel il entend voter. Pour les personnes habituées à l'usage de la plume, le signe d'une croix est très facile à faire ; mais il n'en est pas de même pour les personnes illettrées. On sait par une expérience de tous les jours quelle difficulté éprouve la plupart de ces personnes à se servir de la plume, lorsqu'elles sont appelées dans les affaires ordinaires, à faire leur marque d'une croix comme attestation de leur

signature. C'est tellement le cas que la plupart du temps, celui qui écrit leurs noms au bas d'un document, est le plus souvent obligé de tenir et même de diriger la plume que ces personnes se contentent de toucher pour accomplir la formalité voulue. Aussi, n'est-il pas étrange de voir sur les bulletins beaucoup de croix très irrégulièrement faites. S'il fallait rejeter tous les bulletins ne portant pas une croix semblable au *fac simile* donné par la loi, un grand nombre de voteurs se trouverait de cette manière privé de l'exercice de leur droit de franchise. Mais la loi doit-elle être interprétée aussi strictement ? Son but étant d'assurer le secret du vote, ne doit-on pas considérer au contraire comme valides les bulletins faisant voir à leur face une tentative faite de bonne foi pour faire une croix ainsi que la loi le veut ?

Parmi les bulletins que nous avons examinés, il s'en est trouvé où la tentative du voteur à faire une croix se rapprochait plutôt de la forme d'un V que de celle d'une croix ; quelques-uns ont mis deux croix ; d'autres y ont fait une seule ligne soit perpendiculaire, soit horizontale. La première chose à faire avant de décider de la validité du bulletin était sans doute d'adopter une règle uniforme d'après laquelle ils seraient tous admis ou rejetés. Nous avons déjà pour nous guider dans cette opération les principes énoncés dans la cause de *Woodward* vs *Sarsons* (1), où les mêmes difficultés au sujet de la marque des bulletins ont été soulevées et dans laquelle la cour (C. P.) a adopté les règles suivantes qui sont d'une application évidente à la présente cause. (2)

The ballot paper must not be marked so as to show that the voter intended to vote for more Candidates than he is intitled to vote for, nor so as to leave it uncertain whether he intended at all, or for which Candidate he intended to vote, nor so as to make it possible,

(1) 10 L. R. C. P. 733. (2) P. 733.

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by seeing the paper itself, or by reference to other available facts, to identify the way in which he has voted.

If these requirements are not substantially fulfilled, the ballot paper is void and should not be counted, and if it is counted, it should be struck out on a scrutiny.

But the placing of two crosses, or a single stroke (thus 1) in lieu of a cross, or a straight line (thus, 1)—one mark like an imperfect letter P in addition to the cross, or a star instead of a cross, or a cross blurred or marked with a tremulous hand, or a cross placed on the left hand side of the ballot paper, or a pencil line drawn through the name of the Candidate not voted for, or a ballot paper torn longitudinally through the centre—*Held* not to avoid the vote, in the absence of evidence of connivance or pre-arrangement.

Les règles ci-dessus énoncées ont été considérées comme contenant une saine doctrine et en partie adoptées par les juges. Dans le cours de la discussion de cette cause l'honorable juge en chef ayant soumis à l'examen de ses collègues une règle formulée de manière à couvrir à peu près toutes les difficultés qui peuvent être soulevées à propos de la marque des bulletins, tous les membres de la Cour y ont donné leur adhésion. Cette règle n'est toutefois pas susceptible d'une application aussi générale que celle énoncée dans la cause de *Woodward* et *Sarsons*, car on ne pourrait pas l'invoquer pour valider un bulletin, comme dans les cas ci-dessus cités, ne portant par exemple qu'une seule ligne perpendiculaire ou horizontale. Dans ce cas suivant notre règle on ne peut pas considérer qu'il y a eu de bonne foi une tentative de faire une croix, et les bulletins marqués de cette manière seraient rejetés. Je n'ai pas besoin de répéter ici la forn ule de cette règle que l'honorable juge en chef a déjà lue tout au long dans ses notes sur cette cause.

L'examen des bulletins ayant été fait d'après les règles ci-dessus énoncées, le résultat devant cette Cour a été le même que devant l'honorable juge *Galt*, donnant une majorité de neuf voix à M. *Mills*.

La question soulevée au sujet des votes au poll n° 1,

*Sombra*, dont la nullité est demandée par l'appelant, parce que les bulletins ne portaient pas les initiales du député officier-rapporteur est déjà venu devant cette Cour dans la cause de *Jenkins* et *Brecken* (1).

Sur ce point la décision de la Cour est résumé comme suit :

That in the present case, the Deputy Returning Officer having had the means of identifying the ballot papers as being those supplied by him to the voters, the neglect of the Deputy Returning Officers to put their initials on the back of these ballot papers not having affected the result of the election, or caused substantial injustice, did not invalidate the election.

L'appelant prétend que cette décision ne saurait s'appliquer à la présente cause, parce que la preuve faite dans celle-ci est insuffisante pour identifier les bulletins. Cependant dans l'une comme dans l'autre, les initiales ont été mises sur la marge au lieu d'être sur le dos du bulletin. Le voteur muni d'un semblable bulletin le rapportait au député officier-rapporteur qui avait toute la facilité possible de s'assurer que c'était bien le bulletin qu'il avait donné, en enlevant la marge portant ses initiales, avant de mettre le bulletin dans la boîte du scrutin. Il acquérait par là une connaissance positive que le bulletin déposé était bien celui qu'il avait fourni. Il est vrai qu'il a manqué dans cette cause une preuve qui a été faite dans celle de *Jenkins*. Le député officier-rapporteur et le clerc du poll n'ont pas été entendus comme témoins pour confirmer par leurs témoignages le fait de l'identité des bulletins. La raison de cette omission est que l'un de ces officiers était mort, (le député officier-rapporteur) et l'autre absent aux Etats-Unis, lorsque la preuve a été faite. *J. P. Dawson*, l'un des agents de l'Appelant était présent à l'ouverture de la boîte du scrutin et à l'exception de quelques minutes il avait été présent au poll toute la

(1) 7 Can. S. C. R. 247.

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journée. Il a vu le député officier-rapporteur prendre les bulletins de la boîte, les compter et les lui montrer ainsi qu'aux autres agents qui étaient présents. Il n'a vu aucune irrégularité dans la manière de conduire l'élection à ce poll, si ce n'est celle qui forme le sujet de la deuxième question. Cette irrégularité consiste dans le fait que dix ou douze bulletins sur le dos desquels se trouvaient les initiales du député officier-rapporteur et le n° qui se trouve vis-à-vis le nom du voteur sur la liste électorale ont été donnés à autant de voteurs qui les ont remis au député. Celui-ci les a déposés ainsi marqués dans la boîte du scrutin. La chose s'est passée de la manière suivante : *Dawson*, l'un des agents de l'Appelant, rapporte que le député officier-rapporteur ayant mis ses initiales sur la marge des bulletins et qu'il ne les avait pas mises sur le bulletin même, lui en fit la remarque en lui disant que ce n'était pas suivant la loi,—sans toutefois lui dire comment il devait faire. Après cette observation le député officier rapporteur mit ses initiales et les nos. sur dix ou douze bulletins. Ayant ensuite examiné la loi et n'y trouvant pas la solution qu'il cherchait, il revint à sa première manière de ne mettre ses initiales que sur la marge sans aucune marque sur le bulletin.

Lorsque le député officier-rapporteur, à la clôture du poll, sortit les bulletins de la boîte au scrutin, il les montra un par un à chacun des agents des candidats. Lorsqu'il arriva aux bulletins portant les numéros et ses initiales, il les effaça avec un morceau de caoutchouc, et les compta ; il n'en fut pas compté d'autres que ceux qu'il avait sortis de la boîte. Il déclare aussi n'avoir pas vu d'autre irrégularité dans la manière de conduire l'élection à ce poll que celle qui a eu lieu par rapport à ces 10 ou 12 bulletins marqués comme susdit Il dit aussi que personne n'a pu voir comment avait voté ceux qui avaient déposé des bulletins marqués, parce

que les marques en furent effacées avant qu'ils ne fussent comptés et si bien effacés que l'honorable juge *Galt* n'a pu voir la moindre trace de ces marques. Quant à l'identité de ces bulletins, elle est certaine, puisqu'ils ont pu être reconnus par les numéros et les initiales comme étant ceux fournis par le député officier-rapporteur. La preuve établit aussi positivement que le secret du vote n'a pas été violé par ces irrégularités.

On peut encore fortifier la preuve faite de l'identité de tous les bulletins, tant de ceux qui ne portaient pas originairement d'initiales que de ceux sur lesquels les initiales et les numéros qui y avaient été mis ont ensuite été effacés, par le serment solennel que le député officier-rapporteur à ce poll a prêté pour constater la régularité de ces procédés. Entre autres choses il déclare qu'il a tenu le poll correctement, constate le nombre de votes donnés à chaque candidat, à son poll, et dépose de plus :

That to the best of my knowledge and belief, it contains a true and exact record of the votes given at the polling station, in the said polling district, as the said votes were taken thereat; that I have faithfully counted the votes given for each candidate, in the manner by law provided, and performed all duties required of me by law; and that the report, packets of ballot papers, and other documents required by law to be returned by me to the Returning Officer, have been faithfully and truly prepared and placed within the ballot box, as this oath will be,—to the end that the said ballot box, being first lawfully sealed with my seal, may be transmitted to the Returning Officer according to law.

Si la preuve en cette cause n'est pas aussi forte que celle faite dans la cause de *Jenkins*, elle est toutefois suffisante pour nous convaincre que les bulletins déposés au poll n° 1, *Sombra*, malgré les irrégularités auxquelles il a été fait allusion ci-dessus, sont certainement les mêmes que ceux qui ont été fournis par le député officier-rapporteur, et qu'il a comptés à l'ouverture de la boîte du scrutin dans laquelle il les avait déposés.

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Maintenant ces irrégularités ayant été commises de bonne foi, sans aucune intention quelconque d'éluder les dispositions de la loi, n'est-ce pas le cas de faire application du principe admis par cette cour dans la cause *Jenkins* vs. *Brecken* au sujet du défaut d'initiales sur les bulletins, tant à ceux qui n'ont jamais eu d'initiales qu'à ceux sur lesquels après avoir été mises, elles ont été effacées

Il n'est peut-être pas sans danger d'admettre qu'un député officier-rapporteur ait pu changer l'état d'un bulletin ; mais si la chose n'est jamais faite autrement qu'elle l'a été dans la présente cause, c'est-à-dire de la meilleure foi du monde, dans l'unique but de réparer immédiatement et avant qu'aucun tort n'en fût résulté, et du consentement de tous les agents des candidats, une erreur qui, si elle n'eût pas été réparée alors, auraient pu avoir de graves conséquences ;—il est bien certain qu'il ne saurait jamais résulter d'inconvénients d'un tel procédé fait dans les circonstances où l'a été celui dont il s'agit. Il en serait tout autrement, s'il y avait la moindre preuve que le député officier-rapporteur en agissant ainsi avait la plus légère idée que ce changement pouvait profiter plutôt à l'un qu'à l'autre des deux candidats, je n'hésiterais pas alors à mettre de côté toute la votation faite à ce poll. Je suis en conséquence d'avis que la décision de l'honorable juge *Galt* sur les deux questions concernant les irrégularités qui ont eu lieu au poll n° 1, *Sombra*, étant conforme à celle de *Jenkins* vs. *Brecken* et au principe de la sec. 80 de l'acte des élections de 1874, doit être confirmée.

La troisième irrégularité dont se plaint l'appelant est fondée sur ce que l'état du poll trouvé dans la boite du scrutin au poll n° 1 *Camden* ne portait pas la signature du député officier rapporteur. Cette question a eu une grande importance dans cette cause ; car l'officier-rapporteur se fondant sur cette irrégularité n'a pas

compté les votes donnés à ce poll, ce qui a eu l'effet de donner une majorité apparente à l'appelant qu'il a déclaré élu. L'officier-rapporteur mis en cause pour répondre de sa conduite à cet égard, a été reconnu par l'honorable juge justifiable d'en avoir agi ainsi. Comme il n'y a point d'appel de cette partie de cette décision, il ne reste qu'à savoir si malgré cette omission de la signature, suffisante pour excuser l'officier-rapporteur, les votes enregistrés à ce poll ne devaient pas être comptés. Dans un décompte de la votation ordonné par le juge du comté à la demande de l'intimé les votes omis à ce poll furent comptés et l'état de la votation déclaré comme étant de 1576 pour l'intimé et 1564 pour l'appelant. Toutefois l'ordre du juge n'ayant pas été communiqué à l'officier-rapporteur, celui-ci fit son rapport conformément à la détermination qu'il avait prise de ne pas accepter l'état non signé qui est dans la forme suivante:

Statement under sec. 55.

Election for the Electoral District of Bothwell, held on Tuesday, the 20th day of June, 1882.

| | |
|---|---|
| Votes given for Hawkins, | 44 |
| Votes given for Mills, | 72 |
| Rejected, | 5 |
| Unused, | 101 |
| Spoiled, | 1 |

I certify the within statement to be correct.

Deputy Returning Officer.

Si, comme l'a déclaré l'honorable juge *Galt*, les pouvoirs de l'officier-rapporteur, ne lui permettent pas d'examiner les bulletins pour vérifier cet état il n'en est pas de même du juge appelé à faire un décompte de la votation. Sans entrer dans la considération des devoirs respectifs de ces deux officiers, il est indubitable que sur la contestation de l'élection, le juge, qui a présidé au procès de cette pétition avait droit de se servir non-seulement des documents trouvés dans la boîte du

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scrutin, mais d'autres preuves secondaires qui auraient pu lui être fournies, pour arriver au véritable chiffre de la votation. Sa juridiction est complète à cet égard. L'examen des bulletins devant la Cour en première instance et ici ayant constaté le véritable état de la votation, la question d'irrégularité du certificat est ici sans importance, car il est évident qu'elle n'a nullement affecté le résultat de la votation.

La quatrième question est au sujet du poll n° 3 de *Dawn*. Là tous les bulletins ont été numérotés et rejetés pour cette raison, L'appelant ne s'en plaint pas pas, mais il s'appuie sur ce fait et sur celui des dix bulletins du n° 1 *Sombra*, sur lesquels les nos. et les initiales ont été effacés, pour demander la nullité de l'élection prétendant que ces faits étaient de nature à affecter le résultat de l'élection. Malheureusement il ne peut établir cette conséquence,—car il est absolument impossible de connaître pour qui ont été donnés les dix ou 12 votes du poll n° 1 de *Sombra*—et quant à ceux de *Dawn*, leur rejet n'est évidemment pas à son détriment, mais à celui de son adversaire qui avait une majorité de cinq votes sur lui, dans ce poll.

L'appelant peut-il après avoir maintenu la validité de l'élection et occupé son siège en Chambre, en demander maintenant la nullité, sans avoir présenté de pétition à cet effet et sans s'être conformé à toutes les formalités voulues par la loi pour être admis à demander la nullité d'une élection ? Cette question n'est pas nouvelle ; elle s'est présentée plusieurs fois déjà devant les tribunaux et notamment devant cette Cour dans la cause de *Jenkins* et *Brecken*, et dans celles de *Sommerville* et *Laflamme* (1) où elle a été jugée en sens contraire aux prétentions de l'appelant.

D'ailleurs avant de déclarer nulle une élection pour cause d'irrégularité, les tribunaux exigent d'après l'au-

(1) 2 Can. Sup. C. R. 216.

torité suivante *Woodward* v. *Sarsons* (1) une preuve que l'appelant n'a pas faite :

To render an election void under the ballot act, by any reason of non observance of or non compliance with the rules or forms given therein, such non observance or non compliance must be so great as to satisfy the tribunal before which the validity of the election is contested, that the election has been conducted in a manner contrary to the principle of an election by ballot, and that the irregularities complained of did affect or might have affected the result of the election.

Les moyens de nullité fondés sur les irrégularités mentionnées plus haut sont évidemment insuffisants d'après cette autorité et doivent être rejetés.

Il ne reste plus que les accusations de menées corruptrices pratiquées par l'Intimé ou ses agents. Après avoir lu avec soin la preuve que l'Appelant a offerte à ce sujet, je me bornerai à dire que le verdict de l'honorable juge *Galt* est le seul qu'il pouvait rendre en se fondant sur cette preuve, et que c'est avec raison qu'elles ont été renvoyées.

Pour toutes ces raisons je suis d'avis que le présent appel doit être renvoyé avec dépens, et que l'Appelant n'a pas été dûment élu, mais que l'honorable *David Mills* a été dûment élu.

HENRY, J.:

I concur in the conclusion arrived at in the court below by the learned judge who tried this case, and also with the learned Chief Justice of this court, with the exception of one point, and that is as regards the ballot papers which were numbered by the returning officer in No. 1 *Sombra* and handed to the voters and then returned to him so numbered. The statute provides that the ballots should only have his initials and these have not. In the case of *Jenkins* v. *Brecken* I was of opinion that it was a fatal defect, but the ma-

(1) L. 10 C. P., p. 733.

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jority of the court on that point were of a contrary opinion, and therefore on that point we must be governed by the decision in that case. But as to the numbering of the ballot papers it is a very different thing, for by numbering them the returning officer could identify the voter, although if he had only put his initials on them he would be unable to do so. The clear intention of the statute is, that no mark shall be put on the ballot which can leave that ballot open to a suspicion that it was so marked in order to identify the voter, and if such a mark is put on a ballot, it should, in my opinion, be declared illegal and bad. All these questions have been decided in the case of *Woodward* v. *Sarsons* (1), and the head note in that case giving the result of the judgment, is as follows:

> To render an election void under the ballot act, by reason of a non-observance of or non-compliance with the rules or forms given, such non-observance or non-compliance must be so great as to satisfy the tribunal * * that the election has been conducted in a manner contrary to the principle of an election by ballot.

Under this decision it appears to me that all the votes objected to as improperly marked and allowed by the learned judge in the court below were properly allowed, and the only question then is as to the ballots objected to as having been numbered. Now, the object in not allowing the papers to be numbered, is to prevent anybody finding out for whom the parties who got these ballots have voted. If we allow a ballot paper, which is numbered when handed to the voter, to be valid, then we put it in the power of the returning officer who has put the number on, with the aid of others, to be able to say for whom these persons voted. It seems to me that in every such case the law has been evaded, and there is not that secrecy which the candidates under the statute are enti-

(1) L. R. 10 P. C. 733.

tled to exact. It is true that in this case it is contended that the returning officer acted in good faith, but if we are to be called to decide upon that question of good faith, it will be opening for this court, as well as for the court below, an issue which was never intended to be tried under the statute. Under these circumstances I am justified in arriving at the conclusion that when a ballot paper has been numbered it is a ballot paper which should not be counted, because a returning officer would always be able, by referring to his notes, to ascertain for whom the voter has voted, and he can communicate his knowledge to his friends and thereby secrecy has been done away.

But in this case the appellant, although he does not claim to retain the seat on this ground, claims that the election should, in consequence of these ballots having been numbered, be declared void.

The question, it appears to me, is whether he is, as appellant in this case, in a position to ask this court to arrive at such a result. In the case of *Jenkins* v. *Brecken*, the learned Chief Justice says :—

He (the respondent) accepts the return which gave him a majority of votes, takes his seat in Parliament as a duly elected member, and when his right to hold the seat is attacked, urges on this court to adjudge that at a legal election, regularly and properly held, he was elected by a majority of the electors, and that the majority being so in his favor, he is lawfully entitled to hold the seat he now occupies, but with the same breath, he says: If you cannot find the majority in my favor, then the whole election is irregular, illegal and void, and must be set aside; so that the validity or invalidity, according to his contention, is made to depend upon his having or not having a majority of votes; in other words, he says, through his counsel: If you find I have a majority of votes, it's a right good election and should not be disturbed, but if you find Mr. *Brecken* has the majority, its a dreadfully bad election by reason of divers illegalities and irregularities, and, forsooth, in the public interests should not be allowed to stand. In the meantime, bad as this respondent contends the election is, great as is the public exigency, when he has not the majority, that it should be set aside, he finds it a good enough elec-

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tion to enable him to take his seat in Parliament and make laws for those unfortunate electors who have by these illegalities, mistakes, or irregularities of the returning officers, been prevented from legally electing their members.

But this contention cannot prevail. It shocks common sense. If he wished to attack this election, he should have attacked it by petition, depositing his $1000 as security, when all the candidates at the election would be respondents, as would the returning officer whose conduct is complained of, as provided by section 64.

My brother *Strong*, in reference to this point also says :

The petition was filed by Mr. *Brecken* claiming the seat as having a majority of the legal votes. If the appellant desired to raise this question as to the validity of this election he should have presented a petition himself praying its avoidance, but this he has not done.

The 66th section of the act of 1874, manifestly does not enable him to impugn the election as wholly void and irregular, without a petition ; it merely enables a respondent to a petition, by which the seat is claimed, to recriminate, by shewing that even if the petitioner should prove that he has a majority, he is, by reason of the illegal conduct of himself or his agents, disentitled to have the seat awarded to him.

In that case although differing from the majority of the court on the point as to the initialling of the ballot papers, I said :—

As to the other point, I think it was the duty of the sitting member, if he did not wish to allow the respondent to take the seat, to resign his own seat, and file a petition setting forth grounds to avoid the whole election. Then all parties interested would have been heard, which has not been the case here. They are not here, and this court cannot take upon itself to decide upon the rights of parties who have not been brought before it.

In reference, therefore, to these votes if the appellant had not taken his seat and the respondent was now sitting, according to the views I entertain, I think the appellant as a petitioner would have been entitled to have had the election declared void, but having taken his seat, in the face of the judgment of *Jenkins* v. *Brecken*, I cannot see how we can now at his request

declare that the seat he is claiming should be declared void.

It is true that the appellant in this case could have the election declared void on account of acts of disqualification committed by the respondent or his agents, but as there is no evidence, in my opinion, to arrive at such a conclusion, I have come to the conclusion that in the present case the appellant is not entitled to the seat, and that the respondent is entitled to retain the seat to which he has been declared entitled by the judgment appealed from.

GWYNNE, J.:

I have entertained--and I confess I do still entertain —grave doubts whether we should not be acting more in conformity with the spirit of the Dominion Elections Act, if we should insist upon a precise fulfilment of the terms literally prescribed by the 45th sec. of the Act, by requiring every ballot paper, in order to constitute a good vote, to be marked with a single cross. The statute having prescribed a particular description of mark, and that prescribed being so easily made, it should, I think, be required as the only mode of complying with the statute. It would seem, however, that some people have a difficulty in making this so simple mark if we may judge from the very imperfect attempts to make it appearing upon some ballot papers; to avoid, therefore, as far as possible running the risk of avoiding an honest vote, I concur in adopting as the rule by which the court shall be governed in all questions to arise as to the sufficiency of a mark upon ballot papers in order to constitute a good vote, the rule as laid, down in the judgment of his lordship the Chief Justice in this case, however difficult the application of that rule may be in some cases, and however imperfect it may be in enabling us to draw with certainty the

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correct inference upon the question whether a particular mark was put upon the ballot with an honest or with an improper intent. In *Woodward* v. *Sarsons* (1) the Court of Common Pleas in *England* held, that there being two or more crosses on a ballot paper did not invalidate the vote. Although there is this difference between the Imperial Act, upon which that case proceeded, and the Dominion Elections Act, that in the former the directions as to the manner in which a voter shall mark his ballot paper are contained in a schedule to the Act and not in the body of the Act, whereas in the Dominion Election Act they are prescribed in the body of the Act itself, still, as to the question whether two or more crosses upon a ballot paper should invalidate a vote, I cannot say that I see any difference between the two Acts; for the prohibition as to marking a ballot paper with any mark so that it could be identified is, in both cases, in the body of the Acts. Such double marking is treated in *Woodward* v. *Sarsons* as merely indicating, in an emphatic manner, the intention of voting for the one candidate. While the double marks may be, and perhaps in some cases are, put upon ballot papers merely with that intention, they may also be, I think, and perhaps in some cases are, put upon them with quite a different intention; namely, with the intention of affording means by which the voter could be identified for the purpose of procuring for him, in accordance with a promise to that effect, pecuniary recompense for his vote; and the possibility of their being used for this latter purpose seems to my mind, I confess, a sufficient reason for disallowing all ballot papers so marked. If they are to be disallowed only upon evidence being adduced of an arrangement having been made that the voter should put such additional crosses upon his ballot paper, the difficulty of proving such

(1) L. R. 10 C. P. 749.

pre-arrangement will be always so great, that we shall defeat, I fear, the object of the act, and render void a very material part of it which imperatively prescribes that all ballot papers having any mark upon them by which the voter could be identified shall be rejected.

As, however, uniformity of decision in matters of this kind is all important, and as I cannot see any substantial difference in this particular between the Dominion Elections Act and that upon which *Woodward* v. *Sarsons* was decided, and as my learned brothers are all of opinion that such double marking should not *ipso facto* avoid a ballot, I concur in considering the point as settled by the judgment of the Court of Common Pleas in *Woodward* v. *Sarsons*. So doing, and adopting the rule as laid down by the Chief Justice in this case of all the contested ballot papers, there is only the one marked with an inverted V at polling division No. 6 *Chatham*, which I am not satisfied comes within the rule as above laid down, and which, therefore, I think, should be disallowed. The disallowance of this ballot would, however, make no difference in the result arrived at by the learned judge.

I see nothing in the case which would justify any interference with the judgment of the learned judge upon any of the cases of corrupt acts, nor, indeed, with his judgment upon the other points in the case save only in one, which, however, is, in my judgment, the one upon which the whole case turns; and with the greatest deference for the opinions of the learned judge and my learned brothers in this court, I am bound to say that I am of opinion that the deputy returning officer at polling division No. 1 *Sombra*, erred in counting as good the votes contained in the ballot papers which had been marked by himself with the numbers on the voters' list opposite to the names of the voters to whom those ballot papers were given. Both

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under the express provisions of the statute, and the judgment of the Court of Common Pleas in *England* in the case of *Woodward* v. *Sarsons* (1), those ballots should not have been counted, but should have been rejected for precisely the same defect as avoided all the votes cast at the polling division No. 3 *Dawn*.

The duty of the deputy returning officer at the close of a poll is imperatively prescribed by the 55th sec. of the Dominion Elections Act of 1874, as amended by the 10th sec. of the act of 1878, 41st *Vic.*, ch. 6. That section enacts that immediately after the close of the poll the deputy returning officer shall proceed to count the number of votes given for each candidate, and in doing so he shall reject all ballot papers upon which there is any writing or mark by which the voter could be identified. Now it cannot be questioned that a voter could be identified by his number on the voters' list being on his ballot. Whether in point of fact he was, or was not, so identified at the time of the counting is a matter of no importance in the eye of the law. The statute in effect declares that a mark by which a voter could be identified is sufficient to avoid the ballot upon which such mark is.

Neither does the statute make any difference as to the persons by whom such mark may be put upon the ballot. By whomsoever it was put upon it, the statute equally avoids the ballot and prescribes imperatively that it shall not be counted. In the present case, as in that of *Woodward* v. *Sarsons*, the avoiding mark was put upon these ballots by the deputy returning officer himself. In that case it was not doubted that the 234 ballot papers so marked were void; they were declared to be such and that they could not be counted, but there the not counting them made no change in the result of the election because the candidate for whom 234

(1) L. R. 10 C. P. 748.

of the ballots thus rejected were cast had independently a majority of legal votes cast for him. The only difference which exists between that case and the present, is that the deputy returning officer here, when proceeding with the count, assumed to rectify, as he thought, the mistake which had been committed by himself, so that he might count the ballots so marked, and although the statute said they should not be counted, he proceeded to erase and has so successfully erased the numbers with which he had marked the ballot papers that they cannot now be identified, and so it cannot be ascertained for whom the votes in those ballot papers were given. The only question therefore is, was it competent for the returning officer to erase those marks and then to count the ballot papers. There is nothing in the statute vesting such authority in him, and, in the absence of an express provision to that effect, I am of opinion that he had no authority whatever so to do, and that we cannot sanction his act in so doing without in effect repealing the statute, the sole duty of the deputy returning officer after the ballot papers are put into the ballot box and the poll is closed, and his sole authority, is to count ballots therein as directed by the statute, and not to count but to reject, and to return as rejected, all ballot papers upon which there is any writing or mark by which the voter could be identified. Such a mark being on the ballot paper avoids the ballot. This being so, the ballot is void from the moment it is put into the ballot box with the avoiding mark upon it; and because it is so void the statute says it shall not be counted. The statute gives no power to the deputy returning officer to make a void ballot good and then to count it. His simple duty was to reject all ballots that were in the ballot box when he opened it which the statute directed him to reject, and to count only such as the statute directed him to count. All

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those being rejected which the statute said should not be counted, the rest only were to be counted. He had no authority whatever to erase any thing being on any ballot paper which he found in the box upon opening it at the close of the poll. If he might make a bad vote good, which he had himself made bad by putting the prohibited mark upon a ballot paper, I cannot see why he might not make a bad vote good in a case where such mark had been put upon it by the voter. In this particular case I am free to admit that there is nothing in the evidence which justifies us in imputing to the deputy returning officer anything but an error of judgment, but if the imperative language of the statute should be disregarded because the officer's conduct was attributable solely to an error of judgment, it must needs be disregarded also in the case of a corrupt officer, who might do the same thing from a corrupt motive which he had the tact to conceal or to make to appear to be innocent; so to rule would be plainly to repeal the statute, and to substitute a totally different provision from that which the statute in express terms enacts.

In the present case the deputy returning officer by the mistake which he committed with intent, no doubt, to correct his first mistake, has unfortunately made the matter worse than it would have been if he had left the ballot papers with the prohibited mark upon them, for thereby he has rendered it impossible for the tribunal trying the election petition to say for which candidate those marked ballots were cast, and the result is that as the majority either way is so small, it is impossible to say which of the candidates had a majority of good, valid and countable votes. Had he suffered the marks which he had wrongly put upon the ballots to remain there unerased, we could have seen for whom the votes were given, and

we could have determined as in *Woodward* v. *Sarsons* whether they had or not, and in what manner, affected the result of the election; but having erased the marks and counted the ballots, as it is now impossible to identify the ballots which he so counted, and which the statute declared should not have been counted, we cannot say which candidate had the majority of good votes, and we have therefore, in my opinion, no alternative left to us but to say that there has been no election. It has been argued that such a decision would be at variance with our judgment in *Jenkins* v. *Brecken*, but there is really no resemblance whatever in this particular between that case and the present. In that case the sitting member, after that the petitioner had, upon a scrutiny, succeeded in establishing that he had polled a majority of good legal votes, claimed the right of insisting under the 66th section of the Controverted Elections Act of 1874, 37 *Vic.* ch. 10, that the election was wholly void apart from the result arrived at on a scrutiny, and for reasons altogether unconnected with the question as to which of the candidates had polled a majority of legal votes. The contention of the sitting member was that, although his opponent had established that he had polled a majority of the legal votes, still the election should be avoided by reason of the returning officer not having properly regulated the polling districts as to the numbers of the voters, not having supplied the deputy returning officers in certain districts with a sufficient number of ballot papers, and not having in one district provided sufficient accommodation in the polling booths; and it was held that such objections could not be made by way of recrimination under the 66th sec. of 37th *Vic.*, ch. 10, and that if they should prevail at all they should prevail wholly independently of any enquiry as to who had the majority of the votes polled. It is obvious that between that

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case and the present there is no parallel whatever. Here the whole matter is connected with the scrutiny, and is confined to the question—which of the candidates had the majority of legal votes polled for him? The petitioners insist that Mr. *Mills* had. The respondent insists that he himself had, but, in investigating for the purpose of determining the question thus raised, it appears that at one of the polling booths certain ballot papers were marked in such a manner that the voters using those ballot papers could be identified, and that these ballot papers were counted although the statute imperatively prescribed that they should not be counted. These ballot papers, as the deputy returning officer when counting them erased the marks which he had himself put upon them, cannot be identified, and therefore it cannot be ascertained for whom the voters using them voted. The ballot papers having, however, been illegally counted by the deputy returning officer, ballot papers equal in number to those illegally counted should, in my opinion, be rejected from the votes cast at this polling division; but as it is impossible to say from which of the candidates the illegally counted ballot papers should be deducted, the result is that it is impossible by reason of the slight difference in the number polled for each to say which of the candidates had a majority of the legal votes. Under these circumstances the tribunal upon which is cast the duty of determining which had such majority, must needs find itself incapable of determining this question, and has no alternative therefore left to it but to declare that there has been no election, and that all that has taken place must be set aside and a new election held to enable the constituency to solve the difficulty; and to this effect, in my opinion, our report to the Speaker of the House of Commons should be.

*Appeal dismissed with costs.*

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

Solicitors for respondents: *Fitzgerald & Beck*

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